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47 Cal.2d 29

**PEOPLE of the State of California, acting
by and through the DEPARTMENT OF
PUBLIC WORKS, Plaintiff,**

v.

**PENINSULA TITLE GUARANTY COM-
PANY, a corporation, Defendant,**

**Arthur Bros., a partnership composed of
James H. Arthur and Noel L. Arthur,
Defendant and Appellant,
and**

**City of San Mateo, a municipal corporation,
Defendant and Respondent.**

S. F. 19128.

Supreme Court of California.

In Bank.

Aug. 31, 1956.

Proceeding in eminent domain by the State to acquire a parcel of land, owned by defendant partners, for highway purposes. From an order of the Superior Court, San Mateo County, A. R. Cotton, J., that a specified sum be paid to defendant city in satisfaction of an assessment lien against the land from an amount paid into court by the State in satisfaction of a judgment for the partners and the city tax collector, the partners appealed. The Supreme Court, Shenk, J., held that assessment lien having become effective after partners were divested of their rights in property under Superior Court's order authorizing State to take possession of property, pursuant to constitutional provision, immediately on issuance of summons, partners were entitled to compensation for such taking without deduction of amount of lien.

Order reversed.

Opinion, 288 P.2d 904, vacated.

301 P.2d—1

Cal.Rep. 3017302 P.2d—1

1. Eminent Domain ⇨320

Where there is such a substantial change in status of land taken by condemnor and condemnees' relation thereto as to divest all of condemnees' interest therein for all practical purposes, strict rule that title to property does not pass until condemnation judgment is entered and recorded should not apply. West's Ann.Code Civ. Proc., § 1253.

2. Eminent Domain ⇨320

Under constitutional provision for State's taking of immediate possession of property condemned for highway purposes before divestiture of condemnee's title thereto, owner of property at time of such taking is entitled to compensation, so that property is deemed taken when his title is divested, in absence of prior physical taking, as possession follows title, but divestiture of title after physical taking is merely confirmation of original taking, which is merely accelerated by such provision. West's Ann.Const. art. 1, § 14.

3. Eminent Domain ⇨63

A condemnor's acts in entering into possession of private property and proceeding to commence construction thereon constitute "taking" thereof within constitutional provision for taking of immediate possession of property by public corporation condemning it. West's Ann. Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Taking".

4. Eminent Domain ⇨320

Title to property condemned does not pass until compensation is awarded and final judgment in condemnation filed in

county recorder's office, but a taking of sufficient consequences has same effect of finality of transfer for specific purposes as passage of title. West's Ann.Code Civ. Proc., § 1253.

5. Eminent Domain ⇨320

Land, of which State was ordered by superior court to take immediate possession, pursuant to constitution, on filing of complaint and issuance of summons in proceeding to condemn it for highway purposes, was taken before condemnation judgment, though compensation to owner, required before taking of property, was not made until after trial. West's Ann. Const. art. 1, § 14.

6. Eminent Domain ⇨63

State's dispossession of owners of land therefrom, pursuant to superior court order made on issuance of summons in proceeding for condemnation thereof for highway purposes, and acts of appropriation, destruction of buildings and damage caused by State before judgment, constituted taking of land within constitutional provision, regardless of whether State could restore land to its original status. West's Ann.Const. art. 1, § 14.

7. Eminent Domain ⇨152(1)

Where lien of city's special benefit assessment against land for drainage project became effective after owners of land were divested of their rights therein pursuant to court order authorizing State to take immediate possession thereof on issuance of summons in proceeding to condemn land for highway purposes, such owners were entitled to compensation for taking of land without deduction of amount of assessment lien, though improvement proceedings were initiated before commencement of condemnation action. West's Ann.Streets & Highways Code, § 10,000 et seq.; West's Ann.Const. art. 1, § 14.

Arthur J. Harzfeld, City Atty., Frank W. Rose, Asst. City Atty., San Mateo, for respondent.

SHENK, Justice.

In this proceeding in eminent domain the state acquired for highway purposes a parcel of land in the City of San Mateo which had been owned by the defendants James H. and Noel L. Arthur. The judgment awarded \$25,500 to the Arthurs and to the tax collector of the City of San Mateo "as their interests may appear." The state paid the full amount into court. Subsequently the court ordered that \$612.20 be paid from this fund to the city to satisfy a claimed assessment lien against the property. From this order the Arthurs have appealed.

The proceeding which culminated in the assessment lien asserted against the Arthurs' property was commenced by the City of San Mateo in January, 1952, pursuant to the Municipal Improvement Act of 1913, Str. & H. Code, § 10,000 et seq., for the purpose of completing a drainage project affecting and benefiting the lands involved. The assessment is a special benefit assessment in which the cost of the improvement is assessed against the parcels of property embraced within the district in accordance with the special benefit to each parcel.

A year after the initiation of the proceeding resulting in the assessment lien, the California Highway Commission, on January 21, 1953, adopted a resolution determining that the public interest and necessity required the acquisition of the Arthurs' property for highway purposes. The complaint in eminent domain was filed and summons was issued on April 20, 1953. Pursuant to the constitutional provision, art. 1, § 14, an order was made on that date authorizing the state to take immediate possession of the property. On June 21, 1953, the owners were required to vacate and the state commenced the removal of buildings and the construction of an overpass thereon. Thereafter, on Au-

Schofield, Hanson & Jenkins, Thomas M. Jenkins, San Francisco, for appellant.

gust 19, 1953, the City of San Mateo recorded its special benefit assessment lien against the property. Trial of the cause in eminent domain was commenced on November 9, and judgment was entered on December 2, 1953. The value of the property was fixed as of the date of issuance of summons, April 20, 1953 (see Section 1249, Code Civ.Proc.).

The theory on which the trial court ordered payment of the city's assessment out of the award was that such an assessment is a levy on the interest of the owner; that title to the property does not pass in a condemnation proceeding until judgment is entered and recorded (§ 1253, Code Civ. Proc.); that the mere taking of possession of land prior to judgment pursuant to the provisions of article I, § 14 of the Constitution does not accelerate the passing of title; that the title was therefore in the Arthurs at the time the assessment was levied, and that the lien attached to the award in condemnation. See *City of Los Angeles v. Superior Court*, 2 Cal.2d 138, 39 P.2d 401.

The Arthurs do not claim that the foregoing theory is not supported by authority, but they assert that the conclusion based thereon was never intended by the Constitution and other laws of this state and that a factual situation such as this has never been finally passed upon by its courts. They argue that to deprive them of all but a bare legal title to their property and thereafter to levy and require that they pay an assessment for benefits they can never enjoy out of an award based on the value of their property at the time of taking possession and before accrual of the benefit, is a taking without the just compensation required by article I, § 14 of our Constitution. They rely in part on *City of Los Angeles v. Los Angeles Pacific Co.*, 31 Cal.App. 100, 116, 159 P. 992, 998, where the court, after reviewing cases in other jurisdictions, concluded that "the defendants could not be charged with subsequent taxes against property which they had ceased to own."

[1,2] In situations where it can be said that in addition to a mere taking of possession by the condemner there is also such a substantial change in the status of the land taken and the condemnee's relation to it as to constitute, in effect, a divestiture for all practical purposes of all of the former owners' interest, the strict rule should not apply. *People v. Klopstock*, 24 Cal.2d 897, 151 P.2d 641; *People v. Joerger*, 12 Cal.App.2d 665, 55 P.2d 1269, 1272; 29 C.J.S., Eminent Domain, § 135, p. 966. In the *Joerger* case the court stated that in "the ordinary proceeding the property is not 'taken' until the final decree is entered. Code Civ.Proc., § 1253. It is the divesting of the title of the owner and the vesting of the title in the condemnor which constitutes the 'taking' in such cases. But where, as under our Constitution, provision is made for a 'taking' prior to the divestiture of title, the party who owns the property at the time of such 'taking' is entitled to the compensation * * *. It thus appears that where there is no prior physical 'taking,' the property is deemed to have been 'taken' when title is divested, as possession follows the title. Where there has been a prior physical 'taking,' the subsequent divestiture of title is merely a confirmation of the original 'taking.' The effect of the constitutional amendment was merely to accelerate the 'taking.' To hold otherwise would, in effect, nullify that provision of the Constitution which provides that 'private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner.'"

[3] This court also has held that the act of a condemner in entering into possession of private property and proceeding to commence construction thereon was a "taking" of the property as that term is used in the constitutional provision here involved. Until the adoption of the constitutional amendment in 1918, article I, § 14 did not provide, as it does now, for an order whereby the condemner might enter

into possession of the land prior to a judgment in condemnation. In 1897 the Legislature attempted to amend section 1254 of the Code of Civil Procedure to authorize such orders for possession pending trial of the cause. The constitutionality of the amended section was challenged in *Steinhart v. Superior Court*, 137 Cal. 575, 70 P. 629, 630, 59 L.R.A. 404. The question presented was whether taking possession and using the property during the pendency of the condemnation proceeding was a taking within the meaning of the then constitutional provisions. The court stated: "To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding, and before the amount of compensation has been determined and paid to the owner, or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so." The section was held unconstitutional. To the same effect see the earlier case of *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517.

[4] It should be clear from the foregoing that a distinction is drawn between the legal effect of passage of title and the "taking" of the property involved. There is no passage of title in condemnation proceedings until an award has been made and the final judgment in condemnation filed in the office of the county recorder. § 1253, Code Civ.Proc.; *Metropolitan Water Dist. v. Adams*, 16 Cal.2d 676, 107 P.2d 618. However, as an exception to the strict application of the law, it is recognized that a "taking" of sufficient consequences is deemed to have the same effect of finality of transfer for specific purposes as does the passage of title.

[5] Contentions by the city that article I, section 14 does not permit the conclusion that there has been such a "taking" in the present case are apparently based on the general language therein that "property shall not be taken" without compensation

having "first" been made. As compensation to the owner is not made until after trial, it is said to follow that there can be no taking within the meaning of the section until after trial. But the constitutional language is framed in words of limitation on the rights conferred upon the condemner, see *Steinhart v. Superior Court*, supra, 137 Cal. 575, 579, 70 P. 629, and that the special provisions of the section qualify its general language to permit a taking prior to judgment in condemnation under the special circumstances present in this case. See *Metropolitan Water Dist. v. Adams*, supra, 16 Cal.2d 676, 107 P.2d 618.

[6] It is also claimed by the city that here the acts of appropriation of the land by the state were not final and conclusive; that the state could restore the lands to their original status which would not have been possible in the *Joerger* case. In the present case it appears from an agreed statement of facts that pursuant to the order for possession the state "acting through the Department of Public Works took possession of the real property * * * and required the appellants to remove themselves from the premises. Immediately thereafter the State removed the buildings which had belonged to the appellants and started construction on additions to Bayshore Highway."

There is no justification for a holding that the test of "taking" is whether the lands thereafter may be restored to their original condition. In *Steinhart v. Superior Court*, supra, 137 Cal. 575, 70 P. 629, the court held that there would be a taking where the condemner exercised a right to "take possession of and use the land and premises sought to be condemned, during the pendency and until the final conclusion of the proceedings". In any event it appears in the present case that the disposition of the defendants and the acts of appropriation, destruction and damage brought about by the state prior to judgment constitute a "taking" as contemplated by the constitutional provision.

[7] The City of San Mateo claims that there is no merit in the contention by the Arthurs that if the order of the trial court be enforced they will have been required to pay an assessment for a benefit which they have not and cannot realize, thus resulting in an unconstitutional exaction from them. It is not disputed that benefits from the drainage project would accrue to the lands here involved, and that planning for the project was well in advance of and as a matter of public knowledge prior to the commencement of the condemnation proceeding. The city contends that changed conditions which may reasonably be anticipated can be taken into consideration in determining the value of property, see *Long Beach City H. S. Dist. v. Stewart*, 30 Cal.2d 763, 768-769, 185 P.2d 585, 173 A.L.R. 249; that an award in condemnation necessarily includes every element of value in the property; that in the present case the Arthurs fail to show that the amount awarded did not include the enhanced value of the property by reason of the pending improvement; that the Arthurs demand full value for their property but seek to avoid the cost of the improvement which entered into the determination of the award, and that for equitable reasons they are not entitled to relief from paying the assessment. It cannot be ascertained from the record what means or processes were utilized in arriving at the amount of the award or whether the so-called anticipatory benefit to the land by reason of the improvement to be made was taken into consideration in fixing that amount. Although the improvement proceedings were initiated prior to the commencement of the action in eminent domain, the city acquired no interest in the lands within the improvement district nor the proceeds therefrom until the special assessment liens were recorded on August 19, 1953.

Whatever merit there may be in the foregoing contentions of the city under other circumstances they are of no avail as against the Arthurs if the levy of the assessment was made after the award in condemnation. In the present case the effec-

tive "taking" by the condemner is advanced from the time of the award to the time of appropriation of the property, that is, June 21, 1953, which was prior to the time of the levy.

In accordance with what has been said it follows that the assessment lien became effective after the Arthurs are deemed to have been divested of their rights in the property and they are entitled to compensation without deduction on account of the assessment lien.

The order is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



144 Cal.App.2d 402

Leo GOLDBERG, Plaintiff and Appellant,

v.

Julia GOLDBERG, Defendant and Respondent.

Civ. 21410.

District Court of Appeal, Second District,
Division 3, California.

Sept. 12, 1956.

Husband brought suit for divorce on ground of cruelty, and wife filed a cross-complaint for divorce, on ground of cruelty. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered a decree awarding husband a divorce and denying wife a divorce, and the husband appealed from parts of the decree vacating disposition of community property and awarding support to wife. The District Court of Appeal, Shinn, P. J., held that, since wife was the wrongdoer and husband the aggrieved party, husband was entitled to the greater share of the community property and wife was not entitled to support.

Judgment reversed.

1. Divorce \Rightarrow 252

Where court found wife to be the wrongdoer and husband the aggrieved party and granted husband divorce on ground of extreme cruelty of wife, husband was entitled to the greater share of the community property. West's Ann.Civ. Code, § 146.

2. Divorce \Rightarrow 238

Where court found wife to be the wrongdoer and husband the aggrieved party and granted husband divorce on ground of extreme cruelty of wife, wife, in absence of an agreement, was not entitled to support. West's Ann.Civ.Code, § 146.

Robert H. Green, Balboa Island, for appellant.

Aron & Shapiro, Haskell J. Shapiro, Los Angeles, for respondent.

SHINN, Presiding Justice.

Leo Goldberg sued his wife Julia for a divorce, charging cruelty. He alleged there was community property consisting of a home and furniture, a 1940 Oldsmobile, a 1940 Chevrolet truck, fifty oil paintings of the value of \$5,000 and other property of a nature unknown to him in the possession of his wife. Julia answered and filed a cross-complaint for divorce, charging cruelty. She described the ownership of community property as it was described by Leo, except that she alleged there was other community property of unknown nature in the possession of Leo. Each party sought custody of three minor children, each sought an award of all the community property and Julia prayed for an allowance for the support of herself and the children.

The court found Julia guilty of extreme cruelty and Leo not guilty. It found the residence and contents to be owned in joint

tenancy and did not attempt to disturb that ownership. It found the community property to be as alleged in the pleadings and did not find there was any other community property. The decree awarded Leo a divorce, custody of the children and the car and truck valued at \$100 each. It awarded Julia the paintings of the value of \$5,000 and also \$110 per month until the further order of the court. Leo appeals from the parts of the decree which make disposition of the community property and which award support to Julia.

[1, 2] He has filed a brief; Julia, after liberal extensions of time, has filed none. The cause has been ordered submitted on the opening brief. Rules on Appeal 17(b). If Julia had been awarded a divorce on the ground of cruelty she would have been entitled to the greater share of the community property. Civ.Code, § 146; 16 Cal. Jur.2d 595-6; *Rocha v. Rocha*, 123 Cal. App.2d 28, 266 P.2d 130. But she lost, and the decree was in favor of Leo and the ground for it was the extreme cruelty of Julia. Leo was entitled to the greater share of the community property. Since the court found Julia to be the wrongdoer and Leo the party aggrieved, Julia, in the absence of an agreement, was not entitled to support. *McLaughlin v. Superior Court*, 128 Cal.App.2d 62, 274 P.2d 745.

The appeal is before us upon the judgment roll. Inasmuch as it appears on the face of the record that the division of the community property and the award of support to Julia were contrary to law there is no alternative to a reversal of the judgment.

The parts of the judgment above referred to from which an appeal has been taken are reversed.

PARKER WOOD and VALLÉE, JJ., concur.

144 Cal.App.2d 416

Patrick RICHARDS, a minor, by and through his guardian ad litem, Thomas Milton Richards, Plaintiff and Respondent,
v.

Ross RELLES, Jr., Harry Viani et al.,
Defendants.

Ross William Relles, sued herein as Ross Relles, Jr., by and through his guardian ad litem, Ross Relles, Defendant and Appellant.

Civ. 8776.

District Court of Appeal, Third District,
California.

Sept. 12, 1956.

Minor's action by guardian ad litem for injuries received when struck in eye by an object hurled by eight and one-half year old defendant, also represented by his guardian ad litem. The Superior Court, Sacramento County, Jay L. Henry, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that instructions on negligence, when considered together with other special instructions on degree of care required of children, were not erroneous on ground that they imposed same standard of care on defendant minor as on an adult.

Affirmed.

1. Trial ⇨296(3)

In minor's action for personal injuries received when struck in eye by object hurled by eight and a half year old defendant, instructions on negligence, when considered together with other instructions on degree of care required of children, were not erroneous on ground that they imposed same standard of care on defendant minor as an adult. West's Ann.Civ.Code, §§ 25-37.

2. Negligence ⇨5

A custom or practice does not excuse a defendant's failure to exercise due care unless such custom or practice is consistent with due care.

3. Infants ⇨102

Trial ⇨260(8)

In minor's action for personal injuries received when struck in eye by object hurled by eight and a half year old defendant, there was no error in rejecting defendant's requested instruction that he was not guilty of negligence if he was not doing anything more or less than healthy boys of his age have done, since it was an erroneous statement of the law and unnecessary because jury was otherwise fully instructed as to the true standard of care.

Russell A. Harris and Sherman C. Wilke, Sacramento, for defendant-appellant Relles.

Nichols, Richard, Allard & Williams, Oakland, and Albert H. Mundt, Sacramento, for plaintiff-respondent Richards.

PEEK, Justice.

This is an appeal by the defendant Relles from a judgment in favor of plaintiff and against Relles alone (the jury having found in favor of the defendant Viani) for damages alleged to have been sustained by plaintiff as a result of being struck by a rock thrown by Relles.

The evidence, which is not in contradiction, shows that four years prior to the trial of the action the plaintiff Patrick Richards, who was then approximately four and one-half years of age, was playing in a lot near his home with his older brother Jimmy and younger brother Gary. The defendants, Ross Relles and Harry Viani, who were between eight and nine years of age, were playing in a vacant lot immediately across the street from plaintiff. The defendants were throwing rocks and clods of dirt at various bottles and cans. Upon seeing the plaintiff and his brothers, Relles, to scare the Richards children, began throwing rocks and clods of dirt at them. Before the oldest of the Richards brothers was able to get them home, Patrick was struck in the eye by one of the objects, causing serious injury which resulted in permanent impairment of his vision. Appellant Relles does not contend, nor could

he, that there was insufficient evidence to support the conclusion of the jury upon the question of actionable negligence; however he does contend that the court committed prejudicial error, first in the giving of certain instructions, and second in the refusal to give a particular instruction submitted by him.

The three instructions which form the basis of appellant's first contention are found in B.A.J.I., being numbers 101, 101-A and 102, respectively, and are as follows:

"101. Negligence—Basic Definition.

"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person."

"101-A. Negligence—A Relative Term.

"Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence."

"102. Ordinary Care—Definition.

"Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others."

It is appellant's contention that use of the words "management of one's property or person" and "management of their own affairs" in the challenged instructions clearly implied to the jury that the standard of conduct applicable to the case presented was that for a mature person capable of managing his own property and affairs; that in so doing the court thereby implied that the defendants, aged eight and eight and one-half, were capable of managing their own property or affairs, and hence it was directly in conflict with the provisions

of sections 25 to 37, inclusive, of the Civil Code. In his argument appellant fails to consider that in addition to the instructions so challenged, the court also gave to the jury his instruction number 2 which was as follows:

"You are instructed that while a minor, like an adult, is required to exercise ordinary care, he is only required to exercise that degree or amount of care that is ordinarily exercised by one of like age, experience, and development. The ordinary care which a child of limited judgment and experience is called upon to exercise in a given situation is not the quantum of care required of an adult under the same circumstances. A child is required to exercise only that measure of care which children of the same age under similar circumstances ordinarily exercise."

The court further instructed the jury that:

"A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for his actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of *each of the minor defendants*, and whether his conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances."

[1] In addition thereto, the court instructed the jury that it was to consider the instructions as a whole and not to single out any one particular sentence or word. Under such circumstances it cannot be said that the jury which had the opportunity of seeing the children involved, even though the trial was held four years after the date of the accident, was not well aware that the question presented by

the instructions related to the conduct of minors. Likewise this court cannot say that the wording of the particular instructions so attacked either confused the jury or misled it into a belief that the particular wording of such instructions placed upon defendants a degree of care wholly inconsistent with their ages.

Appellant's second contention is directed at the failure to give a further instruction proposed by him as follows:

"In determining whether or not the defendant Relles was negligent, a helpful guide to you can be found in the answer to this question: Can you, the jury, truthfully and conscientiously say, as you review the facts of this case as you find them, that the defendant Relles, aged 8½ years at the time of the occurrence giving rise to this suit, was doing anything more or less than healthy boys of his age have done from time immemorial and will continue to do as long as the race retains its activity and love of innocent sport?"

"If you find the answer to that question in the negative, then you will find that the defendant Relles was not negligent and return a verdict in his behalf."

It is appellant's contention that while the instruction might have been worded differently, nevertheless, it did instruct the jury that the age, experience and development of a person at the date of the incident forming the basis of the action was the standard by which to judge his conduct, and that the failure of the court to give such instruction led the jury to understand that it was to determine the standard of

conduct to be that of a child of his age at the time of the trial rather than the date of the accident.

[2,3] We agree with plaintiff that the wording of the instruction was definitely argumentative; that it was an erroneous statement of the law, since custom or practice does not excuse a defendant's failure unless it is consistent with due care; and that it was an unnecessary instruction because the jury was otherwise fully instructed as to the true standard of care.

The record further shows that there could have been no question in the minds of the jurors that the injury occurred at a time when the appellant was four years younger than at the date of the trial. Appellant's counsel made this abundantly clear from the outset of the trial in his voir dire examination of the jurors, in his direct and cross-examination of the witness and by his repeated references thereto in his argument to the jury. Furthermore in this regard it should be noted that the court specifically instructed the jury as follows:

"* * * I feel it important to again remind you that in judging the credibility of any witness who is a minor, you should give careful consideration to the age of the witness at the time of the occurrence and at the time he or she testified, the lapse of time between the occurrence of the accident giving rise to this suit, and the time of testifying * * *."

The judgment is affirmed.

SCHOTTKY, J., and McMURRAY, J.
pro tem., concur.

144 Cal.App.2d 284

Thomas J. MEEHAN, Receiver of Rhode Island Insurance Company, and F. Britton McConnell, substituted for John R. Maloney, Insurance Commissioner of the State of California, as Liquidator of Rhode Island Insurance Company, Plaintiffs and Respondents,

v.

Stewart B. HOPPS, Geraldine R. Hopps, U. S. Marine and Foreign Securities, Ltd., a Delaware corporation, et al., Defendants and Appellants.

Civ. 16627.

District Court of Appeal, First District,
Division 1, California.

Sept. 4, 1956.

Rehearing Denied Oct. 4, 1956.

Hearing Denied Oct. 31, 1956.

Action by insurance company's receiver against former officer, who sought to disqualify receiver's attorneys, who had previously acted for corporation. The Superior Court, County of Marin, Thomas F. Keating, J., denied motion and defendants appealed. The District Court of Appeal, Bray, J., held that evidence was insufficient to show that relationship of attorney and client had existed between officer and attorneys.

Order affirmed.

1. Attorney and Client ⇨21

An attorney who attempts to use, against interests of his former client, information gained while attorney-client relationship existed, may be enjoined from so doing. Rules of Professional Conduct, rules 5, 7, West's Ann.Bus. & Prof.Code, following section 6076; West's Ann.Bus. & Prof.Code, §§ 6068, 6077.

2. Attorney and Client ⇨74

Whether attorney-client relationship exists is question of law; however, where evidence upon which facts necessary for determination of such question is in conflict, such conflict must be determined, and it is for the trial court to evaluate the evidence.

3. Attorney and Client ⇨20

Findings are not necessary on determination of motion to disqualify attorney.

4. Attorney and Client ⇨21

In action by insurance company's receiver against former officer, who sought to disqualify receiver's attorneys, who had previously acted for company, evidence was insufficient to show that any relationship of attorney and client existed between officer and attorneys or that officer had given attorneys any information which he was not required to give them in his official capacity as an officer. West's Ann.Bus. & Prof.Code, §§ 6068, 6077.

5. Attorney and Client ⇨20

Where counsel represented corporation dominated by one of its officers, whose personal interests were, to a considerable extent, coincident with interests of the company, attorney-client relationship did not exist between attorney and officer, and attorneys were not deprived of their right to represent receiver of the company in litigation against the officer. West's Ann.Bus. & Prof.Code, §§ 6068, 6077.

6. Attorney and Client ⇨106

Attorney's first duty is to his client.

J. W. Ehrlich, Lloyd W. Dinkelspiel, Eugene S. Clifford, Heller, Ehrman, White & McAuliffe, San Francisco, for appellants Stewart B. Hopps, Geraldine R. Hopps, and U. S. Marine and Foreign Securities, Limited.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., San Francisco, McCutcheon, Thomas, Matthew, Griffiths & Greene, San Francisco, for respondent F. Britton McConnell, Ins. Commissioner of the State of California, as Liquidator of Rhode Island Ins. Co.

Freitas, Allen, McCarthy & Bettini, San Rafael, McCutcheon, Thomas, Matthew, Griffiths & Greene, San Francisco, for respondent Thomas J. Meehan, as Receiver of Rhode Island Ins. Co.

BRAY, Justice.

This is an appeal from a certain order in an action brought by respondents as plaintiffs, against appellants as defendants,

for an accounting and other relief on behalf of the policyholders, creditors and stockholders of the Rhode Island Insurance Company, in which it is charged that Stewart B. Hopps, former director, member of the executive committee and chairman of the board of the company, dominated and managed the company's affairs for his own personal gain in violation of his fiduciary duties. Defendants moved the trial court to restrain and enjoin the Providence, Rhode Island, law firm of Edwards & Angell, its partners, associates¹ and other counsel (to the extent that their knowledge of the subject matter of the action was derived from that firm) from further participation in the case and from disclosing information pertaining thereto. The motion was based upon the alleged dual relationship of Edwards & Angell towards Hopps and a claim that Hopps had turned over to that firm as his lawyers certain files, documents and other information which plaintiffs have used and have threatened to use against him in the present action. After a hearing² the motion was denied. Defendants appeal.³

Questions Presented.

(1) Does the evidence support the court's implied finding that counsel were never Hopps' personal attorneys, and (2) where an attorney represents a corporation dominated by one of its officers whose personal interests to a considerable extent are coincident with the interests of the company, does an attorney-client relationship exist between the attorney and the officer, depriving the attorney of the right to represent the receiver of the company in litigation against the officer?

1. The firm, its partners and associates will hereafter, for brevity, be referred to as "counsel."
2. It occupied 11 days, during which oral and documentary evidence was received. The transcript contains 1183 pages.
3. See *Meehan v. Hopps*, 1955, 45 Cal.2d 213, 288 P.2d 267, holding the order denying the motion appealable.

The Law.

With legislative authority the Board of Governors of the State Bar of California have formulated rules of professional conduct approved by the Supreme Court. These rules are binding upon all members of the State Bar. Bus. and Prof. Code § 6077.⁴ Applicable here are Rule 5: "A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client"; Rule 7: "A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned." Section 6068, Business and Professions Code, provides: It is the duty of an attorney "(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

[1] As the law is clear, we deem it unnecessary to cite the many cases holding that an attorney who attempts to use against the interests of his former client information gained while the attorney-client relationship existed, may be enjoined from so doing.

The question first to be determined is:

1. Had There Been an Attorney-Client Relationship Between Counsel and Hopps? ✓

[2] The determination of that question is one of law. *De Long v. Miller*, 133 Cal. App.2d 175, 178, 283 P.2d 762. However, where there is a conflict in the evidence the factual basis for the determination must first be determined, and it is for the

4. The firm of Edwards & Angell are the attorneys for the receiver, and the attorneys of that firm representing the receiver in the action were admitted by the trial court to the California State Bar for the purpose of participating in this case. None of them appear of record on this appeal.

trial court to evaluate the evidence. *Id.*, 133 Cal.App.2d at page 179, 283 P.2d at page 764.

[3] On the question of whether counsel ever represented Hopps as his attorney, the evidence is directly conflicting. Concededly the firm never charged nor received payment from Hopps for any services whatever. The services which Hopps claims were for him personally were paid for by Rhode Island. Soon after Hopps became connected with the company, counsel ceased to act as general counsel for it. Thereafter they were employed on special matters from time to time. At the time counsel first met Hopps they were working for Rhode Island on a merger of the Merchants Insurance Company into the former. Rhode Island's chairman asked counsel to draw a contract for the employment of Hopps, which was done. Hopps claims that the attorney drawing the contract advised him as well as the company. The attorney denied this and claimed that Hopps consulted his own lawyer, Farber, exclusively concerning the contract. Hopps testified that he confided in and was advised by counsel concerning his personal involvement in the affairs of Rhode Island; that he turned over to counsel his personal files; that Attorney Winsor of the firm was a friendly advisor and legal confidant and familiar with Hopps' personal affairs; that the firm undertook to represent Hopps' personal interest in the California controversy⁵ and in a number of other matters. We deem it unnecessary to detail the evidence concerning the matters testified to by Hopps as showing a personal attorney and client relationship between him and counsel. Suffice it to say that evidence to the contrary on all matters was presented by Edwards & Angell. The question is primarily one of credibility. The trial court obviously disbelieved Hopps.⁶

[4] There are four matters in which appellants particularly claim that counsel acted personally for Hopps.

(1) The preparation of the employment contract between Rhode Island and Hopps. While Hopps does not claim that he employed counsel in this behalf but that Gilman, of counsel, advised him personally, Gilman denied this. Gilman had been handling for Rhode Island a proposed merger of Merchants Insurance Company with it. Watson, Rhode Island's chairman, asked Gilman to draw the employment contract. Gilman conferred with both Hopps and Watson, sending copies of the contract when prepared to both. In the letter to Hopps accompanying the proposed contract Gilman stated that if it was not satisfactory to Hopps Gilman would take up with Watson any proposed changes. It frequently happens that one retained by a client to draft an agreement between him and another, will send such agreement to the other, asking for the latter's suggestions concerning it, which suggestions the drafter will take up with his client. This statement did not convert Gilman's relationship from attorney for Rhode Island to attorney for Hopps in any respect. The agreement was not to become effective unless the merger was made, and provided that Hopps was to have the right to be interested in the Merchants Insurance Company's dealing with Rhode Island and was only required to give part of his time to the latter. Winsor, of counsel, called on Hopps in New York in connection with the merger. None of these matters changed counsel's relationship as attorney for Rhode Island into attorney for Hopps as well. In his deposition Hopps stated that the work done by counsel on the employment contract was done for Rhode Island. At the trial he retracted that statement.

5. This was a conflict between the Insurance Commissioner of California and Rhode Island, see *Rhode Island Ins. Co. v. Downey*, 95 Cal.App.2d 220, 212 P.2d 965, in which the actions of Hopps were looked upon with disfavor by the commissioner.

6. While there were no findings, we must assume that the trial court actually found all matters necessary to support the trial court's ruling. Findings are not necessary on the determination of a motion to disqualify an attorney. *De Long v. Miller*, supra, 133 Cal.App.2d 175, 178, 283 P.2d 762.

This contract was later amended, apparently to Hopps' advantage. Counsel had nothing to do with the change. No attack is made upon the validity, propriety or effect of the employment contract.

(2) Approximately nine years after the contract was drawn, counsel were employed by Rhode Island in connection with a controversy with Cuban interests. It involved nine companies and individuals including Hopps and Rhode Island on the American side, and seven on the Cuban side. It was actually a fight for control. Although the controversy had been going on for approximately seven years, counsel had nothing to do with it until approximately three months prior to its settlement. At Watson's request, counsel were employed to represent Rhode Island. At counsel's request Hopps prepared and gave them data concerning the background and history of the controversy and his interest in it. One of the most important problems was whether a proxy held by Hopps or those held by the Cuban interests should prevail. Hopps prepared memoranda concerning these, sending copies to Rhode Island's executive committee as well as to counsel. Counsel advised Rhode Island that only Hopps' proxy could be considered. The fact that counsel so advised, and the other matters they did in connection with the controversy, did not make them attorneys for Hopps.

(3) The Pioneer Equitable Settlement. This involved a dispute between Rhode Island on one side, the Pioneer Equitable and other companies and an individual on the other. Hopps had interests on both sides. There were a number of lawyers representing Rhode Island in this matter including counsel, who were employed by Rhode Island as special counsel in connection with a suit over custodian funds included in the controversy. Counsel denied Hopps' assertion that their special duty in the controversy involved any consideration by them of Hopps' personal interests nor any advice to him concerning them.

(4) The California controversy. As above stated, this was a controversy between Rhode Island and the Insurance Commissioner of California. Counsel were employed to bring a suit in the Rhode Island federal court to restrain the effect of the California decree appointing the commissioner conservator of Rhode Island. Counsel had no connection with the matter prior to this decree. In addition to proceedings in the federal court, counsel endeavored to work out a settlement of the controversy with the commissioner. Richards, of counsel, after consultation with Hopps and the obtaining of data from Hopps and other company officers, went to California for that purpose. Richards was told by the California authorities that the commissioner objected to Hopps' association with the company. Richards testified that he told them that he would not discuss personalities, but wanted to work out an arrangement by which the company could continue in business in California. During the negotiations in California, Hopps came out as well as other members of counsel, and together they prepared memoranda to be submitted to the commissioner's counsel. Here again there was nothing done by counsel or information received by them, which in anywise made them attorneys for Hopps. While they refused to agree to Hopps' removal from a position of authority in the company, or even to discuss such a change, they were not representing Hopps in so doing, but as attorneys for the company were refusing to discuss the matter of the removal of its president.

Appellants point out that the "contemporaneous record" is replete with instances where Hopps presented memoranda and material to counsel and spent considerable time in conference with counsel, all to assist them in the preparation of the various proceedings in which they were engaged for the corporation. These are matters which Hopps' position as an officer of the corporation, and particularly one who dictated, or at least was instrumental in deter-

mining, the policy of the corporation in the particular matter, required him to give the corporation.

Disregarding the testimony of Hopps, as we are required to do on this appeal, we can find nothing in the record to show any relationship of attorney and client between Hopps and counsel, nor that he gave them any data, or disclosed to them any information which he as an officer of the company was not required by his position to do, nor which they as attorneys for the company in the matters entrusted to them, were not entitled to receive.

2. Effect of Representation of the Company.

[5] Appellant has not cited, nor have we found, any case holding that an attorney for a corporation is disqualified from representing it in an action brought by it against one of its officers, nor that in such an action the attorney may not use information received from such officer in connection with company matters. The attorney for a corporation represents it, its stockholders and its officers in their representative capacity. He in nowise represents the officers personally. It would be a sorry state of affairs if when a controversy arises between an attorney's corporate client and one of its officers he could not use on behalf of his client information which that officer was required by reason of his position with the corporation to give to the attorney.

Kingman, of counsel, testified that on May 26, 1950, White, the then president of the company, came to counsel's office and informed him that the company would have to go into receivership and that Hopps stated that he was going to get counsel appointed as co-counsel for the receiver with another firm of attorneys. Richards, of counsel, testified that later he informed Hopps that any receivership might involve any officer or director of the company. Winsor testified that he and others of counsel stated to Hopps that if the firm accepted employment by the receiver the firm would have but one loyalty and that it

would be the firm's duty to prosecute any claims against any past or present officers or directors. Hopps stated that there were no claims against him and he was not worried. Thereafter at a conference between two members of counsel, Hopps and the then general counsel for Rhode Island and others, legal problems concerning the receivership were discussed. The general counsel stated that he saw no problem in counsel's acceptance of employment by the receiver, as counsel had never represented Hopps, he being Hopps' personal attorney. Winsor then stated that the problem was not a legal one but a personal one and the general counsel stated that no question would ever be raised and asked Hopps whether that was right. Hopps replied that it was. While the above mentioned statements were denied by both Hopps and the general counsel, such denial merely made a conflict in the evidence to be resolved by the trial court. The fact that counsel, as attorney for the receiver, requested and received Hopps' cooperation in certain receivership matters, that prior to their appointment as receiver, counsel on behalf of the company had prepared an answer in which it alleged that the officers, directors and agents of the company were not at fault, in nowise affected their right to represent the receiver, nor to participate in an action in which the receiver claims that Hopps, one of the officers, was at fault. If Hopps' action in arranging for the appointment did not constitute a consent to counsel being appointed attorneys for the receiver and acting in all respects as their duty as attorneys for the receiver required, such action indicates at least that Hopps originally did not consider that counsel had been his personal attorneys nor that he had disclosed to them any information over and above what his position with the company required him to disclose.

Cases cited by appellants where attorneys were enjoined from proceeding against former clients are easily distinguishable from our case. In all of them the relationship of attorney and client actually had existed between the attorney and the party.

against whom the attorney was now acting. *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 15 P.2d 505: A discharged attorney attempted to appear practically on the opposite side of a controversy in which he formerly for many years represented the former client. *Brown v. Miller*, 1923, 52 App.D.C. 330, 286 F. 994: The attorney had formerly been employed by the Alien Property Custodian during a period when the custodian had charge of the affairs of a certain company. While he did not act for the custodian in connection with that company's affairs, he had access to its files, had examined letters and papers concerning the closing of the company's affairs, and had an intimate knowledge of the method of doing business in the custodian's office. He attempted to appear adversely against the custodian in connection with the company's affairs. The court held that in addition to his access to the files his intimate knowledge of the method of doing business in the custodian's office disqualified him from acting as attorney in this matter. *Consolidated Theatres v. Warner Bros. Cir. Man. Corp.*, 2 Cir., 1954, 216 F.2d 920: An attorney who had been in the office of the law firm defending a motion picture producer in anti-trust litigation attempted to represent an exhibitor's anti-trust damage suit against the producer. *United States v. Bishop*, 6 Cir., 1937, 90 F.2d 65: An attorney represented the government on the first trial of an action by a veteran on a war risk policy. On the second trial of the same issue he attempted to represent the veteran. *Watson v. Watson*, 1939, 171 Misc. 175, 11 N.Y.S.2d 537: A wife sued to annul a marriage on the ground of the husband's previous conviction of a crime. The attorneys who had defended the husband in the criminal proceeding and who had obtained from him the history of his life attempted to represent the wife in the annulment action. The other cases cited by appellants relate to situations where the attorney either had represented the person whom he was now appearing against in the same matter or one connected with it or

had advised other counsel representing the person he was now proceeding against. In none of the cases was there a situation where the attorney for a corporation was appearing for the corporation adversely to a former officer thereof.

[6] Assuming that some of the information obtained from Hopps by counsel as representative of the corporation is that upon which the receiver's contention that Hopps dominated the corporation, its officers and companies, to its damage, is partially based, nevertheless such fact would not prevent counsel from representing either the corporation or the receiver in a controversy with Hopps nor from using that information against him. To hold that it would do so, would, in effect, grant an immunity to Hopps to which he was not entitled. The fact that in the several matters in which counsel represented the corporation what appeared to be for the benefit of the corporation also was for Hopps' benefit as a principal stockholder and because of his interest in the allied companies, did not make counsel his personal attorneys. If this were true, then the attorney representing a corporation in any given matter becomes the personal attorney of each stockholder because the attorney's actions benefiting the corporation likewise benefit the stockholder. Such relationship would disqualify the attorney from acting adversely to the stockholder concerning that particular matter in any controversy between the stockholder and a third party, but obviously would not prevent the attorney from representing the corporation in any controversy between it and the stockholder. As attorneys for the corporation, counsel's first duty is to it. Likewise, as an officer of the corporation, it was Hopps' duty to disclose to it all information necessary for its purposes. To hold that the giving of such information in that more or less intimate relationship which necessarily must exist between an officer of the corporation and its attorneys would prevent the corporation attorneys from thereafter using it in favor of the corporation in litigation

against the officer, would be unfair to the corporation and its stockholders, and would violate the above mentioned very important precept, namely, that the attorney's first duty is to his client. Were appellants' contention correct, in all litigation between a corporation and a former officer, more time of the court would be spent in determining, as each bit of evidence appeared, whether it was obtained by the corporation attorney from the officer than in determining the merits of the litigation.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



144 Cal.App.2d 309

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Santiago TARIN, Defendant and Appellant.
Cr. 5568.

District Court of Appeal, Second District,
Division 1, California.
Sept. 12, 1956.

Hearing Denied Oct. 9, 1956.

Proceeding on application for a petition for a writ of error *coram nobis*. The Superior Court, Los Angeles County, David Coleman, J., denied the petition and defendant appealed. The District Court of Appeal, Doran, J., held that petitioner's grounds for setting aside his judgment of conviction lacked support in the record, and denial of his petition for writ of error *coram nobis* did not violate any of his constitutional rights.

Order affirmed.

Criminal Law §997(15)

In proceeding on application for writ of error *coram nobis*, grounds set forth by

petitioner for vacating his judgment of conviction lacked support in the record, and denial of his petition for the writ did not violate any of his constitutional rights.

Santiago Tarin, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from an order denying a petition for a writ of error *coram nobis*. Appellant appears in pro. per.

Defendant was charged with the possession of heroin. As recited in respondent's brief, "defendant with counsel present, entered a plea of 'Guilty as charged in the information'. Probation was denied and, no legal cause appearing why judgment should not be pronounced, judgment was pronounced and defendant was sentenced to the State Prison for the term prescribed by law, the Terminal Island Facility being recommended.

"Judgment was entered on October 3, 1952 and no appeal was taken from the judgment entered on defendant's guilty plea.

"More than three years after entry of judgment, on October 25, 1955, defendant filed in the Superior Court of the State of California, in and for the County of Los Angeles, a document entitled, 'Petition for Writ of Error Coram Nobis, Writ of Habeas Corpus, Writ of Certiorari and for the Order to Show Cause Why the Writ or Writs Should Not Be Granted.'

"In the 'Petition' defendant recited that he had been paroled on October 13, 1953, and that parole was revoked on August 4, 1955.

"Grounds Stated in the Petition

"As 'grounds' for issuance for the requested relief defendant contended:

"1. That he was 'forcibly restrained without his consent upon illegal entry of his private domicile';

"2. That his plea of guilty was 'coerced' in that he was 'forced to withstand an ordeal of some (60) days in the jail tanks handicapped by an infected eye'; and

"3. That the Adult Authority 'violated the petitioner and aggravated a new charge using it as a prior.'

"No reason was stated by the defendant in his application why he waited over three years to file his petition. Further, no affidavits or other proof was offered in support of the charge of 'coercion' or of any of the other grounds alleged."

As recited in appellant's brief, "Appellant contends that there is only one question of law that is to be settled by the District Court of Appeal. This question is:

"Did the Superior Court of the State of California violate the constitutional rights of defendant by denying defendants petition for error coram nobis without a proper hearing?"

"Your appellant, Santiago Tarin, being confined in a State Prison located at Represa, California was informed on or about the 1st day of October, 1955, while studying law in the Law Library of said Prison, that he was given a fraudulent and void trial on the 11th day of September, 1952 in that while being represented by counsel, he was forced to enter a Plea of Guilty to charges contained in the information filed against him on the 3rd day of September, 1952.

"Your appellant contends that his constitutional rights to a fair trial were denied him by the method used by the Court Officers in that he was subject to coercion which resulted in the overreaching of his free will and clear judgment in making the Plea of Guilty.

" * * * * *

"Appellant contends that had he been informed of the true meaning of the law of the State of California prior to the 1st of October, 1955, he would have then filed his petition for a Writ of Error Coram Nobis at the very earliest possible moment, however, due to the fact that he was not aware of his trial being fraudulent until October

of 1955, he is entitled to be heard by way of Error Coram Nobis even though a period of three years has passed since the entering of the plea of guilty.

"Appellant concedes that the writ of Error Coram Nobis is one of narrow scope and its purpose very limited."

The record reveals that appellant actually made no showing in support of the application for the writ. As argued by respondent, "In the instant case the petitioner made no such showing and as a consequence, the petition was properly denied.

"Aside from the foregoing which required the court below to deny the petition, the following must be considered:

"It is well established that on such an application, affidavits (if any were filed), and statements made by the defendant do not have to be accepted at face value but may be disbelieved and in that event the discretion of the trial judge, in the absence of a clear showing of an abuse thereof, will not be disturbed.

" * * * * *

"Under the circumstances, the trial court had no alternative but to deny the petition for writ of error coram nobis. In a case such as this, the burden is on the applicant for the relief to *produce convincing proof of a fact* which constitutes legal ground for the issuance of the writ. The presumption that the judgment is valid in all respects is strong. It is clear that the appellant failed in the trial court to overcome this strong presumption and that he is entitled to no relief from an appellate court.

"People v. Shorts, supra (32 Cal.2d 502, 508, 197 P.2d 330).

"As the court said in People v. Stapleton [139 Cal.App.2d 513, 293 P.2d 793, 794]:

"A petition for writ of error coram nobis places the burden of proof to overcome the strong presumption in favor of the validity of the judgment on the petitioner. This burden requires the production of strong and convincing evidence. A mere naked allegation that a Constitutional right

has been invaded will not suffice. *The application should make a full disclosure of the specific facts relied upon and not merely state conclusions as to the nature and effect of such facts.* People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330. [Emphasis added.]”

As pointed out by respondent, appellant's contentions lack support in the record. The denial of the petition for writ of error coram nobis in no sense violated defendant's constitutional rights.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.



144 Cal.App.2d 370

Henry Wood SHELTON et al., Plaintiffs
and Respondents,

v.

Jeanie MALETTE et al., Defendants and
Appellants.

Civ. 5409.

District Court of Appeal, Fourth District,
California.

Sept. 7, 1956.

Rehearing Denied Sept. 27, 1956.

Hearing Denied Oct. 31, 1956.

Action to determine boundaries and to quiet title. The Superior Court of San Diego County, C. M. Monroe, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Mussell, J., held, in part, that evidence established that possession of plaintiffs of disputed property had been actual, notorious, uninterrupted, adverse and exclusive until spring of 1951 when defendants had caused fence to be erected some 400 feet west and parallel to fence line pointed out to plaintiffs by original owner as east boundary line of their property; that during all such period plaintiffs had paid state and county taxes assessed against their lot, with exception of small area in northeast

corner; that in 1929, plaintiffs had entered into oral agreement with original owner by which owner, in consideration of payment of certain sum, had agreed to execute will conveying lot to plaintiffs, including area in dispute.

Judgment affirmed.

1. Adverse Possession — 57, 85(5)

In action to determine boundaries and to quiet title, evidence sustained findings that plaintiffs had had actual, notorious, uninterrupted, adverse and exclusive possession of disputed area between parties' lots until spring of 1951 when defendants caused fence to be erected some 450 feet west and parallel to fence line which original owner had pointed out to plaintiffs as east boundary line of their property; that during all such period plaintiffs had paid state and county taxes assessed against their lot; and that plaintiffs had entered into oral agreement with original owner by which owner for valuable consideration, had agreed to execute will conveying lot which included area in dispute.

2. Boundaries — 3(3), 40(1)

The true location of the survey of a tract of land is a question of fact; and in boundary disputes, monuments control over courses and distances, and, if circumstances warrant it, fences may be considered monuments.

3. Boundaries — 48(3)

To make an agreement establishing a boundary line binding, occupation in accordance with line so fixed must be acquiesced in by parties for period equal to that fixed by statute of limitations, or for such a length of time that parties ought not to be allowed to deny its correctness.

4. Boundaries — 48(2)

To be binding, an agreed boundary line must be accepted as the true line, regardless of its accuracy as shown by subsequent measurements.

5. Boundaries — 48(1)

In applying the doctrine of agreed boundaries, it is not the theory of law that

there has been a conveyance of land from one coterminous owner to other; but rather, that they have agreed between themselves as to land which they respectively owned under circumstances which are binding upon both of them and their privies.

6. Boundaries ⇨48(6)

An agreement establishing a boundary line is conclusive of correctness of line.

7. Boundaries ⇨48(2)

A fence may establish or mark the true boundary line between adjoining landowners and constitute an agreed boundary, when it is erected or maintained in circumstances rendering applicable the doctrine of agreed boundaries.

8. Boundaries ⇨37(5)

In action to determine boundaries and to quiet title, evidence sustained finding that original owner and defendants' predecessor in title, for many years, had recognized barbed wire fence pointed out to plaintiffs as true and common boundary line, and conclusion of trial court that plaintiffs were owners of disputed area was supported by record.

9. Wills ⇨58(2)

In action to determine boundaries and to quiet title, evidence supported finding that plaintiffs had paid original owner \$1,800 for which he had promised to execute will leaving disputed property to them.

10. Wills ⇨59, 67

Where parties paid original owner \$1,800 for which owner promised to execute will leaving disputed property to parties, promise was enforceable; parties, as intended legatees, were entitled to enforce their rights under the contract with the original owner.

11. Adverse Possession ⇨57

In action to determine boundaries and to quiet title, evidence established that plaintiffs had possession of disputed area, and that that possession was actual, notorious, uninterrupted and exclusive from 1929 to 1951, at which time defendants had erected fence west of common boundary

line between lot owned by plaintiffs and lot owned by defendants.

12. Adverse Possession ⇨57

In action to determine boundaries and to quiet title, evidence that plaintiffs had actual, notorious, uninterrupted and exclusive possession of disputed area between parties' lots from 1929 to 1951 was sufficient to constitute adverse possession under statute.

13. Evidence ⇨274(11)

Statements of original owner pointing out boundary line of plaintiffs' lot, which owner for valuable consideration had agreed to devise to plaintiffs, and survey which original owner had taken of property, were not inadmissible as self-serving declarations of a deceased person intending to enlarge his holdings, in suit involving boundary dispute between successors in title of original owner, since declarations of original owner were all against his interest as original owner of land west of old fence, claimed by plaintiffs to be true boundary line, and such declarations confirmed reduction of original owner's holdings as claimed by plaintiffs. West's Ann.Code Civ.Proc., § 1853.

W. E. Starke, San Diego, for appellants.

Sloane & Fisher, San Diego, for respondents.

MUSSELL, Justice.

This is an action to determine boundaries and to quiet title. On March 10, 1922, one Jessie M. Lockhart conveyed lots 3, 5, 6, 7 and 8, in section 7, township 14, range 4 east, S.B.M., on Cuyamaca Mountain in San Diego county, to one A. B. Tahar. In October, 1922, Tahar obtained a survey of this property by a licensed surveyor, Percy L. Day, and a map of the property involved was prepared by him for Tahar's use. On or about November 14, 1922, A. B. Tahar conveyed to one George S. Gay said lots 7 and 8, according to the said survey made by Percy L. Day in October, 1922, and all

of said lots 3 and 6 lying north of the meandering creek bed running through said lots, described by metes and bounds. In 1923 Tahar conveyed to George A. Malette a portion of lot 6 of said land which was described in the deed as commencing at a point on the south line of lot 6 where a small creek intersects same; thence north along said creek to its intersection with a road north of Rocky Hill; thence west along said road to the west line of said lot 6; thence south along said west line to its intersection with the south line of said lot marked by a post in a stone mound; thence along said south line to the point of beginning.

In 1928 the plaintiffs became acquainted with A. B. Tahar and visited his mountain property. The Sheltons and Tahar became very close friends and in 1929, when the Sheltons were on the Tahar property, Tahar showed them the Day survey map and told them that they were to have lot 3 as shown thereon. He pointed out the boundary of this lot to the Sheltons and directed their attention to a barbed wire fence which he said was the boundary line between the property they were to have and the property which he had theretofore deeded to George Malette. The Sheltons paid \$1,800 to Tahar and he agreed to execute his will leaving them the property. They built a cabin on it, ran a pipe line to a spring and occupied the property pointed out to them by Tahar actually, notoriously and uninterruptedly until the spring of 1951, at which time the defendants caused a fence to be erected approximately 450 feet west of and parallel to the fence pointed out to the Sheltons by Tahar as being the boundary line between his property and that theretofore conveyed to Malette. The area between these two fences is the property in dispute here and is shown on a map in evidence prepared by Daniels, Brown and Hall (Defendants' exhibit I).

In 1936 section 7, township 14 south, range 4 east, S.B.M., was surveyed by one Dupree Averill, a United States surveyor, and he prepared a map (Plaintiffs' exhibit

5) in which the boundary line between lots 3 and 6 did not correspond to the boundary line shown on the Day map and pointed out to the Sheltons by Tahar.

On July 21, 1931, Tahar executed his will in which he left to George A. Malette "My remaining interest in Lots Five (5) and Six (6), Section Seven (7), Township Fourteen (14) South, Range Four (4) East, S.B.M." The will further provided as follows:

"I have heretofore arranged for thirty-seven (37) acres of my Cuyamaca property to go to Henry Wood Shelton and Dorothy Shelton, provided my death occurs within ten (10) years from date hereof and in that event, I leave any interest therein to said Henry Wood Shelton and Dorothy Shelton and their children, without the right of disposition, until the death of all said Shelton family, as a life estate, upon their death said property to be disposed of by will of last survivor of those mentioned herein. This is in cancellation of my indebtedness to them. The said property is to be subject to the Agreement entered into by and between George Gay, George A. Malette and myself."

Tahar died in 1938 and letters testamentary were issued to George A. Malette on May 27 of that year. On January 27, 1939, an order for partial distribution was made in the estate of Tahar distributing "Lot 3, Section 7, Township 14 S, R 4 E, SBM, consisting of 37 acres, recorded in County Records office of San Diego, California, to Henry Wood Shelton and Dorothy Shelton. Lots 5 and 6, Section 7, Township 14 S, R 4 E, SBM, as recorded in County Records office, San Diego, California, to George A. Malette."

In the trial herein it was stipulated and found by the court as follows:

"Upon trial defendants expressly disclaimed any right, title or interest in lands in Section 7, Township 14 South, Range 4 East, SBM, lying westerly of

such division fence, until January 27, 1939, and confined their claims to those which arose under Order for Partial Distribution on said date in the Matter of the Estate of A. B. Tahar, deceased, Probate No. 25535 in the Superior Court of San Diego County, California."

Plaintiff Henry Shelton testified that he and his wife paid taxes on their property first in 1931 and 1932 to Tahar and later to George Malette and finally they paid "direct"; that in 1929 Tahar pointed out to him and to his wife the boundary of lot 3, both as shown on the Day map and on the ground, and told them that the property which he was showing them was what they were to have; that Tahar pointed out to them the barbed wire fence and stated that that was the east boundary line of their property; that remnants of this fence were still on the property at the time of trial; that George Malette died June 6, 1949, and that during his lifetime he made no assertion of any right to change the said boundary line fence and acquiesced in it as the true boundary line between his property and that of the plaintiffs.

[1] The trial court found, in substance, that all of the allegations of the plaintiffs' complaint were true; that defendants confined their claims to those which arose under the said order of partial distribution; that the possession of plaintiff of the disputed property was actual, notorious, uninterrupted adverse possession and exclusive until the spring of 1951 when defendants caused the fence to be erected some 450 feet west and parallel to the fence line pointed out to the Sheltons by Tahar as the east boundary line of their property; that during all of such period plaintiffs paid state and county taxes assessed against lot 3 with the exception of a small area in the northeast corner thereof; that on or about December 13, 1929, plaintiffs entered into an oral agreement with A. B. Tahar, in which Tahar, in consideration of the payment to him of \$1,800, promised and agreed to execute his will conveying lot 3

to them, including the area here in dispute. These findings are supported by substantial evidence and cannot be here disturbed.

[2] The true location of the survey of a tract of land is a question of fact and in boundary disputes, monuments control over courses and distances and where the circumstances warrant it, fences have been considered as monuments. *Rodgers v. Roseville Gold Dredging Co.*, 135 Cal.App.2d 6, 286 P.2d 536.

[3-7] In 8 Cal.Jur.2d 763-767 it is said that to establish an agreed boundary line there must be an actual designation of the line upon the ground and occupation in accordance therewith. To make the agreement binding, occupation in accordance with the line so fixed must be acquiesced in by the parties for a period equal to that fixed by the statute of limitations, or for such a length of time that the parties ought not to be allowed to deny its correctness. An agreed boundary line must be accepted as the true line, regardless of its accuracy as shown by subsequent measurements. In applying the doctrine of agreed boundaries, it is not the theory of the law that there has been a conveyance of land from one coterminal owner to the other, but rather, that they have agreed between themselves as to the land which they respectively own under circumstances which are binding upon both of them and their privies. Such an agreement is conclusive of the correctness of the line and a fence may establish or mark the true boundary line between adjoining landowners and constitute an agreed boundary, when it is erected or maintained in circumstances rendering applicable the doctrine of agreed boundaries.

In *Mello v. Weaver*, 36 Cal.2d 456, 460, 224 P.2d 691, it is held that an agreement to locate a boundary line need not be express, but it may be implied from long acquiescence; that the implied agreement must have been based on a doubtful boundary line; that a dispute or controversy is not essential but it may be evidence of the existence of a doubt or uncertainty; that it is not required that the uncertainty should

appear from the deed or from an attempt to make an accurate survey from the calls in the deed; that a doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made, and if in good faith the parties resolve their doubt by the practical location of the common boundary, it will be considered the boundary called for by the deed.

[8] The evidence, considered in the light of the rules stated herein, is sufficient to support the finding of the trial court that Tahar and Malette, for many years, recognized the barbed wire fence pointed out to Shelton as the true and common boundary line between lot 3 and lot 6 and the conclusion of the trial court that plaintiffs are the owners of the disputed area is supported by the record.

[9, 10] There is also substantial evidence to support the trial court's finding that plaintiffs paid Tahar \$1,800 for which he promised to execute a will leaving the disputed property to them. Such a promise is enforceable. *Brown v. Superior Court*, 34 Cal.2d 559, 560, 212 P.2d 878. Plaintiffs, as intended legatees, are entitled to enforce their rights under the contract with Tahar. *Daniels v. Bridges*, 123 Cal.App.2d 585, 590, 267 P.2d 343. As is said in *Weeks v. Taddeucci*, 132 Cal.App.2d 491, 495, 282 P.2d 586, 589, quoting from 50 Restatement of Trusts:

"Although a trust of an interest in land is orally declared and no memorandum is signed, the trust is enforceable if, with the consent of the trustee, the beneficiary as such enters into possession of the land or makes valuable improvements thereon or irrevocably changes his position in reliance upon the trust."

[11] The evidence further shows that plaintiffs had possession of the disputed area, which possession was actual, notorious, uninterrupted and exclusive from 1929 to 1951, at which time defendants

erected a fence west of the common boundary line between lots 3 and 6. As is said in *Klein v. Caswell*, 88 Cal.App.2d 774, 779, 199 P.2d 689, 692:

"The possession required by the statutes and by the decisions is one that must be so open, notorious and continuous as to give notice to others that it is hostile to the record owner and must be such as to indicate a claim of right, at least to the extent of putting a prudent man upon inquiry. "It must, in other words, be an open, unequivocal, actual possession—notorious, apparent, uninterrupted, and exclusive—carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property." *Lofstad v. Murasky*, 152 Cal. 64, 91 P. 1008, 1010."

[12] In the instant case the evidence was sufficient to constitute adverse possession under the statute.

[13] Appellants argue that all statements attributed to A. B. Tahar as well as the so-called "Day" survey should not have been admitted and that all of these statements attributed to Tahar were self-serving declarations of a deceased person intending to enlarge his holdings. We are not in accord with these contentions. The declarations of Tahar were all against his interest as the original owner of the land west of the old fence and they confirm the reduction of his holdings as claimed by the Sheltons. In *Sharp v. Blankenship*, 79 Cal. 411, 413, 21 P. 842, it was held that in case of a disputed boundary line which is in doubt, the declarations of a grantor, at or before the time of the sale and conveyance, are admissible against both him and the parties claiming under him. See also section 1853 of the Code of Civil Procedure.

The judgment is affirmed.

GRIFFIN, Acting P. J., and BURCH, J. pro tem., concur.

144 Cal.App.2d 264

Arne RASMUS, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation; Circosta Iron & Metal Company, etc., et al., Defendants and Respondents.

No. 16830.

District Court of Appeal, First District,
Division 1, California.

Aug. 31, 1956.

As Corrected Sept. 26, 1956.

Action by railroad employee against railroad under Federal Employers' Liability Act and against a shipper for injuries suffered when railroad employee was struck by a piece of pipe thrown from a car by one of shipper's employees while railroad employee was inspecting cars at shipper's siding. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., granted a nonsuit in favor of the railroad and rendered judgment for shipper. The employee appealed from both judgments. The District Court of Appeal, Bray, J., held that evidence was sufficient to present a question for jury on issue of railroad's negligence in sending employee to work in a dangerous place, and that instruction given on the issue of the negligence of shipper that the happening of the accident would not support an inference in negligence was prejudicial error.

Both judgments reversed.

1. Master and Servant ⇨265(2)

Under the Federal Employers' Liability Act, the injured employee, in order to recover damages for injuries received in scope of his employment, must prove negligence of employer. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A., § 51 et seq.

2. Master and Servant ⇨228(1)

Negligence ⇨101

Under the Federal Employers' Liability Act, the contributory negligence of injured employee is not a defense, but it must be considered by jury in reduction of damages. Federal Employers' Liability

Act, §§ 1 et seq., 3, 4, 45 U.S.C.A., §§ 51 et seq., 53, 54.

3. Appeal and Error ⇨927(3)

In passing upon an order granting a nonsuit in a Federal Employers' Liability Act case, the District Court of Appeal must construe the evidence most favorably to plaintiff, and if fair minded persons could reach different conclusions on the same evidence, the issue is for jury even where evidence is not controverted. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Master and Servant ⇨106(1)

Employer whose duty it is to provide his employee with a safe place to work, ordinarily is not liable for injuries to his employee on premises of third party over which employer has no control, however, if employer knows, or should have known, that the third parties' premises are dangerous, employer may be liable for employee's injuries there.

5. Master and Servant ⇨286(9)

In action by railroad employee against railroad under the Federal Employers' Liability Act and against a shipper for injuries suffered when railroad employee was struck by a piece of pipe thrown from a car at shipper's siding, evidence was sufficient to present a question for jury on the issue of railroad's negligence in sending employee to work in a dangerous place. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

6. Master and Servant ⇨289(39)

Negligence ⇨136(31)

In action by railroad employee against railroad under the Federal Employers' Liability Act for injuries suffered when employee was struck by a piece of pipe thrown from a car by one of shipper's employees while railroad employee was inspecting cars at shipper's siding, whether the fact that employee saw a man standing in the car he was about to inspect and failed to realize that the man might throw material out of car, was or was not the sole proximate cause of accident, or whether it constituted contributory negligence, which,

while not a defense, would serve to minimize damages, were questions for the jury. Federal Employers' Liability Act, §§ 1 et seq., 3, 4, 45 U.S.C.A. §§ 51 et seq., 53, 54.

7. Appeal and Error ⇨216(1)

Ordinarily, where plaintiff offered no instructions on the doctrine of *res ipsa loquitur*, the reviewing court would be precluded from considering the failure of the trial court to give an instruction on it.

8. Appeal and Error ⇨1066

Where trial court instructed that the happening of accident did not support an inference of negligence, reviewing court was required to determine whether doctrine of *res ipsa loquitur* applied, even though plaintiff had offered no instructions on the doctrine.

9. Negligence ⇨121(2)

For doctrine of "*res ipsa loquitur*" to be applicable, the injury must be caused by an instrumentality under the exclusive control of defendant, the accident must be of a type which ordinarily does not happen unless someone is negligent, and accident must not have been due to any voluntary act or contributing fault on part of plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

10. Railroads ⇨282(3)

In action by railroad employee against shipper for injuries sustained when employee was struck by piece of pipe thrown from a car by one of shipper's employees while railroad employee was inspecting cars at shipper's siding, evidence was sufficient to authorize application of doctrine of *res ipsa loquitur* as to shipper.

11. Negligence ⇨121(2)

The fact that plaintiff, in action for personal injuries, proved specific acts of negligence causing injury would not preclude application of doctrine of *res ipsa loquitur*.

12. Appeal and Error ⇨1064(1)

Railroads ⇨282(14)

In action by employee of railroad against shipper for injuries suffered when

employee was struck by a piece of pipe thrown from a car by shipper's employee while railroad employee was inspecting cars at shipper's siding, where under proper instructions doctrine of *res ipsa loquitur* could have been applied by jury, giving instruction that the happening of accident did not support an inference of negligence, even though employee offered no instructions on the doctrine, was prejudicial error.

13. Railroads ⇨282(9)

In action by railroad employee against shipper for injuries suffered when railroad employee was struck by a piece of pipe thrown from a car by shipper's employee while railroad employee was inspecting cars at shipper's siding, whether railroad's employee, who did not make his presence known, was contributorily negligent in not ascertaining what observed shipper's employee was doing in car was question for jury.

14. Railroads ⇨275(1)

Where shipper's employee was engaged in leveling a car full of metal at shipper's siding and process of leveling car required that long pieces of metal more than five feet long, or metal which protruded over edges of car would be thrown out, employee's duty was to use only ordinary care to avoid throwing metal on railroad employee walking beside the cars.

Leo Fried, George Olshausen, San Francisco, for appellant.

Roger G. Eliassen, San Francisco, for respondent Circosta Iron & Metal Co.

Ricksen, Freeman, Hogan & Vendt, Oakland, for respondent Southern Pacific Co.

BRAY, Justice.

In this action for personal injuries brought against defendant Southern Pacific Company, a corporation, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and against Circosta individually and doing business as the Circosta Iron & Metal Company, the trial court granted a nonsuit in favor of defendant Southern Pacific and the jury granted a verdict in

favor of Circosta. Plaintiff appeals from the judgments entered thereon.

Questions Presented.

1. As against Southern Pacific—was there substantial evidence of its negligence to go to the jury?

2. As against Circosta—

(a) Withdrawal of *res ipsa loquitur* issue.

(b) Was contributory negligence an issue?

(c) Instructions on relative duty of care of plaintiff and Circosta.

(d) Propriety and correctness of court's instruction in absence of parties.

Evidence.

Plaintiff was employed by Southern Pacific as an inspector of freight cars. His foreman was McTiernan who customarily gave the inspectors the numbers of the cars they were to inspect. It was then the duty of the inspectors to go to the yards of the different shippers which had loaded and leveled cars, and inspect them. The leveling process consisted of throwing out any scrap metal which was more than 5 feet long or which protruded over the edges of the cars. The inspectors usually came to the yard about 4:00, at which time the cars were usually ready. However, there was testimony that the cars on occasion were leveled between 4 and 4:30 p. m.

The day of the accident, Doris McLaughlin at the Southern Pacific dispatching office had received an order from Davis, a Southern Pacific employee who customarily gave such information, that two Southern Pacific cars would be ready for inspection in the Circosta yard at 4 p. m. Doris informed McTiernan about 3:35 p. m. that the cars were ready for inspection there. McTiernan and plaintiff then drove to that yard, arriving shortly after 4:00. Their presence was not made known at the Circosta office. The cars plaintiff was to inspect were located about 200 feet from the office. On the near side of the track was a road, on the other side of the cars were

the scrap metal piles. As plaintiff approached the cars he assumed that they were loaded and leveled. There was nothing sticking over. While he was turning around the end of a car to inspect the other side, he noticed a man in the car. Plaintiff could not see what he was doing. Plaintiff only saw the upper part of his body and it seemed like he was looking down at the load. Plaintiff did not notify him of his presence. When plaintiff was about through inspecting the first car and was between the two cars getting ready to inspect the second, he was hit on the head with a piece of pipe thrown from the car by the Circosta employee in it who was leveling the load. This person had not been cautioned to be careful in throwing material from the car as inspectors might be about and did not know of plaintiff's presence. The employee gave no warning nor did he look in the direction he was throwing the pipe. Plaintiff was severely injured by the pipe.

Rasmus sued Southern Pacific Company under the Federal Employers' Liability Act. At the end of Rasmus' case, Southern Pacific's motion for nonsuit was granted. The action against Circosta, which was brought under the ordinary law of negligence, proceeded to a verdict and judgment for this defendant. Plaintiff's motion for new trial was denied by operation of law through the court's failure to act upon it. Plaintiff appeals from the judgments.

1. Southern Pacific Appeal—Nonsuit.

[1-3] Was there any evidence of negligence of Southern Pacific? Under the Federal Employers' Liability Act the injured employee, in order to recover damages for injuries received in the scope of his employment, must prove negligence of the employer. *Blunk v. Atchison, T. & S. F. Ry. Co.*, 97 Cal.App.2d 229, 234, 217 P.2d 494. Contributory negligence is not a defense, but must be considered by the jury in reduction of damages. 45 U.S.C.A. § 53. Assumption of risk has been abolished. 45 U.S.C.A. § 54. The duty of this court in

passing upon an order granting a nonsuit in a Federal Employers' Liability Act case is the same as in cases under the state law of California, namely, the evidence must be construed most favorably to plaintiff, *Lavender v. Kurn*, 327 U.S. 645, 652, 66 S.Ct. 740, 90 L.Ed. 916, and if fair minded persons could reach different conclusions on the same evidence, the issue is for the jury even where the evidence is not controverted. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 63 S.Ct. 1062, 87 L.Ed. 1444; *Carpenter v. Atchison, T. & S. F. Ry. Co.*, 109 Cal.App.2d 18, 23, 240 P.2d 5.

[4, 5] Here there was evidence that the employer informed the employee that the cars were ready for inspection, that with his foreman plaintiff went to inspect the cars, that it was customary for the foreman not to check at the Circosta office to determine that the cars actually were ready for inspection, nor to check the cars themselves to see if the loading and leveling had ceased. There was evidence to the effect that work in loading cars customarily continued after 4 o'clock, the time when inspection of the cars customarily started. The rule in cases of this kind is that the employer whose duty it is to provide his employee with a safe place to work, ordinarily is not liable for injuries to his employee on premises of a third party over which the employer has no control. The rule, however, is subject to the well recognized exception that if the employer knows, or should have known, that the third party's premises are dangerous, the employer may be liable for the employee's injuries there. See *Ericksen v. Southern Pacific Co.*, 39 Cal.2d 374, 380, 246 P.2d 642.

"As was said in *Beattie v. Elgin, Joliet & Eastern Ry. Co.*, 7 Cir., 217 F.2d 863, 865, 866: 'The fact that an employee is sent to premises not belonging to or under the control of his employer does not absolve the employer from liability for injuries he may sustain because of their unsafe con-

dition. * * * Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was chargeable with knowledge of the conditions which existed there from time to time which in the exercise of reasonable care it could have ascertained. * * *'" *Van Horn v. Southern Pacific Co.*, 141 Cal.App.2d 528, 297 P.2d 479, 481.

Whether the above facts, coupled with the fact that the information given plaintiff by his employer to the effect that the cars were ready for inspection was incorrect, constituted negligence by the employer, was a question for the jury. It cannot be said that as a matter of law the employer was not negligent.

[6] Nor can we say as a matter of law that the fact that plaintiff saw a man standing in the car and failed to realize that the man might throw material out of the car made that fact the sole proximate cause of the accident. As said in *Ericksen v. Southern Pacific Co.*, supra, 39 Cal.2d at pages 379-380, 246 P.2d at page 646: "The plaintiff's knowledge of the unsafe nature of the premises does not relieve the defendant of liability. Since 1939 the defense of assumption of risk has been barred under the Act. 45 U.S.C.A. § 54. No subsequent decision has been cited which as a matter of law relieves an employer from liability for injuries due to dangers known to the employer simply because those dangers were also known to the employee." Whether a reasonable and prudent person would have concluded that the man's presence meant danger, and therefore the failure to so conclude was or was not the sole proximate cause of the accident, or whether it was or was not contributory negligence which, while not a defense, would serve to minimize the damages, were all matters for the jury. The nonsuit should not have been granted.

[7, 8] 2. Circosta Appeal. (a) *Res Ipsa Loquitur*.¹

1. Plaintiff offered no instructions on the subject. Ordinarily this would preclude

our consideration of the failure to give an instruction upon it. However, the

[9, 10] Generally, three conditions are necessary to make the doctrine applicable. See *John v. B. B. McGinnis Co., Inc.*, 37 Cal.App.2d 176, 179, 99 P.2d 323. (1) The injury must be caused by an instrumentality under the exclusive control of the defendant. This condition existed. (2) The accident must be of a type which ordinarily does not happen unless someone is negligent. It was for the jury to determine whether this requirement was met. It could have found that this condition existed. Defendant's main answer to this is that it was the custom for its men to throw pipe and metal off cars. But the prevailing custom within a company or an industry does not necessarily determine that the customary activity measures up to the degree of care required by the law. If it was Circosta's custom to throw metal off the cars without ascertaining that no one was in a position to be hit, particularly during the period when Circosta knew that the Southern Pacific employees were accustomed to inspect, a jury could find that this fact would not only not measure up to the standard of care required but also that the accident would not have occurred had there been no negligence. (3) The accident must not have been due to any voluntary act or contributing fault on the part of the plaintiff. As pointed out before, whether that situation existed was one for the jury to determine. See *Baker v. B. F. Goodrich Co.*, 115 Cal.App.2d 221, 252 P.2d 24.

[11] The fact that plaintiff proved the specific acts of negligence causing the injury does not preclude the application of the doctrine. "If, because of the circum-

stances of the case and the probabilities, an inference of negligence, is raised, the doctrine should be applied, it is difficult to see why its application should be denied merely because plaintiff proves specific acts of negligence. There is no reason why such proof should wholly dispel the inference any more than it would in any other case. The plaintiff is penalized for going forward and making as specific a case of negligence as possible. If he endeavors to make such a case he runs the risk of losing the benefits of the doctrine to which the circumstances entitle him. Rather than place him in such a position he should be encouraged to prove as much as possible. The end result is not injurious to the defendant. He is not injured by the fact that the inference of negligence arose. The circumstances established a foundation therefor based upon probability. Indeed, he is in a better position as he has specific evidence to meet before the trier of fact that may be helpful to him. The case goes to the trier of fact with the general inference of negligence, plus other evidence of specific acts of negligence, to be weighed against defendant's showing. There is no reason for applying a different test for determining when the inference is wholly dispelled as a matter of law in a case where *res ipsa loquitur* is applicable, than is used in the case of any other inference." *Leet v. Union Pac. R. Co.*, 25 Cal.2d 605, 621-622, 155 P.2d 42, 51, 158 A.L.R. 1008; see also *Doke v. Pacific Crane & Rigging, Inc.*, 80 Cal.App.2d 601, 609, 182 P.2d 284.

[12] In the following cases the doctrine was held applicable: *Robbins v. Henry*

court instructed that the fact of the happening of the accident does not support an inference of negligence and also that negligence is never presumed, and that the jury would not be justified in inferring that defendant was negligent as the accident might have occurred without any fault of defendant. In *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7, the court held it to be prejudicial error in a case involving *res ipsa loquitur* to give an instruction of the type given here even

though no instructions on the *res ipsa loquitur* doctrine were asked. Therefore, here we are required to determine whether the doctrine applies. "Even though instructions on the doctrine of *res ipsa loquitur* were not requested, the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself in determining whether defendant was negligent." *Jensen v. Minard*, *supra*, 44 Cal.2d at page 329, 282 P.2d at page 9.

Cowell Lime & Cement Co., 7 Cal.App.2d 646, 46 P.2d 781, the plaintiff was struck by a cement sack being thrown down a chute; *Cooper v. Quandt*, 105 Cal.App. 506, 288 P. 79, employee of one building contractor was struck by a plank dropped by an employee of another contractor working on the building; *Doke v. Pacific Crane & Rigging, Inc.*, supra, 80 Cal.App.2d 601, 182 P.2d 284, employee of industrial plant killed by the falling of an appliance while assisting appliance company's employees in installing the appliance at the plant. The trial court erred prejudicially in giving the above mentioned instructions in this case where under proper instructions the doctrine of *res ipsa loquitur* could have been applied by the jury.

(b) Contributory Negligence.

[13] Unlike the situation as to the Southern Pacific Company, contributory negligence could be a defense in favor of Circosta. The court properly instructed on it. The fact that a crane lifting metal was working near the cars, the fact that plaintiff saw a man in the car looking downwards, were circumstances which the jury, although not compelled to so find, could have found would cause a prudent person to determine that the leveling of the metal in the car had not been concluded, and that hence there was danger of being struck, and that plaintiff was guilty of contributory negligence in not ascertaining what the man was doing in the car.

(c) Relative Duties of Care.

[14] The court instructed that defendant was not required to use any greater degree or amount of care than plaintiff was required to use. Plaintiff contends that this is contrary to the holding in *Dixon v. Pluns*, 98 Cal. 384, 33 P. 268, 20 L.R.A. 698. There the court said that one engaged with tools and materials directly over a public sidewalk was required to use more than ordinary care to prevent them from falling on pedestrians lawfully using the sidewalk. Such rule would not apply here where no public sidewalk was involved. Defendant's duty was only to use

ordinary care. We see no impropriety in the instruction.

(d) Instruction in Absence of Parties.

Inasmuch as the case will have to be retried because of the court's failure to instruct on *res ipsa loquitur*, and obviously no such occurrence will be repeated, we deem it unnecessary to discuss this assignment of error.

Both judgments are reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



144 Cal.App.2d 310

H. S. MANN CORP., a corporation doing business as California Smelting and Refining Co., Plaintiff and Respondent,

v.

Bryce MOODY, George E. Moody, individually and doing business as Moody Sprinkler Co., and Frank Moody, Barbara Moody, H. R. Goedert (sued as John Doe One), John Doe Two, Jane Doe One, Jane Doe Two, Doe and Roe, a copartnership, and Advance Industrial Finance Company, a limited partnership (sued as Doe Corporation, a corporation), Defendants,

Advance Industrial Finance Company, a limited partnership and H. R. Goedert, Appellants.

Civ. 21570.

District Court of Appeal, Second District,
Division 2, California.

Sept. 4, 1956.

Action by prior assignee of certain accounts receivable which were assigned to it while they were in futuro for recovery of amount paid to a subsequent buyer of the same accounts which were sold to it after they were in esse. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment for prior assignee and subsequent buyer appealed. The District

Court of Appeal, Ashburn, J., held that receivables which were to grow out of future agreements for sale and purchase of assignor's goods had sufficient substance to be recognized as assignable choses, the assignments to become complete when the debts came into being, and as such, such assignments were within protection of recording statute giving priority to a first recorded assignment of accounts receivable.

Judgment affirmed.

recording statute giving priority to a first recorded assignment of accounts receivable. West's Ann.Civ.Code, §§ 3017-3029, 3017 (1).

6. Statutes ⇨181(1)

A guiding star of statutory construction is intention of the legislature.

7. Statutes ⇨184, 217.1

To the end that the intention of the legislature be correctly ascertained, a statute is to be read in the light of its historical background and evident purpose.

8. Statutes ⇨181(2)

The object sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation.

9. Statutes ⇨207

Where possible, all parts of a statute should be read together and construed to achieve harmony between seemingly conflicting provisions rather than holding that there is an irreconcilable inconsistency.

10. Statutes ⇨183

If departure from a literal meaning of the text of a statute be necessary to effectuate legislative intention, that should be done.

11. Assignments ⇨84

Section of accounts receivable recording statute defining account, properly construed, embraces present and future items of existing and future book accounts, and the word "contract", as used in such section, connotes future agreements as well as those existing at the time of the assignment protected by recordation of notice provided for in such statute. West's Ann.Civ.Code, §§ 3017-3029, 3017(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Contract".

12. Assignments ⇨57, 85

Where notice of assignment of certain accounts receivable which were assigned while they were in futuro was recorded, it was not necessary for assignee to give debtor notice of such assignment, and by the

1. Account, Action on ⇨7

A claimant can establish his claim on an open account by proof of the account as it appears in a defendant's books.

2. Bankruptcy ⇨188(8)

Dominant purpose of statutes relating to assignment of accounts receivable and providing for the giving of notice thereof is the protection of assignees of receivables against claims of priority of a bankruptcy trustee without the necessity of giving actual notice to a debtor. West's Ann.Civ. Code, §§ 3017-3029.

3. Assignments ⇨12, 13

Monies to be earned under an existing contract are assignable at law, and in the absence of an existing contract the question of assignability of potential earnings or other receivables is generally a matter for equity.

4. Assignments ⇨7, 9

Equity will uphold assignments, not valid at law, of any future interest, as a rule applying alike to those which are vested, but relate to property to come into existence in the future, and to those which rest only in possibility, provided they are fairly made and not against public policy.

5. Assignments ⇨7, 85

Receivables which were to grow out of future agreements for sale and purchase of assignor's goods had sufficient substance to be recognized as assignable choses, the assignments to become complete when the debts came into being, and as such, such assignments were within protection of re-

recording the assignment was perfected and assignee acquired statutory priority over later assignments of the same accounts to defendant. West's Ann.Civ.Code, §§ 3017-3029.

Leland & Plattner and N. Stanley Leland, Los Angeles, for appellants.

Kopald & Mark, Beverly Hills, Arthur Smith, Los Angeles, for respondent.

ASHBURN, Justice.

This appeal presents the problem of priority between assignments of certain receivables, plaintiff having purchased same while they were in futuro and defendant after they were in esse. Judgment went for plaintiff in the sum of \$3,501.77. It runs in favor of H. S. Mann Corp., doing business as California Smelting and Refining Co., against Advance Industrial Finance Co., a limited partnership, and H. R. Goedert, one of the general partners. Defendants appeal from the judgment.

On September 16, 1952, Bryce Moody was indebted to H. S. Mann in the sum of \$8,595.70 for raw materials which he had purchased for his factory. Bryce's father, George Moody, was engaged in manufacturing sprinkler equipment and was buying castings from Bryce. On the last mentioned day Bryce by a writing assigned to Mann an account owing to Bryce by George Moody as it existed on that date "and as it may exist at any time during the term of this agreement." In making such assignment it was Bryce's purpose to use the money due from the account to enable him to purchase his further metal requirements from Mann without direct extension of credit to Bryce. It was the latter's agreement to cause his invoices and billings to bear the notation that same had been transferred, and were payable, to Mann. "Notice of Assignment of Account Receivable" was duly recorded September 18, 1952, when the balance due from George Moody to Bryce was apparently \$918.

Bryce Moody and George Moody,¹ were originally defendants, but the action was dismissed as to them. The written contract of September 16, 1952, designates Bryce Moody as "Moody" and H. S. Mann Corp. as "Mann." It contains the following pertinent provisions: "1. Moody hereby assigns to Mann his account receivable from George Moody, doing business as Moody Sprinkler Co., referred to hereinafter as The Account, * * * as that account exists as of this date, and as it may exist at any time during the term of this agreement. * * * 4. * * * Moody agrees that he will cause his invoices and billings to The Account to bear the notation that same have been transferred and are payable only to Mann, and that he will cause copies thereof to be sent to Mann at the same time they are sent to The Account, * * * 6. This agreement is, and shall be construed as, a sale by Moody to Mann of Moody's account receivable from The Account as it exists this date, and as it will exist in the future."

Mann continued to sell materials to Bryce who, when castings were sold and delivered to George, would furnish Mann with a memorandum of each delivery. Mann would then send an invoice to George containing a notice that Bryce had assigned to him certain specified invoices owing from George to Bryce. Each of such assigned invoices was paid by George in due course until defendant Advance Industrial Finance Company entered the scene. On February 3, 1953, Bryce sold to Advance invoices totaling \$2,677.19, and on February 13, 1953, sold it further invoices aggregating \$824.58. On February 3 Bryce owed Mann \$6,896.19, and on February 13, \$5,778.66. The contract between them was still in existence and the recorded notice of assignment had never been withdrawn. Defendant collected from George Mann \$3,501.77 upon the particular invoices sold to it. Bryce later went into bankruptcy.

Counsel debate the applicability and effect of Chapter IIIb of Title 14, Part 4,

1. Herein frequently referred to as Bryce and George for sake of brevity.

Division 3 of the Civil Code, §§ 3017-3029, which chapter is headed "Assignment of Accounts Receivable". The title of the original act, Stats.1943, p. 2542, is: "An act to add a new chapter to Title 14 * * * of the Civil Code to be known as Chapter 3b, relating to the assignment of accounts receivable and providing for the giving of notice thereof." Said chapter was enacted as the result of *Corn Exchange Nat. Bank & T. Co. v. Klauder*, 1943, 318 U.S. 434, 63 S.Ct. 679, 87 L.Ed. 884, and in furtherance of a policy of furthering non-notification financing of receivables. (The history of this statute is discussed in 17 So.Cal.L.Rev. 303; 33 Cal.L.Rev. 40; 38 Cal.L.Rev. 308; *In re Nelson's Estate*, 211 Iowa 168, 233 N.W. 115, 72 A.L.R. 856; and *Durkin v. Durkin*, 133 Cal.App.2d 283, 291-292, 284 P.2d 185.) In the *Klauder* case a creditor's committee of Quaker City Sheet Metal Company took assignments of its accounts receivable, which assignments were recorded on the company's books but no notice was ever given to the debtors whose obligations had been thus transferred. The company having gone into bankruptcy within four months, the trustee challenged the effectiveness of the assignments as against the bankruptcy estate. Section 60 sub. a, of the Bankruptcy Act, 11 U.S.C.A. § 96, sub. a, as then in existence is set forth in the footnote, so far as here pertinent.* The case arose under the law of Pennsylvania which was to the effect that, in case of failure of an assignee of a chose in action to give notice to the debtor, a subsequent good-faith assignee who gives such notice acquires a superior right. The court held that the trustee in bankruptcy had the same

rights as a bona fide subsequent purchaser, and said in 318 U.S., at page 437, 63 S.Ct. at page 681: "So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy. By thus postponing the effective time of the transfer, the debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law, although in fact made concurrently with the advance of money. In this case the transfers, good between the parties, had never been perfected as against good-faith purchasers by notice to the debtors as the law required, and so the conclusion follows from this reading of the Act that the petitioners lose their security under the preference prohibition of § 60, sub. b."

Under California law then existing notice had to be given to the debtor of the fact of assignment of a chose in action in order to effectuate it as one having priority over a subsequent assignment; the later assignee acquired the better right if he bought without knowledge of the existing assignment and gave notice to the debtor before the first assignee did so. *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 120, 56 P. 627; 44 L.R.A. 632; *Adamson v. Paonessa*, 180 Cal. 157, 163, 179 P. 880; *Smitton v. McCullough*, 182 Cal. 530, 535, 189 P. 686; *First Nat. Bank v. Pomona Tile Mfg. Co.*, 82 Cal.App. 2d 592, 605, 186 P.2d 693; *City of Los Angeles v. Knapp*, 7 Cal.2d 168, 171, 60 P.2d 127; 1 Cal.Jur.2d § 15, p. 332.

Various states met the *Klauder* decision in different ways. (33 Cal.L.Rev. 40, 86.) California, Ohio and Missouri adopted re-

2. "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, * * * the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a

transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy * * * it shall be deemed to have been made immediately before bankruptcy."

cordation statutes of varying content (id. p. 96). Sections 3017-3029, Civil Code, Chapter IIIB, enacted on May 26, 1943, constitute the California response to the difficulty.

The transactions at bar occurred in September, 1952, and February, 1953. Between 1951 and September 9, 1953, § 3017 read, in part, as follows: "(1) 'Account' means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account." Section 3018 said, in part: "An assignment of an account is entitled to priority over any subsequent assignment of the same account; provided, that as between two or more assignees who receive written assignments for value without notice, the assignee whose notice of assignment or of intention to assign, is first filed as provided in this chapter is entitled to priority over all other assignees of the same account. Except as to any credit extended by a creditor after the notice provided for in this chapter is filed, an assignment of an account shall be invalid as against any creditor of the assignor without actual notice unless notice of or of intention to make the assignment as provided for in this chapter is filed at the time of or before the execution of the assignment or within five days thereafter." The county recorder is designated as the "filing officer", § 3017, subd. (6), and § 3019 prescribes the necessary contents of the recorded notice.

[1] It appears that Bryce kept in his books no account with George showing the transactions giving rise to receivables. But exhibit B is a book account kept in George's business which does show those sales and the resulting debits and credits. It is settled law that a claimant can establish his claim on an open account by proof of the account as it appears in defendant's books. *Millet v. Bradbury*, 109 Cal. 170, 173, 41 P.

865; *Richmond v. Frederick*, 116 Cal.App. 2d 541, 546-550, 253 P.2d 977; *Gardner v. Rutherford*, 57 Cal.App.2d 874, 884, 136 P.2d 48; *Moss v. Underwriters' Report, Inc.*, 12 Cal.2d 266, 83 P.2d 503; *Shanklin v. Scribner*, 62 Cal.App. 487, 217 P. 130. The discussion of the law must start with the premise of an existing open account and an assignment of same to plaintiff Mann.

[2] The court, having regard for the statutory phrase "'rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account'", made finding XI which was intended to affirm the existence of a requirements contract between Bryce and George Moody whereby George was to purchase and Bryce to supply all castings needed by the former in his business. The finding is: "[T]hat there existed an agreement, express or implied, between the father and son to the effect that the father would purchase all castings necessary for the father's business from the son, so long as the price and quality delivered by the son were competitive; that said agreement between father and son existed prior to September 16, 1952, when the son assigned his account with the father to plaintiff; that plaintiff knew of this agreement between father and son and relied on it in taking said assignment from the son, and that the monies that were to become due to the son, and did in fact become due to the son, after September 16, 1952 from the father, which made up the account assigned to the plaintiff, arose pursuant to and in accordance with the above-described agreement between the father and son." But the evidence as a matter of law does not support this finding of an existing contract. George Moody testified:

"Q. Did you ever have any contract or agreement with your son whereby you obligated yourself to purchase any particular amount of merchandise from him? A. No.

"Q. In other words, he like other customers, would offer you merchan-

dise and if you wanted it you would buy it; is that correct, sir? A. Well, I might make it a little different from that. If I wanted it I would order it.

"Q. Correct. If you did not want it you did not order it; is that correct? A. That's right.

"Q. For this merchandise you did not owe him any money, did you, until you ordered the merchandise? A. No."

Bryce Moody was not asked and hence did not testify on the subject. Mr. Mann testified that George Moody, before Bryce went into the business of making castings, had purchased most of his requirements from Burke's foundry; that when Bryce returned from service in the army George Moody caused to be turned over to Bryce the bulk of the patterns which had been used in making George's castings, and that the bulk of this pattern equipment was moved from Burke's foundry to Bryce's premises; that this may or may not have been all of the pattern equipment owned by George; that he, Mann, had numerous discussions with George and Bryce concerning the type of their business dealings with one another; "The Witness: * * * Mr. George Moody's conversations with me, said very briefly that if Bryce Moody could produce brass castings at a cost to George Moody that was competitive with prices demanded by other producers of the brass castings; if Bryce Moody were to produce brass castings of satisfactory quality and if Bryce Moody were to maintain delivery schedules which were suitable to the needs of George Moody, he, George Moody, would favor his son, Bryce, to the exclusion of other vendors, but Mr. George Moody made very clear that his son, Bryce, must not place his business at any disadvantage, if he could not produce, to potential sources of supply. I had a very clear understanding of the business relationship between father and son." The foregoing comprises the entire evidence on the subject. It leaves the purported contract without any established price for the goods or any prescribed quantities, with no maxi-

mum and no minimum, no commitment by Bryce to supply all the castings that George needed and no promise by George to buy only from Bryce or to buy all his requirements from him. This falls short of an integration. 1 Williston on Contracts, Rev. Ed., § 104A, p. 361, says: "A question of interpretation also arises where an offer does not exactly define the quantity of goods. * * * The true interpretation may be, however, that the offer is an open one to be accepted from time to time by submitting orders for specific quantities. The requirement contracts sometimes fall within this category,—a series of contracts being formed as the separate orders are given." A footnote to the text cites numerous authorities to the effect that this does not measure up to an enforceable requirements contract. 46 Am.Jur. § 64, p. 257: "Where there is no other consideration than the promises of the parties, an agreement for the sale of such quantity as the buyer, at his option, may order or request from the seller is invalid, because the buyer may avoid any liability without any detriment. Where an agreement for the sale of such quantity as the buyer desires, wishes, or wants has been construed to have the same meaning and effect, it has been held invalid for the same reason. Where a seller agrees to sell a definite quantity of a certain article at a fixed price, and the buyer does not agree to purchase any definite quantity, but merely promises to buy only so much as he may desire to order from time to time, and gives no other consideration, there is insufficient consideration for the seller's promise." Southwest Pipe Line Co. v. Empire Natural Gas Co., 8 Cir., 33 F.2d 248, 250: "This court has had occasion in many cases to discuss the question of mutuality in contracts for the future delivery of personal property. It is well established that such contract cannot be enforced, if the will, wish, or want of one of the parties determines absolutely the quantity to be delivered. If that situation exists, there is want of mutuality." But the absence of an enforceable contract between Bryce and

George does not necessarily end the matter. It calls for a careful analysis and interpretation of the statute, whose dominant purpose was the protection of assignees of receivables against claims of priority of a bankruptcy trustee without the necessity of giving actual notice to the debtor. The legislature was not interested in re-defining assignability of choses, merely in establishing priority over the trustee of such assignments as were recognized as good under existing California law.

[3, 4] Monies to be earned under an existing contract have long been held assignable at law; in the absence of an existing contract the question of assignability of potential earnings or other receivables is generally considered one for equity, which supplements and corrects the inadequacies of the common law. Indeed this process has proceeded in this state to the point where the difference between law and equity vanishes for practical purposes so far as concerns the subject in hand. See *First Nat. Bank v. Pomona Tile Mfg. Co.*, supra, 82 Cal.App.2d 592, 606, 186 P.2d 693. "The California cases relating to contingent results of existing contracts do not refer to such distinction, and they state the rule as a general one that equity will uphold assignments, not valid at law, of any future interest, as a rule applying alike to those which are vested, but relate to property to come into existence in the future, and those which rest only in possibility, provided they are fairly made and not against public policy." *Bridge v. Kedon*, 163 Cal. 493, 497-498, 126 P. 149, 151, 43 L.R.A.,N.S., 404.

[5] It clearly appears that Bryce and George Moody had established a business relationship which actually resulted in George's buying all of his required castings from Bryce, in Bryce's satisfying George as to price, delivery and quality and that the established method of doing business afforded basis for expectation that it would continue indefinitely. The receivables which were to grow out of it had sufficient substantiality to be recognized as assignable choses, the assignment to be-

come complete when the debt came into being. The case is closely parallel to *H. D. Roosen Co. v. Pacific Radio Pub. Co.*, 123 Cal.App. 525, 531, 11 P.2d 873, 875. It is there said, in part: "While on August 4th, the day of the assignment itself, there was no express agreement that Kriedt was to print the August issue for defendant, yet he had been doing defendant's work for a long time; and Dickow's testimony shows that defendant did not intend to make a change before that issue appeared. In furtherance of the purposes of both parties, an express contract for the printing was made verbally at the time of the acceptance on August 8th, whereby defendant undertook to pay plaintiff \$900 out of the compensation to accrue. The fund was unquestionably existent potentially at the time of the acceptance; and, in view of the past relations of the parties and the testimony of Dickow as to contemplated continuance of the relationship, the assignment, when made on August 4th, had for its support not merely a supposititious expectancy, but a potentiality sufficient to validate an equitable transfer. *Walker v. Rich*, 79 Cal.App. 139, 144, 249 P. 56."

Is the assignment of such a potential chose protected by the recording statute, Chapter IIIb? Though subdivision (1) of § 3017 (above quoted), when read without reference to the context, seems to include only receivables, reflected in a book account, which are presently in existence and payable immediately or at some later date, plus such potential receivables as may grow out of performance of a presently existing contract, other provisions of the statute point to the conclusion that the phrase "due or to become due" used in connection with the words "open book account" includes future items of the account which enter into it as a result of later transactions in the course of dealings between the parties to the account. For instance, subdivision (3) of § 3017 defines creditor in such manner as to include one having a contingent claim. Under § 3018 he has priority over the assignee of any book account unless notice is recorded as required. Section 3019,

which prescribes the requisites of the notice of assignment, says in subdivision 2 that the notice shall not be effective unless the "assignment, if it assigns *accounts to arise in the future*, gives the general nature of the business out of which such accounts *are to arise* and the address where such business *is or will be carried on*". (Emphasis added.) This recognizes a right to assign "accounts to arise in the future," not merely future items of an existing account. And the notice must give the "general nature of the business out of which such accounts are to arise and the address where such business is or will be carried on". This refers to accounts arising from future businesses, as well as future accounts arising out of going businesses. Subdivision 2(a) of § 3019 calls for: "A statement that the assignor intends to assign or has assigned an account or accounts *then existing or thereafter arising* to the assignee". (Emphasis added.) In the event the assignor intends to assign or has assigned specified accounts, the notice must set forth the names and addresses of the persons owing the same. As previously noted, the chapter is headed "Assignment of Accounts Receivable" and § 3020 requires the recorder to keep an index entitled "Index of Notices of Assignment of Accounts Receivable".

[6-11] The guiding star of statutory construction is the intention of the legislature. To the end that it be correctly ascertained the statute is to be read in the light of its historical background and evident objective. *Stafford v. Realty Bond Services Corp.*, 39 Cal.2d 797, 805, 249 P.2d 241; 23 Cal.Jur. § 148, p. 773; "the objective sought to be achieved by a statute as well as the evil to be prevented is of

prime consideration in its interpretation". *Richfield Oil Corp. v. Crawford*, 39 Cal.2d 729, 738, 249 P.2d 600, 605. All parts of the law are to be harmonized. "Where possible, all parts of a statute should be read together and construed to achieve harmony between seemingly conflicting provisions rather than holding that there is an irreconcilable inconsistency." *Wemyss v. Superior Court*, 38 Cal.2d 616, 621, 241 P.2d 525, 528. And if departure from the literal meaning of the text be necessary to effectuate the legislative intention, that should be done. "A statute must be so construed as to make sense; to make every clause and phrase effective in deriving the legislative intent; and when the true purpose of the statute has been determined, it must be liberally construed in order to effectuate the purpose. The manifest reason and purpose of an act must not be sacrificed to a literal interpretation of its verbiage. When the legislative intent has been ascertained, it must be enforced as intended notwithstanding the derived meaning may be inconsistent with the strict letter of the statute as enacted." *People v. Villegas*, 110 Cal.App.2d 354, 357-358, 242 P.2d 657, 659. In the light of these principles no difficulty is experienced in reaching the conclusion that this statute was not intended to change the law of assignability of potential receivables; that its primary purpose was to give priority to the first assignee of any such receivables as are recognized as assignable; that § 3017, properly construed, embraces present and future items of existing and future book accounts; that the word "contract" connotes future agreements as well as those existing at the time of the assignment which is to be protected by the recordation of notice.³

3. Section 3017(1) was amended in 1953 to read as follows: "'Account' means a debt, due or to become due, arising out of the sale, storage, transportation, care, repair, processing, manufacture or other improvement of tangible personal property, or arising out of a contract therefor, or arising out of the rendition of personal services which in the regular course of

business will result in an open book account; * * *." Its terms are sufficiently obscure to prevent the amendment from throwing much helpful light upon the present problem, either by way of indicating a legislative intent to change the law or, on the other hand, merely to interpret the previous form of the section.

[12] The receivables here involved were covered by the assignment to plaintiff and they came into being and hence were fully assigned to him before the covering invoices were sold to defendant on February 3 and February 13, 1953. Notice of assignment having been recorded it was not necessary for Mann to give the debtor, George Moody, notice of his blanket assignment; it was perfected and acquired statutory priority over the later assignments to defendant.

Finding XI is erroneous, but other findings fully support the judgment, which is correct. Finding XI is stricken. The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



Louis DAMIANI, Appellant,

v.

Harry ALBERT et al., Respondents.*

Civ. 21558.

District Court of Appeal, Second District,
Division 1, California.
Sept. 12, 1956.

Hearing Granted Nov. 8, 1956.

Proceeding on petition for writ of mandate ordering petitioner restored to position of deputy sheriff. The Superior Court of Los Angeles County, Bayard Rhone, J., denied writ of mandate and petitioner appealed. The District Court of Appeal, Doran, J., held that deputy sheriff's prior suspensions, which were effected without any hearing and without giving deputy sheriff proper or adequate opportunity to defend himself against them, were not proper grounds for discharge and also that petitioner could not be discharged on basis of violation technical rule, which had merely been assumed to apply to petitioner

and in addition that evidence was insufficient to show that petitioner falsely and with knowledge of its falsity accused police sergeant of being intoxicated while working as a uniformed officer at an approved outside assignment.

Judgment and order reversed with directions, that writ of mandate issue.

Opinion, 297 P.2d 1022, vacated.

1. Officers ⇨70

Sheriffs and Constables ⇨21

A deputy sheriff or other public servant, after a long period of service, should not be discharged from office except in those cases where adequate grounds exist and where discharged employee has been accorded a fair and impartial hearing, and in such a case, it is essential that the employee's rights, together with well recognized humanitarian principles, be closely guarded and given every possible consideration.

2. Officers ⇨69.7

Where prior suspensions of deputy sheriff for disciplinary reasons were effected without any hearing and deputy sheriff was thus not given a proper or adequate opportunity to defend himself against such suspensions, prior suspensions were neither proper ground for discharge in subsequent hearing before Civil Service Commission, nor were properly admitted in evidence at that hearing.

3. Sheriffs and Constables ⇨21

Where deputy sheriff was charged with failure to go through proper channels in the designated chain of command in making an official communication to a captain in the sheriff's emergency reserve, and was discharged on basis of that and other charges, but the technical rule requiring such procedure was merely assumed to apply to reserve officers to which deputy sheriff had made his communications, such assumption was prejudicial to deputy sheriff's rights and such charge therefore could not be basis for discharge.

* Opinion vacated 306 P.2d 780.

4. Sheriffs and Constables Ⓒ21

Discharge of a deputy sheriff based upon something less than full proof of the elements of the charge cannot be given judicial approval.

5. Mandamus Ⓒ168(4)

In proceeding on petition for writ of mandate ordering petitioner restored to position of deputy sheriff, wherein it was disclosed one of the grounds for discharge was that petitioner had falsely accused police sergeant of having been intoxicated while working as a uniformed officer at an approved outside assignment, evidence was insufficient to show that deputy sheriff falsely and with knowledge of its falsity accused the police sergeant of being intoxicated at time in question.

Rosalind G. Bates and Roland S. Bates, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Los Angeles, for respondents.

DORAN, Justice.

Appellant Damiani, a Deputy Sheriff of Los Angeles County, was discharged for cause on November 18, 1954. A formal hearing, requested by appellant, was held before the County Civil Service Commission on December 22 and 23, 1954, and the order of discharge sustained. The appellant then petitioned the Superior Court for a Writ of Mandate which was denied, and the present appeal followed.

The Sheriff's letter giving notice of the discharge states that the appellant had violated certain rules of the Sheriff's Office which require official communications to be sent through channels or the "chain of command", in that "you on or about October 30, 1954, * * * communicated verbally and in writing directly with Captain Charles Mullison, of the Sheriff's Emergency Reserve", etc.; and that "on or about October 25, 1954, you submitted a signed, but undated report to your station

Commander, Captain James E. Pascoe, in which you falsely stated that Sergeant Byron A. Mallette was intoxicated while off duty, but working in an approved outside assignment at the Elliott Junior High School, 2184 N. Lake Avenue, Altadena, California, between 8:00 p. m. and 11:30 p. m., as a uniformed officer". A further ground for discharge specified in the Sheriff's letter is that on May 1, 1952, appellant Damiani had been suspended 30 days for violation of rules and regulations, and on November 2, 1951, had been suspended for 5 days, "because you directed vile and profane language against your superior officer".

The trial court's findings in the mandamus proceeding were to the effect that the appellant had not been denied due process of law; that the findings of fact made by the Civil Service Commission were supported by substantial evidence; that appellant, previous to the discharge involved herein, had been "suspended, without pay for disciplinary reasons twice", for less than 30 days, and "that there is no provision for a hearing on a suspension for not longer than thirty days"; that the hearing before the Civil Service Commission was held "on due notice, and was full and fair", and that "Petitioner's discharge was justified".

It is one of the contentions that appellant did not violate the chain of command rule by making charges directly rather than "through channels", for the reason that Captain Mullison and Deputy Weberg mentioned in the Sheriff's letter, were "private citizens" deputized under the Disaster Relief Authority of Los Angeles County, and acting on the Emergency Reserve, which fact did not make such persons members of the Sheriff's Department; and that there was nothing in the Manual of Policy and Ethics prescribing the channels requirement in reference to such Reserves.

The appellant also argues that "There was not substantial evidence in the light of the whole record to support the findings

of either the Civil Service Commission or the trial judge". It is likewise claimed that "No law or rules of any commission were presented to the trial court, nor * * * to this court, which allows former suspensions without a hearing to be used as a basis for a discharge".

[1] That the discharge of a deputy sheriff or other public servant, after a long period of service, is a matter of the utmost importance both to the individual and to the public, cannot be denied. It is likewise fundamental that such a discharge should not come about save in those cases where adequate grounds exist, and where the discharged employee has been accorded a fair and impartial hearing. And in such a case as the present, it is essential that the employee's rights, together with well recognized humanitarian principles, be closely guarded and given every possible consideration.

This fundamental duty devolves upon every official, commission and court before whom the matter is presented, from the lowest to the highest. The modern tendency of creating various boards and commissions with quasi-judicial powers and broad discretionary authority in no manner alters this basic rule. Any other view of the matter would seem to countenance an arbitrary grant of power quite un-American in principle.

In the instant litigation it appears that Louis J. Damiani had been employed as a deputy sheriff in Los Angeles County for six years, and previous to that period had been a police officer in another state. The reasons for Damiani's discharge, according to Sheriff Biscailuz's letter, are threefold, namely, that appellant made certain official communications directly to a superior officer rather than sending the same through a prescribed "chain of command" or official "channels"; that appellant had falsely accused Sergeant Mallette with having been intoxicated at a school dance; and finally, that on two previous occasions, several years before, Damiani had been suspended without pay.

From the record it is impossible to say which of these accusations was deemed vital or controlling, or whether it was only the sum total and cumulative effect thereof which was considered important enough to warrant appellant's discharge. The respondents' brief practically eliminates from consideration the last ground for discharge, namely the evidence of appellant's prior suspensions without pay, by stating that "While not sufficient standing alone to support any disciplinary action, it was properly considered in connection with the severity of the sentence to be given on the main charge". The respondent does not go on to state whether the "main charge" so mentioned is the violation of the channels rule, or the alleged false statements concerning Sergeant Mallette's intoxication. So far as the record shows, there is no "main charge", and the matter is thus left in an unsatisfactory and indefinite condition.

[2] Respondents' position in regard to the evidence of former suspensions cannot be upheld. As said in appellant's supplementary brief on rehearing, "Since the Court must assume that Petitioner paid the penalty of any such violations, (loss of pay, etc.), their inclusion as one of the three charges against him and their reason for his discharge is basically unfair, and there are no rules of any Commission justifying such procedure". In this connection it should be remembered that these prior suspensions were effected without any hearing and appellant was thus given no proper or adequate opportunity to defend himself. Such prior suspensions were neither proper grounds for discharge nor properly admitted in evidence, and the procedure in reference thereto must be deemed highly prejudicial to appellant's fundamental rights.

The charge that appellant's accusatory communications were not made through proper channels in the designated chain of command, in itself a technical matter, can be sustained only if it appears that the technical rules involved therein are clearly

applicable to the case at hand. Yet, this highly important element has been assumed to exist and was not definitely established. It is not enough that there might be, as Captain Pascoe stated, some "general practice" relating to this matter. The record is barren of any definite showing that these "chain of command" requirements relied upon, actually apply to the Sheriff's Reserves to which Captain Mullison belongs.

[3,4] Captain Mullison was, according to the testimony, "connected with the Sheriff's Department * * * in the Reserve Section". The "duties of that position" are "to supply reserves as needed and as called for by the Captain of the Altadena Station". The Manual of Policy and Ethics prescribing the "channels" method of official communications fails to make any mention of such Reserves. The practical situation, therefore, is that appellant is charged with having breached a technical rule which has been assumed to apply to these reserves. This defect must be deemed prejudicial to the appellant's rights. The discharge of a deputy sheriff based upon something less than full proof of the elements of the charge, cannot be given judicial approval.

The appellant was clearly entitled to precise accusations and definite proof of serious grounds for discharge; nothing should be left to supposition. Yet in this case, as previously mentioned, appellant was presented with a conglomeration of charges, one of which was clearly improper, and another which is left in the realm of indefiniteness and surmise. Whether appellant was discharged for one or the other of the three charges, or on general principles, or for the sum total, cannot be ascertained. The entire proceeding is thus left in an unsatisfactory condition, difficult to understand and even more difficult to defend.

[5] Nor is the record at all satisfactory in respect to the charge that appellant falsely and *with knowledge of its falsity*

accused Sergeant Mallette of being intoxicated at the time in question. Even if it be assumed that appellant was entirely mistaken in believing such to be a fact, it does not follow that the accusation was made with knowledge of its falsity. If appellant had observed certain symptoms which from previous association indicated that Mallette was intoxicated, the conclusion which Damiani arrived at on the occasion in question, was not an unreasonable one.

The record indicates that the appellant was quite frank and open about the matter, even discussing it with Sergeant Mallette who testified that Damiani "called to me from the platform out in the yard and he said: 'What about being drunk at the Elliott School?'. I said, 'Well, what about it?' He said, 'Well, you were drunk'. I said, 'All right, just put it in writing and be sure to sign your name to it'." And, with such an apparent stamp of approval on Mallette's part, this is exactly what appellant did. Moreover, Captain Weberg, to whom appellant's report was submitted, seems to have more or less approved of it, and testified, "I might have agreed, I don't know", claiming to be somewhat confused about the matter.

All of this is a long ways removed from proof that appellant knowingly made false statements or was guilty of conduct which would justify a discharge. And this matter assumes much greater importance when it is considered that it cannot be determined whether Damiani's discharge was given on this or some other ground, or on general principles. In addition to the charges already mentioned, the Civil Service Commission seems to have also incorporated a general catch-all phrase in its conclusions to the effect that the appellant had "behaved in a manner to bring discredit upon himself and the department". In this indefinite state of the record it is futile to talk about substantial evidence in support of the findings.

The judgment and order are reversed, with directions that a Writ of Mandate

issue, ordering that the appellant Louis Damiani be restored forthwith to his position as Deputy Sheriff as of November 18, 1954.

WHITE, P. J., and FOURT, J., concur.



144 Cal.App.2d 393

The PEOPLE of the State of California,
Plaintiff and Respondent.

v.

Adolph William LEMPIA, Defendant and
Appellant.

Cr. 5521.

District Court of Appeal, Second District,
Division 1, California.

Sept. 12, 1956.

Rehearing Denied Sept. 26, 1956.

Hearing Denied Oct. 9, 1956.

Proceeding on prisoner's application for a writ of error coram nobis, writ of audita querela, writ of habeas corpus, writ of certiorari, and recall of remittitur. The Superior Court, Los Angeles County, David Coleman, J., denied the petition and prisoner appealed. The District Court of Appeal, White, P. J., held that where prisoner sought to vacate his judgment of conviction on ground that he pleaded guilty through mistake or fear, and on ground of illegality of procurement of evidence used against him, such grounds, if meritorious, could have been considered and remedied or corrected upon a motion for a new trial or upon an appeal from the judgment, and in view of fact prisoner did not avail himself of such statutory remedies a review of his conviction was not authorized upon a writ of error coram nobis.

Order affirmed.

1. Habeas Corpus ☞113(4)

Statute permitting appeals to the District Court of Appeal by the state from a

final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant after his conviction in a criminal case does not authorize an appeal by a convicted defendant from an order denying a petition for a writ of habeas corpus. West's Ann.Pen.Code, § 1506.

2. Criminal Law ☞997(6)

Purpose of a writ of error coram nobis is to secure a release, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court.

3. Criminal Law ☞997(2)

The writ of error coram nobis will not issue for any cause for which there is another statutory remedy, the functions of such writ being strictly limited to an error of fact for which there is no other statutory remedy provided.

4. Criminal Law ☞274

Where record disclosed defendant was represented by counsel at all stages of proceedings from arraignment to judgment of conviction for violation of narcotics laws, his plea of guilty to such charge could not be set aside on the basis of mistake, ignorance, inadvertence and overreaching of free will. West's Ann.Health and Safety Code, § 11500.

5. Criminal Law ☞998

In order that it may be effective and within the possibility of favorable action thereon, a motion to vacate a judgment must be made within a reasonable time after such judgment has been rendered.

6. Criminal Law ☞997(12)

A petition for a writ of error coram nobis to set aside a defendant's judgment of conviction brought three years after the judgment of conviction and including a period of 16 months on parole during which time no effort was made to seek a remedy for the errors asserted in the petition, was not an application within a reasonable time,

and therefore could not be acted upon favorably.

7. Criminal Law §997(1)

A writ of error coram nobis is not a catch-all by means of which those convicted of crime may litigate and relitigate the propriety of their convictions ad infinitum.

8. Criminal Law §997(2)

A writ of error coram nobis cannot be utilized to obtain adjudication of issues or errors that could have been remedied and corrected upon a motion for a new trial or upon an appeal from the judgment.

9. Criminal Law §997(2)

Where prisoner sought to vacate his judgment of conviction on ground that he pleaded guilty through mistake or fear, and on ground of illegality of procurement of evidence used against him, such grounds, if meritorious, could have been considered and remedied or corrected upon a motion for a new trial or upon an appeal from the judgment, and in view of fact prisoner did not avail himself of such statutory remedies a review of his conviction was not authorized upon a writ of error coram nobis.

10. Habeas Corpus §3, 4

Where the affidavit of complaint against a defendant charged with a crime and his commitment after conviction was sufficient, and the information stated facts constituting an offense of which the trial court had jurisdiction, all subsequent irregularities or errors, if any such occurred in the trial court, were matters for review upon motion for new trial or on appeal, and habeas corpus would not lie on account thereof.

11. Habeas Corpus §4

The writ of habeas corpus may not serve as a substitute for an appeal.

12. Habeas Corpus §4

It is only where facts alleged in a petition for habeas corpus indicate that the accused had no opportunity to present his contentions at the trial, or on appeal, that he may resort to such writ.

13. Habeas Corpus §3, 4

Where all matters set forth by a prisoner in his petition for habeas corpus were known to him at the time of trial and could have been raised on motion for a new trial or on appeal from the judgment, or both, he could not resort to a writ of habeas corpus to serve the function of an appeal.

14. Habeas Corpus §48

Folsom State Prison is not within the habeas corpus jurisdiction of the District Court of Appeal for the Second Appellate District, Division One.

William Adolph Lempia, in pro. per., and Fredric Spindell and Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Patrick McCormick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

This is an appeal from an order denying appellant's petition for a writ of error coram nobis, writ of *audita querela*, writ of *habeas corpus*, writ of certiorari, and recall of remittitur.

The record reveals that on December 3, 1951, in the Superior Court of Los Angeles County, an information was filed charging appellant with a violation of Section 11500 of the Health and Safety Code of California, and alleging two prior felony convictions.

On December 5, 1951, accompanied by counsel, appellant appeared in said superior court and entered his plea of not guilty. On February 11, 1952 appellant with his counsel, appeared before the court, withdrew his plea of not guilty and entered a plea of guilty to the charge made against him in the information. On motion of the district attorney each allegation of prior conviction was stricken from the record. On March 19, 1952 appellant's application for probation was denied, judgment was pronounced and he was sentenced to State

Prison. No appeal was taken from the judgment.

On June 20, 1955 appellant filed his petition above referred to, and also his notice of appeal from the denial thereof. The petition was denied and the notice of appeal attached thereto was ruled premature on July 15, 1955. On July 29, 1955 appellant filed his notice of appeal.

As a basis for his aforesaid petition appellant alleges that:

"1. His plea of guilty was made through mistake, ignorance, inadvertence and overreaching of his free will.

"2. The evidence used against him was procured by the arresting officers through use of force and fear."

[1] From a reading of the record and briefs herein it appears to us that this is an appeal from the order denying appellant's petition for a writ of error *coram nobis* since the statute, Penal Code, section 1506, does not authorize an appeal by a petitioner from an order denying a petition for a writ of *habeas corpus*.

[2,3] When the foregoing grounds which form the basis of appellant's petition are considered, it appears that he has misconceived the purpose of the writ of error *coram nobis*. Under our law, a motion to vacate a judgment in the nature of a petition for a writ of error *coram nobis* is a remedy of narrow scope. As was said by our Supreme Court in *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13, 15: "Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. [Citing cases.]" (Emphasis added.) See also *People v. Reid*, 195 Cal. 249, 255, 256, 232 P. 457, 36 A.L.R. 1435. The matters charged in appellant's petition constitute grounds, that if they had merit, would have been remediable by motion for a new trial and reviewable upon appeal therefrom. All

the cases which have come to our attention concur in the conclusion that the writ will not issue for any cause for which the statute provides a remedy, and that its functions are strictly limited to an error of fact for which the statute provides no other remedy. Historically, it may be said that at the time the writ came into general use there was no remedy by appeal or by motion for a new trial, and the ordinary writ of error afforded to a considerable extent the remedy now available by appeal, and the writ of error *coram nobis* to a very limited extent the remedy now available upon motion for a new trial. The advent of these remedies by statutory enactment have supplanted this ancient writ in so far as its former scope is comprehended in and covered by the statutory remedies.

[4] Furthermore, appellant's contention that his plea of guilty should be set aside on the basis of mistake, ignorance, inadvertence and overreaching of his free will is unavailing because the record discloses that he was represented by counsel at all stages of the proceedings from arraignment to judgment.

Equally unavailing is appellant's claim that the evidence against him was procured by the officers through force and fear, because if such contentions were meritorious they furnished proper grounds for a motion for a new trial or an appeal.

[5,6] As a matter of legal principle, the rule has been frequently announced that, in order that it may be effective and within the possibility of favorable action thereon, a motion to vacate a judgment must be made "within a reasonable time" after such judgment has been rendered, and in this state, the concrete examples of what should be construed as "a reasonable time" would seem to point to the conclusion that in the matter now engaging our attention the delay has been so long that the prayer of appellant should not be granted. *People v. Martinez*, 88 Cal.App.2d 767, 773, 199 P.2d 375; *People v. Black*, 114 Cal.App. 468, 473, 300 P. 43; *People v. Lumbley*, 8

Cal.2d 752, 761, 68 P.2d 354. As was said in *People v. Martinez*, supra, 88 Cal.App.2d at page 773, 199 P.2d at page 379: “* * * An application for a writ of error *coram nobis* should be made within a reasonable time. Diligence is required. A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands. * * *” Appellant herein, for over a period of three years, which included a period of 16 months on parole, made no effort to seek a remedy for the errors which he now asserts existed since the time of the original judgment on March 19, 1952.

[7] A writ of error *coram nobis* “is not a catch-all by [means of] which those convicted [of crime] may litigate and re-litigate the propriety of their convictions ad infinitum.” *People v. Martinez*, supra, 88 Cal.App.2d at page 774, 199 P.2d at page 379.

[8] The writ here sought serves a useful purpose, but also a limited one. It cannot be utilized to obtain adjudication of issues or errors that could have been remedied and corrected upon a motion for a new trial or upon an appeal from the judgment.

[9] Appellant challenges the claim that he was guilty of laches in filing his petition with the assertion that the basis of his writ arose after the holding in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, and that his delay was not deliberate. The grounds urged by appellant in his petition do not come within the purview of the case just cited. That case involved the question of illegal searches and seizure which was not involved in the case at bar. The grounds upon which appellant’s petition herein was predicated, if meritorious, could have been considered, remedied and corrected upon a motion for a new trial or upon an appeal from the judgment. Not having availed himself of these statutory remedies, a re-

view is not authorized upon a writ of error *coram nobis*.

[10-14] If we should consider appellant’s petition as an original petition for a writ of *habeas corpus* it must be held that the grounds relied upon for issuance of the writ are insufficient. When, as here, the affidavit of complaint and commitment being sufficient, and the information states facts constituting an offense of which the court had jurisdiction, all subsequent irregularities or errors, if any occurred in the trial court, are matters for review upon motion for a new trial or on appeal, and *habeas corpus* will not lie on account thereof. The latter writ may not serve as a substitute for an appeal. In *re Lindley*, 29 Cal. 2d 709, 177 P.2d 918. It is only where the facts alleged indicate that the accused had no opportunity to present his contentions at the trial, or on appeal, that he may resort to the writ of *habeas corpus*. Had petitioner herein exhausted his remedy by motion for a new trial or by appeal (there being herein no question of the constitutionality of the statute under which he was convicted), *habeas corpus* might be available to him. But where, as here, all the matters set forth by appellant in his petition were known to him at the time of trial and could have been raised on motion for a new trial or on appeal from the judgment, or both, he cannot now resort to a writ of *habeas corpus* to serve the function of an appeal. In *re Danford*, 13 Cal.App. 741, 743, 110 P. 692; *People v. Bronaugh*, 100 Cal.App.2d 220, 223, 223 P.2d 256; In *re Bell*, 19 Cal.2d 488, 495, 122 P.2d 22. Furthermore, appellant is in Folsom State Prison, which is not within the *habeas corpus* jurisdiction of this court. *People v. Martinelli*, 118 Cal.App.2d 94, 98, 257 P.2d 37.

For the foregoing reasons, the order from which this appeal was taken is affirmed.

DORAN and FOURT, JJ., concur.

144 Cal.App.2d 426

George Alvarado HATJIS, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Civ. 21933.

District Court of Appeal, Second District,
Division 1, California.

Sept. 13, 1956.

Rehearing Denied Oct. 10, 1956.

Prohibition proceeding was brought in the District Court of Appeal to prevent the Superior Court of the State of California, in and for the County of Los Angeles, from trying petitioner on an information charging him with violation of the narcotics law. The District Court of Appeal, Nourse, J. pro tem., held that where petitioner failed to establish that officers did not have a warrant for his arrest, it was presumed that his arrest was lawful, and that the presumption was sufficient to support a finding by committing magistrate that arrest was lawful and that search as incident thereto was a reasonable one, and that Superior Court properly denied motion to set aside the indictment.

Alternative writ of prohibition discharged and peremptory writ denied.

Indictment and Information §140(2)

Where defendant failed to establish that officers, who found a capsule of heroin on defendant's person, did not have a warrant for his arrest, it was presumed that his arrest was lawful, and presumption was sufficient to support a finding by committing magistrate that the arrest of defendant was lawful and that search of defendant's person as an incident thereto was a reasonable one, and Superior Court properly denied defendant's motion to set aside indictment charging him with violation of narcotics law. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1963, subds. 1, 15, 33; West's Ann.Pen. Code, § 995.

Robert Thomas Baca, El Monte, for petitioner.

S. Ernest Roll, District Atty., Jere J. Sullivan, Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner seeks a writ of prohibition to prevent the respondent court from trying him upon an information charging him with the violation of section 11500 of the Health and Safety Code, that court having denied his motion made pursuant to section 995 of the Penal Code to set aside that information.

It is petitioner's contention that the police did not have probable cause to believe that he had committed a felony and that therefore his arrest was illegal, and that the heroin found upon his person was illegally seized and was therefore improperly admitted into evidence by the committing magistrate.

The relevant facts, as shown by the evidence before the committing magistrate, are: The arresting officers had received, two or three days before the arrest, information from two sources that a person known only as "Al" and another known only as "Green Eyes" were selling narcotics from the hotel room in which petitioner was later arrested. This information had been received from two sources, one of which had supplied information to the officers before, but the officers had never made an arrest upon the basis of information given by this informant, and no testimony was given which would indicate that the informants were or were not reliable.

Prior to the arrest the officers had placed the hotel under surveillance and had seen quite a heavy traffic in and out of the hotel; and people in the traffic had been identified to the officers as addicts. On the day the arrest was made the arresting officers maintained a surveillance of the hotel, and they had observed two known narcotic users entering and leaving the hotel. The officers then entered the hotel and in a hall-

way thereof placed under arrest one Robert Rivera, the occupant of Room 8, and he gave his consent to the officers' entering his room. This they did. Upon entering Room 8 they found petitioner and one Frovo. They immediately placed both Frovo and petitioner under arrest, and upon searching petitioner found a capsule which was proved to contain heroin.

Over objection by counsel for petitioner the officers were then allowed to testify as to certain admissions made by petitioner. There was evidence that the officers did not have a warrant to search Room 8, but there was no direct evidence as to whether they had a warrant for the arrest of petitioner. There was no evidence that petitioner was the person known as "Al" or the person known as "Green Eyes," or that the officers placed petitioner under arrest under the belief that he was either of these persons. The capsule seized from petitioner's person was admitted into evidence by the committing magistrate over the timely objection of petitioner's counsel.

There can be little doubt that if there had been direct evidence that the arresting officers did not have a warrant for petitioner's arrest, the facts established by the evidence could not be held to constitute probable cause to believe that the defendant had committed a felony and thus made his arrest lawful. *People v. Dixon*, 46 Cal.2d 456, 296 P.2d 557; *People v. Kitchens*, 46 Cal.2d 260, 294 P.2d 17.

While it might well have been inferred by the committing magistrate from the evidence offered, that the officers did not have a warrant for petitioner's arrest, it was his function as the trier of the fact, and not ours, to draw that inference; and we must presume that he did not draw it. The petitioner having failed to establish that the officers did not have a warrant for petitioner's arrest, it is presumed that his arrest was lawful. Code Civ.Proc. § 1963, subds. 1, 15, 33; *People v. Farrara*, 46 Cal.2d 265, 294 P.2d 21. This presumption was sufficient to support a finding by the committing magistrate that the arrest was law-

ful and that therefore the search of defendant's person as an incident thereto was a reasonable one, and his admission of the capsule, which established the corpus delicti, into evidence was justified.

It follows that the respondent court properly denied petitioner's motion to set aside the indictment. *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23.

The alternative writ of prohibition heretofore issued is discharged, and a peremptory writ denied.

WHITE, P. J., and FOURT, J., concur.



144 Cal.App.2d 294

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Miguel SOTO, Defendant and Respondent.

Cr. 3200.

District Court of Appeal, First District,
Division 1, California,

Sept. 4, 1956.

Prosecution for unlawful possession of heroin. The Superior Court, Alameda County, Donald K. Quayle, J., sustained defendant's motion to dismiss the information and the State appealed. The District Court of Appeal, Peters, P. J., held that where police officer received information that a narcotics party was being held in hotel room and was informed by a known narcotic user that such user had obtained narcotics in the room and that there were more narcotics in the room, officer had reasonable grounds for belief that registered occupant of room was guilty of felony and upon being admitted to room by defendant had reasonable grounds for belief that defendant was also guilty of unlawful possession of narcotics and there-

fore search of defendant and seizure of evidence thus obtained was not illegal.

Order reversed.

1. Indictment and Information ◊140(1)

In a proper case, the Superior Court may pass upon admissibility of evidence allegedly the product of an unlawful search or seizure in a proceeding to set aside an indictment. West's Ann.Pen.Code, § 995.

2. Indictment and Information ◊140(1)

The scope of review under statute providing for setting aside of an indictment is to determine whether a magistrate has held the defendant to answer without reasonable or probable cause. West's Ann.Pen.Code, § 995.

3. Indictment and Information ◊140(1)

Where the only evidence produced against a defendant at a preliminary hearing is incompetent and inadmissible there exists no reasonable or probable cause to hold defendant to answer, and therefore the competency of the evidence in such a situation is reviewable on a motion to set aside the indictment. West's Ann.Pen.Code, § 995.

4. Indictment and Information ◊140(1)

On a motion to set aside an indictment on the ground of lack of reasonable or probable cause, the trial court has no power to pass on conflicts in the evidence. West's Ann.Pen.Code, § 995.

5. Indictment and Information ◊140(2)

Admissions of a defendant after his arrest as to having spent the night in the room of a known narcotics user, and as to owning certain heroin and a needle, had to be disregarded on a motion to set aside his indictment on the ground of lack of reasonable or probable cause because of illegality of the only evidence introduced at his preliminary hearing. West's Ann.Pen.Code, § 995.

6. Arrest ◊71

A search may be unlawful, although an arrest is legal.

7. Searches and Seizures ◊7(12)

The criterion as to the reasonableness of a search is whether or not there has been the commission of a public offense in the presence of a police officer, or whether, under the facts, the police officer has reasonable grounds to believe that a defendant may have committed a felony.

8. Arrest ◊63(4)

"Reasonable or probable cause" for making arrest and search means such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion that an accused person is guilty of a crime.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

9. Arrest ◊63(4)

While an anonymous tip, of itself, cannot alone constitute reasonable grounds for belief that a person is guilty of a commission of a felony, it is a factor to be considered in determining whether reasonable grounds exist for making arrest and search.

10. Arrest ◊63(4)

Searches and Seizures ◊3(1)

The police, in a proper case, may act on information received from others, in making an arrest or a search if the source is reliable.

11. Arrest ◊63(4)

Searches and Seizures ◊3(1)

The rule that the fact that police have reasonable and probable belief that a known occupant of a room or house has committed a felony will not justify a search or arrest of a casual visitor to that room or house, is not absolute but depends upon the facts of each case.

12. Arrest ◊63(4)

Searches and Seizures ◊3(1)

The test of whether police have reasonable or probable cause for the search or arrest of a casual visitor in a room

or house in which a known occupant has committed a felony, is whether there is reasonable cause for believing that such visitor himself, whoever he may be, also committed a felony.

13. Searches and Seizures ☞3(1)

Where police officer received information that narcotics party was being held in hotel room, and was informed by a known narcotic user that such user had obtained narcotics in the room and that there were more narcotics in the room, officer had reasonable grounds for belief that registered occupant of room was guilty of a felony and upon being admitted to the room by defendant had reasonable grounds for belief defendant was also guilty of unlawful possession of narcotics and therefore search of defendant and seizure of evidence thus obtained was not illegal.

14. Courts ☞97(1)

In view of fact that rules applicable to illegal searches are not based on due process, but are mere rules of evidence, District Court of Appeal is not bound by decisions of the United States Supreme Court on the subject.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, Oakland, for appellant.

George Nye, Public Defender, Enid Weseman, Asst. Public Defender, Oakland, for respondent.

PETERS, Presiding Justice.

Defendant was charged with unlawful possession of heroin, and with a prior conviction of the same offense. After being held to answer, defendant moved, under section 995 of the Penal Code, to dismiss the information. The trial court, on the ground that the sole evidence against defendant had been secured illegally, and was, therefore, inadmissible, dismissed the information. The People appeal.

[1-4] The first question presented is whether or not the Superior Court properly may pass upon the admissibility of evidence allegedly the product of an unlawful search or seizure in a proceeding under section 995. In a proper case, the Superior Court may do so. The scope of review under that section is to determine whether the magistrate has held the defendant to answer without reasonable or probable cause. When the only evidence produced against the defendant is incompetent and inadmissible, then there exists no reasonable or probable cause to hold him to answer. The competency of the evidence in such a situation is, therefore, reviewable on a motion made under section 995. *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929; *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23. But, on such a motion, the trial court has no power to pass on conflicts in the evidence. As was stated in *Badillo v. Superior Court*, 46 Cal.2d 272, 294 P.2d 25: "Accordingly, the information should not be set aside on the ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion [citations], and in such cases the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue."

In the instant case, the only evidence before the trial court on the motion under section 995 of the Penal Code was the transcript of the preliminary hearing. At that hearing the only witness called was Officer Hilliard of the Oakland Police Department. It is our duty to ascertain whether his evidence discloses, without conflict, that the arrest and search of defendant were illegal.

Hilliard testified that about 8:30 a.m. on July 22, 1955, he was informed that another officer had received an anonymous telephone call to the effect that a narcotics party was going on in Room 37 of the Baldwin Hotel; that pursuant to that information he and another officer proceeded to the Baldwin Hotel; that the room clerk there informed him that the registered occupant of Room 37 was one Alphonso Garcia, also known as

"Wimpy"; that such a person was known to him as a narcotics user; that he then proceeded to Room 36, which adjoins Room 37, and interviewed the occupant; that this occupant stated that "for the past two weeks that a steady stream of people going in and out of Room 37 had bothered him, in fact at night had kept him awake most of the night," and that "there were peculiar sniffing noises coming from the room and he had heard conversation relating to narcotics and stuff"; that while he was talking to the occupant of Room 36 he saw a man by the name of Charles Shuck, a known narcotics user, come out of Room 37; that he asked Shuck what he was doing in that room and Shuck stated that he had gone to the room to use narcotics and had used heroin while in the room; that he asked Shuck if there were any more narcotics in the room; that Shuck replied that there were but that he did not know exactly where; that while he was talking to Shuck two other men approached Room 37; that he recognized one of the men as a known narcotics user by the name of Romero, also known as "Snake"; that he asked the men where they were going, and Romero stated that they were going to Room 37 to see "Wimpy"; that he and Romero then approached Room 37 and he knocked on the door; that a voice from inside asked who was there; that he replied "Me and Snake"; that the door was then opened by defendant Soto; that until that moment he did not know that Soto was in the room; that he proceeded into the room and notified Soto that he was under arrest; that he noticed "Wimpy" asleep in the bed and he awoke "Wimpy"; that while he was doing this, Soto started to put on his shoes; that he seized the shoes and found a hypodermic needle and eye dropper in one shoe and two packets of heroin in the other. Admittedly, the officers did not have a search warrant or a warrant of arrest.

[5] The defendant Soto was taken to the police department where he admitted that the heroin and needle belonged to him. At that time he stated that he had brought these articles to "Wimpy's" room the night

preceding the arrest and had spent the night with "Wimpy". These admissions, on this motion, must be disregarded. *Hall v. Superior Court*, 120 Cal.App.2d 844, 262 P.2d 351; *People v. Schuber*, 71 Cal.App.2d 773, 163 P.2d 498.

Under this evidence, for the purpose of a motion under section 995 of the Penal Code, were the search and seizure illegal? That is the question.

[6,7] The parties first argue as to whether the arrest in the instant case was or was not a lawful one. That is not the decisive question involved. A search may be unlawful although the arrest is legal. *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528. The real criterion as to the reasonableness of a search is whether or not there has been the commission of a public offense in the presence of a police officer, or whether, under the facts, the police officer has reasonable grounds to believe that the defendant may have committed a felony. See *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40; *People v. Rios*, 46 Cal.2d 297, 294 P.2d 39; *People v. Martin*, 46 Cal.2d 106, 293 P.2d 52; *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57; *People v. Gale*, 46 Cal.2d 253, 294 P.2d 13; *People v. Johnson*, 139 Cal.App.2d 663, 294 P.2d 189; *People v. Villarico*, 140 Cal.App.2d 233, 295 P.2d 76; *People v. Martin*, 140 Cal.App.2d 387, 295 P.2d 33; *People v. Moore*, 140 Cal.App.2d 870, 295 P.2d 969; *People v. Rodriguez*, 140 Cal.App.2d 865, 296 P.2d 38; *People v. Moore*, 141 Cal.App.2d 87, 296 P.2d 91; *People v. Lujan*, 141 Cal.App.2d 143, 296 P.2d 93; *People v. Smith*, 141 Cal.App.2d 399, 296 P.2d 913; *People v. Sanders*, 46 Cal.2d 247, 294 P.2d 10; *People v. Dixon*, 46 Cal.2d 456, 296 P.2d 557.

[8] Reasonable or probable cause has been discussed in many cases. Generally speaking, it means "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." *People v. Smith*, 141 Cal.App.2d 399, 296 P.2d 913, 915; see also *People v. Villarico*, 140 Cal.App.2d

233, 295 P.2d 76; *People v. Rodriguez*, 140 Cal.App.2d 865, 296 P.2d 38; *People v. Moore*, 141 Cal.App.2d 87, 296 P.2d 91; *People v. Moore*, 140 Cal.App.2d 870, 295 P.2d 969.

[9,10] In the instant case Officer Hilliard knew that the police had received an anonymous tip that a narcotic party was being held in Room 37 of the Baldwin Hotel. He discovered that Garcia was the registered occupant of that room. Then he learned from the occupant of an adjoining room that there was a steady stream of people going into Room 37, and that "sniffing" noises and conversation about narcotics came from the room. Then he learned from Shuck, a known user, that he had just used narcotics in that room, and that there were more narcotics in the room. He then recognized Romero, a known user, going to the room. Under such circumstances, if Garcia, the registered occupant of the room, was the person here involved, the arrest and search would clearly have been lawful, and respondent does not argue to the contrary. The law on this issue is clear. While an anonymous tip, of itself, cannot alone constitute reasonable grounds for a belief that a person is guilty of the commission of a felony, *People v. Thymiakas*, 140 Cal.App.2d 940, 296 P.2d 4, it is a factor to be considered. The police, in a proper case, may act on information received from others if the source is reliable. *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36; *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535. When this factor is considered with the other information then known to Officer Hilliard it would appear that he had reasonable grounds to believe that a felony had been committed in that room. In *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6, the officers had defendant's residence under surveillance for about a month. They observed known narcotics users frequenting the premises. They were told by two visitors to the premises that they had just received a shot of heroin there. A search, based upon a forcible entry, was

held to be lawful. A similar result was reached in *People v. Sayles*, 140 Cal.App.2d 657, 295 P.2d 579. There the police, knowing defendant was an addict, placed his home under surveillance. A paid informer told the police that defendant had narcotics in his home and had sold some to the informer. It was held that a search based on a forcible entry was legal because the officers had reasonable grounds to believe that defendant had committed a felony. See also *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36; and *People v. Villarico*, 140 Cal.App.2d 233, 295 P.2d 76.

As already pointed out, if Garcia were the defendant in the instant case, the search would clearly have been a legal one. But he is not. Soto, a man the police officer, until his entry, did not know was in the room, is the defendant. Does that make any difference? Did the police have reasonable grounds to believe that Soto had committed a felony?

[11,12] There can be no doubt that under some circumstances the fact that the police have the reasonable and probable belief that the known occupant of a room or house has committed a felony will not justify the search or arrest of a casual visitor to that room or house. *People v. Kitchens*, 46 Cal.2d 260, 294 P.2d 17; *People v. Sanders*, 46 Cal.2d 247, 294 P.2d 10; *People v. Schraier*, 141 Cal.App.2d 600, 297 P.2d 81. But the rule is not absolute. Each case must turn on its own facts. The test is whether the police had reasonable cause for believing that the person arrested, whoever he may be, has committed a felony.

[13] In the instant case, for reasons already stated, the police officer had reasonable grounds to believe that the person or persons in Room 37 were in possession of narcotics. He had reasonable grounds to believe that the occupant or occupants of that room were committing a felony. The police officer thought that Garcia, the registered occupant of the room and who

was known to the officer, was the culprit. But when the defendant Soto opened the door to the room, and the officer saw him in his bare feet, with Garcia asleep in the bed, he could reasonably conclude that Soto was not a mere innocent bystander or casual visitor. The officer had learned from Shuck that Shuck had just used narcotics in the room and that more narcotics were still there. The officer could reasonably conclude that Soto, the man who answered the door, had been in the room while Shuck had used the narcotics, and had furnished them to him. Accordingly, there existed "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." *People v. Smith*, 141 Cal.App.2d 399, 296 P.2d 913, 915.

[14] The respondent, in contending that reasonable grounds did not exist for his arrest and search, relies on several federal cases. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210; *Hernandez v. United States*, 9 Cir., 17 F.2d 373. None of these cases involved facts such as ours. In the *Johnson* case the federal officers had been informed that unknown persons were smoking opium in a certain hotel. The officers could smell opium when they approached the suspected room. They arrested the occupants and a search disclosed opium. By a 5 to 4 decision the majority held the search to be illegal. The case is an argumentative authority in support of respondent, but we do not think the rule there adopted should be followed in this state. Inasmuch as the Supreme Court of this state has held that the rules applicable to illegal searches are not based on due process, but are mere rules of evidence, *People v. Cahan*, 44 Cal. 2d 434, 442, 282 P.2d 905, we are not bound by the decisions of the United States Supreme Court on the subject. As was said in the *Cahan* case, 44 Cal.2d at page 450, 282 P.2d at page 915: "In developing

a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them."

The California Supreme Court in *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852, has refused to follow the *Johnson* case in certain particulars. In *People v. Bock Leung Chew*, 142 Cal.App.2d 400, 298 P.2d 118, the other division of this court refused to follow the *Johnson* case in a factual situation where the basis of the suspicion for the arrest and search was much weaker than in the *Johnson* case. In the *Chew* case, Mr. Justice Dooling, speaking for the court, after referring to the facts and law of the *Johnson* case, stated, 142 Cal. App.2d 403, 298 P.2d 119: "With all due respect to the justices of that court [the United States Supreme Court] who joined in this holding, we cannot follow their reasoning and agree rather with the four justices who dissented." The Supreme Court of California has denied a hearing in the *Chew* case.

In the *Di Re* case an informer pointed out a particular individual as the possessor of counterfeit gasoline ration stamps. When this person was arrested, sitting beside him in the automobile was *Di Re*. *Di Re* was searched and counterfeit stamps were found on his person. The Supreme Court of the United States held that the arrest and search were not based on probable cause and were illegal. The mere presence of *Di Re* in the automobile was not, of itself, sufficient to create probable cause. Factually, the case differs from ours in that in the *Di Re* case the informer had definitely identified another individual as the sole and actual perpetrator of the crime. That is not so in the instant case. Here the reasonable suspicion was that the occupant or occupants of Room 37, whoever they might be, had committed the crime. This serves to distinguish the case. But, if the *Di Re* case stands for a rule contrary to the one stated in this opinion

we do not think it is a sound rule, and we believe that it should not be followed.

In the Hernandez case, 17 F.2d 373, the narcotic agents had a house under surveillance. They saw the defendant come from the house accompanied by a known narcotics peddler. The two acted in a suspicious manner. Upon an arrest and search without a warrant, morphine was found in defendant's possession. The court held that there was no reasonable grounds for the search. The case is of little help in solving the instant one, differing as it does so materially on the facts.

For the foregoing reasons the order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



144 Cal.App.2d 420

Ervln Scott ARMSTRONG, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR The COUNTY OF LOS ANGELES, Respondent,

John Dolgner, Real Party In Interest.

Civ. 21920.

District Court of Appeal, Second District,
Division 1, California.

Sept. 13, 1956.

Action to recover damages for personal injury. Petitioner moved to quash service of summons. The Superior Court, County of Los Angeles, denied the motion and petitioner sought a writ of mandate requiring the court to issue an order quashing the service. The District Court of Appeal, Nourse, J. pro tem., held that where petitioner was served with a summons as a defendant designated in a complaint by a fictitious name, and the summons so served did not bear endorsement required by statute in-

forming defendant that he was being served as the person sued under a specified fictitious name, the summons served was defective and its service was insufficient to give the Superior Court jurisdiction over petitioner.

Peremptory writ of mandate issued.

1. Appearance ⇨9(3)

Where petitioner for a writ of mandate to require superior court to issue an order quashing service of summons filed in the superior court a notice of special appearance and motion to quash the service, mere fact that he attempted to demonstrate that the court did not have jurisdiction of his person because he was not a party to the action by citing authorities which he mistakenly believed supported his contention did not change his appearance from a special one to a general one. West's Ann.Code Civ.Proc., § 416.3.

2. Appearance ⇨9(1)

If a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a "special appearance", but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he has made a "general appearance".

See publication Words and Phrases, for other judicial constructions and definitions of "General Appearance" and "Special Appearance".

3. Parties ⇨51(4), 73

Under statute providing that a defendant may be designated by a fictitious name when the plaintiff is ignorant of defendant's true name, the plaintiff in an action to recover for personal injury had a right in good faith to allege that there were other tort-feasors than the named defendant, whose true names were unknown to him, and to thereafter amend his complaint so as to name those tort-feasors and serve summons upon them. West's Ann.Code Civ. Proc., § 474.

4. Limitation of Actions ⇨124

Mere fact that a complaint may not state a cause of action against fictitiously named defendants and that an amended complaint naming them might be barred by the statute of limitations does not prevent such fictitiously named defendants from being parties to an action. West's Ann.Code Civ.Proc., § 474.

5. Process ⇨31

Where petitioner was served with a summons as a defendant designated by a fictitious name, and the summons so served did not bear an endorsement required by statute informing defendant that he was being served as the person sued under a specified fictitious name, the summons served was defective and its service was insufficient to give the Superior Court jurisdiction over petitioner. West's Ann.Code Civ.Proc., § 474.

6. Process ⇨31

Statute providing that when a plaintiff is ignorant of the name of a defendant he may designate such defendant by any name, but that the copy of the first pleading or notice served upon such fictitiously designated defendant bear on the face thereof a notice informing such defendant that he is being served as the person sued under a specified fictitious name, is not directory but mandatory, and its effect is to deprive a court of the right to proceed against a defendant who is served with a summons omitting such notice. West's Ann.Code Civ.Proc., § 474.

7. Mandamus ⇨187(4)

In proceeding by petitioner for a writ of mandate requiring superior court to issue an order quashing service of a summons, question of defect in summons served upon petitioner was properly before District Court of Appeal in view of fact that notice of motion to quash the summons advised superior court and plaintiff that the defect in the summons was one of the grounds upon which the motion would be made and in view of fact that plaintiff made no motion in superior court to strike an affidavit of petitioner which established the defect in

the summons served upon him. West's Ann.Code Civ.Proc., § 416.3.

8. Process ⇨158

Mere fact that a statute precludes a clerk of court from entering a default and the superior court from entering a judgment by default upon a person designated in a summons or other process under a fictitious name, who, when served, does not receive a process bearing a statutory endorsement informing him that he is the person sued under a specified fictitious name, does not mean that a person served with a summons defective under such statute is required to take his chance that neither the clerk nor the court will, inadvertently, act contrary to the terms of the statute, but he may move to quash service of such process. West's Ann.Code Civ.Proc. § 474.

H. T. Ellerby, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel,
Wm. E. Lamoreaux, Asst. County Counsel,
Los Angeles, for respondent.

Parker, Stanbury, Reese & McGee, Los Angeles, Irving E. Tarson, Beverly Hills, for real party in interest.

NOURSE, Justice pro tem.

Petitioner seeks a writ of mandate pursuant to section 416.3, Code of Civil Procedure, requiring respondent court to issue an order quashing the service of summons on petitioner in an action brought by one Dolginer to recover damages for personal injury.

Dolginer's action was commenced on December 8, 1954. The complaint named as defendants one Stover and Doe One and Doe Two. By paragraph I of the complaint it is alleged "That the defendants Doe One and Doe Two are fictitious, their true names being unknown to plaintiff and when the same are ascertained, leave of court will be asked to amend this complaint accordingly."

In the charging paragraphs of the complaint it is alleged that the defendants operated a certain automobile in a careless and negligent manner so as to cause the same

to collide with plaintiff's automobile, and "That by reason of the aforesaid carelessness, recklessness and negligence of the defendants, and each of them" plaintiff's automobile was damaged, the plaintiff sustaining injuries to his person.

The petition here alleges, and its allegations are admitted by the demurrers of respondent and real party in interest, that on April 8, 1956, a copy of the summons and complaint was served upon petitioner and that the summons so served did not bear the endorsement required by section 474, Code of Civil Procedure. On April 17, 1956, petitioner filed in the respondent court a notice of special appearance and motion to quash service of summons upon the ground that he was not named as a defendant in the action and on the further ground that the summons did not bear the endorsement required by section 474 of the Code of Civil Procedure. Petitioner asked no relief from the court other than that the service of summons be quashed.

By his notice of motion to quash the service of summons, petitioner only designated, as the matters upon which his motion would be based, "all papers on file in this case and the attached Memorandum of Points and Authorities." In the exhibits to supplemental points and authorities filed with respondent court, petitioner filed with the court his affidavit, the facts stated in which establish the failure of the summons served upon him to be endorsed in accordance with section 474, Code of Civil Procedure. Thereafter the court denied his motion.

[1] It is the contention of respondent and real party in interest that petitioner made a general rather than a special appearance, and that therefore, irrespective of the merits of the points he raises here, the trial court acted properly in denying the motion. They base this contention upon the fact that the first ground stated by petitioner in his motion to quash constituted in effect a general demurrer to the complaint and therefore a request for relief from the court and a general appearance; and upon the fact that in the points and authorities

filed by petitioner with the respondent court, defendants cited authorities to the effect that where a person is sued under a fictitious name and no attempt is made in the original complaint to state a cause of action against him, and later an attempt is made to amend the complaint as against him, the statute of limitations "is computed from the date of the alleged acts to the date of the filing of the amended complaint and not to the date of the filing of the original complaint."

This contention of respondent cannot be sustained. A reading of the notice of motion to quash makes it apparent that the only relief sought by petitioner was to quash service of summons upon him upon the grounds that the court had not thereby acquired jurisdiction of his person. The fact that he attempted to demonstrate that the court did not have jurisdiction of his person because he was not a party to the action by citing authorities which he mistakenly believed supported his contention did not change his appearance from a special one to a general one.

[2] The test as to whether an appearance is general or special is, "Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special. * * * The rule in this regard may be epitomized by saying that if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then

he had made a general appearance." *Judson v. Superior Court*, 21 Cal.2d 11, 13, 129 P.2d 361, 362; see also *Hernandez v. National Dairy Products Co.*, 126 Cal.App.2d 490, 272 P.2d 799.

[3,4] Petitioner contends that the complaint here was insufficient to make him a party to the action and that therefore the service of summons upon him did not subject his person to the jurisdiction of the court. This contention cannot be sustained. The plaintiff, under provisions of section 474, Code of Civil Procedure, had a right in good faith to allege that there were other tort-feasors than the named defendant,¹ whose true names were unknown to him, and to thereafter amend the complaint so as to name those tort-feasors and serve summons upon them. If it be a fact that the complaint here does not state a cause of action against the fictitiously named defendants, and that therefore an amended complaint naming them might be barred by the statute of limitations, this did not prevent them from being parties to the action.

In support of his contention, petitioner cites *Gates v. Wendling Nathan Co.*, 27 Cal. App.2d 307, 81 P.2d 173, and *Stanley v. Kawakami*, 127 Cal.App.2d 277, 273 P.2d 709. Petitioner misconceives the rule laid down by these cases. In neither of them was it held that a fictitious defendant, against whom a cause of action was not stated, could not be served with process and jurisdiction thus obtained of his person. All that the court held in each case was that if the original complaint did not purport to state a cause of action against the defendants sued under fictitious names, and the statute of limitations had run before they were served with process, then the action was barred by the statute.

[5,6] We believe, however, that the respondent court was in error in denying

plaintiff's motion to quash the service upon the grounds that the summons served upon petitioner was fatally defective in not being endorsed so as to show that the petitioner was served as one of the persons sued under a fictitious name as required by section 474, Code of Civil Procedure, as amended in 1953. The provisions which were added to the section by the 1953 amendment provide in part as follows: "no default or default judgment *shall* be entered against a defendant" sued under a fictitious name "unless it appears that the copy of the summons or other process * * * served upon" the defendant bears upon its face the notice we have heretofore mentioned as lacking in the summons in question. [Emphasis added.] This statute is not directory but mandatory, and its effect is to deprive the court of the right to proceed against a defendant served with such a defective summons; that is to say, its effect is to make the service of such a defective summons insufficient to give the court jurisdiction over the person of the defendant.

Respondent has cited us to a number of cases arising under section 474, Code of Civil Procedure, before the addition to that section in 1953 of the provisions we have heretofore quoted, and in which it is held that the provision of the statute that after the discovery of the true name of a person sued under a fictitious name the complaint might be amended to state the true name, was only directory, and that omission to amend the complaint before the entry of a default judgment against such a defendant constituted error only and did not affect the jurisdiction of the court to enter a default judgment.

These cases are clearly not in point, for there the statute did not, by its terms, in any wise take away from the court the power to proceed, as does the matter added to the section by the amendment of 1953.

1. We do not pass upon the question as to whether or not the allegations of paragraph 1 of the complaint are sufficient to authorize an amendment to the complaint naming petitioner as a party to the action, though we note that the paragraph does not allege that John Doe One and John

Doe Two are persons whose names are unknown to the plaintiffs and who are therefore sued under said fictitious names, but that on the contrary the allegation is that they are *fictitious* persons; and the word *fictitious* means that which is not real but imaginary.

Counsel for the real party in interest assert that the question of the defect in the summons served upon the petitioner is not properly before us. This is so, they assert, because the affidavit of petitioner which established the defect in the summons served upon him was not part of the record upon which the notice of motion stated the motion would be based.

[7] This contention cannot be sustained. The notice of motion clearly advised respondent court and the real party in interest that the defect in the summons was one of the grounds upon which the motion would be made. The fact of the defect was a matter within the knowledge of the defendant, and he could not be taken by surprise by the proof of that fact by petitioner's affidavit. It was within the discretion of the trial court to, and it apparently did, receive this affidavit, and the real party in interest made no motion in that court to strike it from the files or to controvert it. He thus waived the defect in the notice.

Real party in interest also asserts that petitioner has a speedy and adequate remedy at law in the lower court, and that he is not injured by the denial of his motion to quash the summons. He says that this is so because the section precludes the clerk from entering a default, and the lower court from entering a judgment by default upon the service here made upon the petitioner; and that it is to be presumed that the clerk will not enter the default or the court enter a judgment, even should the clerk inadvertently enter a default.

[8] There is no substance in this contention. We do not think that it could be held that one who is served with a defective summons is required to take his chance that neither the clerk nor the court will, inadvertently, act contrary to the terms of the statute, and that he may not have notice of the entry of a judgment inadvertently entered against him until after his time to move to set aside that judgment has expired. To so hold would be to penalize the party for diligence in protecting his own rights.

Let a peremptory writ of mandate issue requiring the respondent court to enter its order quashing service of summons and complaint upon the petitioner in the action bearing number 637257 in that court.

WHITE, P. J., and FOURT, J., concur.



144 Cal.App.2d 363

Ernest TOMSON, by and through his guardian ad litem, Helen Tomson, and Helen Tomson, Plaintiffs and Appellants,

v.

Anthony KISCHASSEY, Gladys M. McPhall, William C. McPhall, Howard T. Kischassey and Helen M. Kischassey, Defendants and Respondents.

Civ. 5172.

District Court of Appeal, Fourth District, California.

Sept. 7, 1956.

Action by passenger on bicycle for injuries resulting from a collision between the bicycle and an automobile on a street at night. The Superior Court, San Diego County, Joe L. Shell, J., rendered judgment for motorist and bicycle passenger appealed. The District Court of Appeal, Griffin, Acting P. J., held that refusal of trial court to instruct jury that if they found that driver of bicycle was negligent they must also determine whether driver's negligence should be imputed to passenger, and before it can be so imputed, they must find that passenger and driver were in joint or common possession and control of bicycle, in conjunction with the court's refusal to give instructions relating to the standard of care or conduct of children and the amount of caution required of a motorist and that of a bicycle driver constituted reversible error.

Judgment reversed.

Opinion, 299 P.2d 933, vacated.

1. Appeal and Error ⇨1064(1)

In bicycle passenger's action for injuries received when bicycle on which he was riding collided with automobile approaching from opposite direction, giving instruction that no person driving a motor vehicle shall knowingly permit any person to ride on any portion of vehicle not designed or intended for use of passengers, when considered with section of Vehicle Code which provides that any person riding a bicycle upon a highway shall be granted all the rights and shall be subject to all the duties applicable to the driver of an automobile, was not prejudicial error. West's Ann.Vehicle Code, §§ 31, 32, 452, 596.5.

2. Automobiles ⇨246(35)

In personal injury action by bicycle passenger who was riding tandem at time of collision with automobile approaching from opposite direction at night, where passenger was 15 years of age and operator of bicycle only 13, court should have given instruction relating to standard of care and conduct of children in conjunction with instruction that bicycle riders have the same right as motorists to use streets and that former are chargeable with only ordinary care for their own safety as persons of like age, intelligence and experience would exercise under like circumstances.

3. Automobiles ⇨246(10)

In bicycle passenger's action for injuries received when bicycle on which he was riding collided with automobile approaching from opposite direction, instruction that it was duty of motorist to be vigilant at all times and to keep vehicle under such control that to avoid a collision he could stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver, and that it was the motorist's duty to exercise ordinary care to avoid placing himself and others in danger and to exercise ordinary care at all times to avoid a collision was insufficient.

4. Negligence ⇨93(8, 14)

Contributory negligence of a driver of a vehicle is not ordinarily imputable to his passenger or guest.

5. Negligence ⇨93(14)

Where there is nothing in common between a passenger and a driver of vehicle except a common destination and a common purpose in going there, the negligence of driver is not to be imputed to passenger.

6. Appeal and Error ⇨1067**Negligence** ⇨141(11)

In action by bicycle passenger who was riding tandem at time of collision with automobile, refusal to instruct jury that if they found that driver of bicycle was negligent, they must also determine whether his negligence should be imputed to the passenger, and that before it could be so imputed they must find that passenger and driver were then in joint or common possession and control of bicycle, in conjunction with court's refusal to give instructions relating to standard of care or conduct of children 13 and 15 years old riding on bicycle, and amount of caution required of driver of automobile and that of a bicycle driver, constituted reversible error. West's Ann.Vehicle Code, §§ 31, 32, 452, 596.5.

7. Appeal and Error ⇨207**Trial** ⇨125(4)

In personal injury action, reference in argument to jury to ability or inability of defendant to respond to money judgment is improper and such reference by defendant invites error on part of plaintiff to show that defendant is in fact insured, and any such conduct if prejudicial might require reversal of judgment if proper objection is made.

Brooks Crabtree and Thomas P. Golden, San Diego, for appellants.

McInnis, Hamilton & Fitzgerald, San Diego, for respondents.

Melvin M. Belli, San Francisco, amicus curiae.

GRIFFIN, Acting Presiding Justice.

Plaintiffs and appellants, Helen Tomson and her son, Ernest Tomson (aged 15)

through his mother as guardian ad litem, brought this action against defendants and respondents for claimed damages for injuries resulting from a collision on the night of June 10, 1952, between a bicycle operated by one John Simmons (aged 13) and on which Ernest was riding tandem and a car owned by defendants Gladys and William McPhail and operated by defendant Anthony Kischassey (aged 17). His parents are also named herein as defendants. The accident occurred on Garfield Avenue, the paved portion of which is 18 feet wide with 3-foot shoulders, near La Mesa. It runs in a general north-south direction. Chatham Street runs in an east-west direction and forms a "T" intersection with Garfield Avenue.

Anthony was driving the car east on Chatham and proceeded to turn north on Garfield. About that time he noticed two boys on bicycles proceeding northerly on Garfield, one near the center line and one near the east edge of the pavement. He said he noticed no boys approaching him on the west side of Garfield but apparently Ernest and John were riding in a southerly direction, without the aid of lights on John's bicycle, which he was steering. As Anthony started to pass the two cyclists, he proceeded on the west side of Garfield and came in collision with the bicycle on which Ernest was riding tandem. He was seated on a permanently attached luggage rack over the rear wheel. It knocked the boys to the ground and injured Ernest quite severely. The speed of the defendants' car was fixed at about 10-20 miles per hour at the time. Either John invited Ernest to ride on the rack of his bicycle to take Ernest home or Ernest asked John for a ride home on Ernest's bicycle because John's bicycle was not at the oil station where he expected it would be after the Boy Scout meeting. No money or other consideration was paid nor agreed to be paid for the ride. A jury verdict was rendered in favor of defendants. The principal complaint on appeal involves instructions which were given or refused and claimed misconduct of defense counsel.

[1] On voir dire examination of one juror, plaintiffs' counsel, after asking the same question of the five previous jurors without objection, propounded a question as to whether the juror had any prejudice, one way or the other, in the event the evidence showed two people were riding on the same bicycle. Objection was then made by defendants' counsel and he stated as a reason that there might be some question of law involved "concerning the propriety of that activity". The objection was overruled and the juror remarked that he had been informed that it was against the law for two children to ride on the same bicycle and if so, he "might be prejudiced in that matter". He was immediately informed that the court would admonish him as to the law and no further objection was made. It later admonished the jury to erase the form of objection from their minds since it had not then been established that such conduct was against the law and indicated that the court would later instruct on this subject. Thereafter the court gave, at the request of defendants, an instruction in the language of section 596.5 of the Vehicle Code, which provides:

"Unlawful Riding. No person shall ride, and no person driving a motor vehicle shall knowingly permit any person to ride on any vehicle upon any portion thereof not designed or intended for the use of passengers. This provision shall not apply to an employee engaged in the necessary discharge of his duty or to persons riding within or upon vehicle bodies in space intended for any load on said vehicle."

Plaintiffs' counsel contends that this was the only law in support of the juror's information that it was a violation of the law to ride tandem on one bicycle and that the section itself does not prohibit such an act.

In *La Fleur v. Hernandez*, 84 Cal.App.2d 569, 574, 191 P.2d 95, it was questioned whether that section was applicable where the passenger was riding on the handlebars of a bicycle. It concluded, however, that the error, if any, was not prejudicial.

Section 31 of the Vehicle Code defines a vehicle as a "device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway, excepting a device moved by human power * * *." That section especially eliminates a bicycle in the definition of a vehicle. Section 32 defines a motor vehicle and likewise excludes a self-propelled bicycle. The only section of the Vehicle Code which could possibly include it is section 452, which provides that every person riding a bicycle or riding or driving an animal upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle, but this division (9) excepts those provisions which by their very nature can have no application. Section 596.5 is included within division 9 (traffic laws). It therefore appears that it might possibly apply to riding a bicycle upon a highway but it would be difficult to hold that it applied to a horse being ridden bareback and double. Apparently, in *James v. Myers*, 68 Cal.App.2d 23, 156 P.2d 69, a similar question arose where a motorcycle operator and his companion were riding on the single seat of the vehicle intended and designed for the exclusive use of the operator. The court held it was a violation of section 596.5 of the Vehicle Code. If it could be applied to a motorcycle under section 452, the trial court was justified in submitting the question of its application to a bicycle to the jury. No prejudicial error resulted in this respect.

[2] The trial court refused plaintiffs' proffered instruction in the language of BAJI 147 as to the standard of care or conduct of children, claiming it was "inapplicable". The reason it was inapplicable is not indicated. Here, the plaintiff was 15 years of age and the operator of the bicycle was 13. The evidence produced might well have justified the giving of this instruction. A similar instruction in *Blanton v. Curry*, 20 Cal.2d 793, 129 P.2d 1 (12-year-old child) and *Kelley v. City & County of San Francisco*, 58 Cal.App.2d 872, 137 P.2d 719 (13-year-old boy and a junior traffic

officer acquainted with traffic and safety laws) was approved.

The court did give an instruction that bicycle riders have the same right as automobile drivers to the use of the streets and the former are chargeable with only such ordinary care for their own safety as a person of like age, intelligence and experience would exercise under the same or similar circumstances. The proffered instruction should have been given since the instruction given only partially covered the subject matter.

[3] The court also refused plaintiffs' proffered instruction in the general language of BAJI 138-A and 201-F, with modifications, in reference to the amount of caution required of the driver of a motor vehicle and also that of a bicycle rider. This type of instruction was approved in *O'Brien v. Schellberg*, 59 Cal.App.2d 764, 770, 140 P.2d 159. However, the proffered instructions modified the BAJI instructions to the extent that they may have been considered objectionable. The court did give a general instruction on this subject with the statement that it is the duty of the driver of a motor vehicle using a public highway to be vigilant at all times and to keep the vehicle under such control that to avoid a collision he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in a like position, and it is his duty to exercise ordinary care at all times to avoid placing himself and others in danger and to exercise ordinary care at all times to avoid a collision. This instruction only partially covered the subject matter.

A more serious question arises as to the refusal of the trial court to give plaintiffs' proffered instructions to the effect that if plaintiff was enjoying the hospitality of John Simmons and was riding on the bicycle for his own pleasure or on his own business without making any return to or conferring any benefit on him, other than the mere pleasure of his company, then plaintiff Ernest Tomson was a guest and the negligence of the driver is not then imputed to

a guest. The court agreed, in chambers, to give an instruction in the general language of BAJI 210-E to the effect that if John was negligent and his negligence contributed in some degree as a proximate cause to the injury of plaintiff, the jury must determine whether John's negligence should be imputed to plaintiff, thus constituting contributory negligence on his part, and barring recovery by him; that to so impute negligence, it must find plaintiff and the driver were then in joint or common possession and control of the bicycle, with the two having equal rights to be heard in its control and management. The proffered instructions were refused as "covered by court's instruction on imputed negligence". Apparently the trial judge, when he came to this instruction, in reading it to the jury, did start to read it in the general language of BAJI 210-E, and then, for some unexplained reason, stopped and told the jury to strike it out. Apparently, no other or further instruction was given on the subject of imputed negligence. The instruction the court ordered stricken was not placed in the record on appeal among the "refused" instructions but, as pointed out in a petition for rehearing, it apparently was not given.

[4-6] The rule is well established that the contributory negligence of a driver of a vehicle is not ordinarily imputable to his passenger or guest. *Pope v. Halpern*, 193 Cal. 168, 173-174, 223 P. 470. Where there is nothing in common between a passenger and a driver of a vehicle except a common destination and a common purpose in going there, the negligence of the driver is not to be imputed to the passenger. *Campagna v. Market St. Ry. Co.*, 24 Cal. 2d 304, 149 P.2d 281. In the instant case the jury was not instructed that if it found John was negligent, it must also determine whether his negligence should be imputed to plaintiff, and that before it could be so imputed it must find that plaintiff and the driver were then in joint or common possession and control of the bicycle. Plaintiff was entitled to have his or some adequate instruction given on this subject.

This fact, in conjunction with the other instructions refused, clearly constitute reversible error.

[7] Another serious question is jointly raised by counsel for plaintiffs and for amicus curiae. By stipulation, the argument to the jury and on the motion for new trial was not reported. Plaintiffs now claim that in the argument to the jury, defendants' counsel stated that his client was "a young man" and that "In the event you were to give plaintiffs a verdict of say \$5,000.00, how much would you think Anthony could pay on such a judgment? \$50.00 a week? Assuming that he could pay as much as \$50.00 a week, it would take him 100 weeks to pay \$5,000.00. Any higher verdict would take a comparable longer time to pay; and anything like \$25,000.00 would be entirely out of the question for him to pay." In some sort of a hearing before the trial judge, after this appeal had been taken, counsel for plaintiffs endeavored to have counsel for defendants agree as to what was said in the argument to the jury in this respect. He denied that such statement was made and claims he only referred to how long it would take to earn \$5,000, and that that sum would go a long way, and that he made no remark about defendant's ability to pay.

Had plaintiffs' claim affirmatively appeared as a part of the record of the argument to the jury, it would have been error for either counsel to refer to the ability or inability of a defendant in any such action to respond to the judgment rendered. By such conduct, counsel invites error on the part of plaintiff to show that defendants are in fact insured (which plaintiffs claim is a fact) and any such conduct, if prejudicial, might well call for a reversal of the judgment if proper objection is made at the time and a request made that the court instruct the jury to disregard the statement. *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393; *Drotleff v. Renshaw*, 34 Cal.2d 176, 208 P.2d 969. Apparently, the authorized record before this court does not indicate that objection to the claimed argument of counsel was made at the time and no re-

quest was then made to the court to instruct the jury to disregard it. There was a conflict in the supplemental reporter's transcript as to what was said in the argument in this respect and the court made no finding on the subject.

Since a reversal of the judgment is otherwise required, on the next trial such claimed misconduct, if true, may well be avoided.

Judgment reversed.

MUSSELL, J., concurs.



144 Cal.App.2d 387

CALIFORNIA BANK, a corporation,
Plaintiff and Respondent,

v.

Herbert DIAMOND, E. B. Corbin, and H.
Grabell & Sons of California, a
corporation, Defendants,

E. B. Corbin, Appellant.

Civ. 21773.

District Court of Appeal, Second District,
Division 1, California.

Sept. 11, 1956.

Rehearing Denied Sept. 28, 1956.

Action by drawee bank against drawer of check, payee of check and endorser for declaratory judgment. The Superior Court, Los Angeles County, John Gee Clark, J., entered judgment adverse to endorser, and endorser appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence sustained finding that endorser had notice of infirmity in check at time he took check from payee and that check was paid by bank by mistake.

Affirmed.

1. Declaratory Judgment ☞316

Drawee bank's complaint against drawer, payee and endorser of check which had been paid to endorser after drawer had

ordered bank to stop payment was sufficient to state cause of action for declaratory relief determining if, at time of payment, drawer was indebted to payee or endorser or if endorser was then a holder for value and whether or not drawer was entitled to reimbursement from bank and bank was entitled to reimbursement from payee and endorser.

2. Declaratory Judgment ☞6

While court may under certain circumstances, in its discretion, refuse to accept jurisdiction and declare rights of parties, it is not obligated to so exercise its discretion where complaint shows that an actual controversy does exist.

3. Declaratory Judgment ☞6

Where a multiplicity of actions would result unless rights of parties were first declared and relief given accordingly in same action, it would be abuse of discretion to deny declaratory relief.

4. Declaratory Judgment ☞388

Where complaint stated cause of action for declaratory relief, court had jurisdiction of entire matter and jurisdiction to render money judgment.

5. Banks and Banking ☞227(2) Evidence ☞317(7)

In action by drawee bank against endorser to whom check was paid, testimony of officer of bank that order to stop payment had been received by bank and had been signed by drawer of check was material and was not hearsay.

6. Evidence ☞317(7)

In action by drawee bank against endorser to whom check had been paid after drawer had ordered payment to be stopped, testimony of drawer that neither he nor his corporation had been indebted to payee was part of res gestae and was not objectionable as hearsay.

7. Evidence ☞502

In declaratory judgment action by drawee bank against drawer, payee and endorser after drawer had ordered payment upon check stopped, it was within discretion of trial court to admit testimony of

drawer as to conclusion that neither he nor his corporation had been indebted to payee and to allow endorser to cross-examine drawer to bring out facts from which contrary conclusion might be drawn.

8. Appeal and Error ⇨731(5)

Assignment of error that finding was contrary to evidence was defective in form where appellant made no attempt to direct attention of District Court of Appeal to evidence upon subject in question.

9. Banks and Banking ⇨227(3)

In action by drawee bank against endorser to whom check was paid after drawer had delivered to bank order to stop payment, evidence sustained finding that endorser had notice of infirmity in check at time he took check from payee and that check was paid by bank by mistake.

10. Bills and Notes ⇨335

Endorser who had notice of infirmity in check at time he took check from payee did not become a "holder in due course." West's Ann.Civ.Code, §§ 3133, subd. 4, 3137.

See publication Words and Phrases, for other judicial constructions and definitions of "Holder in Due Course".

11. Banks and Banking ⇨226

Drawee bank's complaint against endorser to whom check had been paid after drawer had delivered to bank order to stop payment was sufficient to raise issue of whether the check was paid by mistake, in view of allegation of facts from which mistake could be inferred, although complaint did not use the word mistake.

Hy Schwartz, Beverly Hills, for appellant.

Swanwick, Donnelly & Proudft, and Donald O. Welton, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Appellant E. B. Corbin is one of the defendants in an action brought by respondent for declaratory and other relief. Ap-

pellant appeals from a money judgment rendered against him in the amount of \$672.75, which was the full amount sought by the complaint.

Appellant makes five assignments of error. We shall treat them in the order in which they are set forth in the brief.

Appellant's first two points may be treated together as the second is but a corollary of the first. His first point is that the complaint does not state facts sufficient to state a cause of action for declaratory relief; his second point is that inasmuch as the complaint does not state a cause of action for declaratory relief, the court did not have jurisdiction to render the money judgment against him.

There is no merit in these points. By its complaint, the plaintiff alleged that prior to September 4, 1954, the defendant H. Grabell & Sons of California (hereinafter called Grabell) executed and delivered to the defendant Diamond a check dated September 15, 1952, in the amount of \$672.75 drawn upon plaintiff bank; that on the 4th of September, 1952, Grabell delivered to the plaintiff bank a written order to stop payment upon its said check; that on February 5, 1954, appellant caused the check to be presented to respondent for payment, and at that time it bore the endorsements of Diamond and Corbin, and plaintiff thereupon paid said check through the clearing house; that said check had been negotiated from Diamond to Corbin at some time between the date of its execution and delivery to Diamond and prior to the payment of said check by respondent; that prior to the negotiation of said check by Diamond to appellant the date of the check had been changed from September 15, 1952, to September 15, 1953; that on the 3rd of March, 1954, defendant Grabell demanded of respondent return of said sum of \$672.75, and thereupon plaintiff made demand upon Corbin for the return of said sum, and also made demand upon Diamond for the return to plaintiff or Grabell of said sum, but neither had returned any portion of said sum to either respondent or Gra-

bell; that an actual controversy existed between respondent and the defendant concerning their respective rights under the check and under the circumstances, in that if Grabell was indebted to Diamond or to Corbin at the time respondent paid the check, or if Corbin was a holder for value at the time of the payment of said check, Grabell was not entitled to reimbursement in the amount of said check from respondent, but that if Grabell was not indebted to the defendant Diamond or appellant Corbin at the time the said check was paid, Grabell was entitled to reimbursement from respondent and respondent was entitled to reimbursement from Diamond and Corbin.

The respondent prayed that a judgment be rendered declaring the respective rights and duties of the parties, and that if it be determined that plaintiff was liable to Grabell it should also be determined that Diamond and Corbin were liable to plaintiff.

[1-3] It is evident from this statement that the allegations of the complaint showed that actual controversies existed between respondent and Grabell and between Grabell and the other defendants and between respondent and the other defendants, and that these controversies arose out of the check and the circumstances of its negotiation. It thus stated a cause of action for declaratory relief, and while the court may under certain circumstances, in its discretion, refuse to accept jurisdiction and declare the rights of the parties, *Lord v. Garland*, 27 Cal.2d 840, 168 P.2d 5; *Pacific Electric Ry. Co. v. Dewey*, 95 Cal.App.2d 69, 212 P.2d 255; *Schessler v. Keck*, 125 Cal.App.2d 827, 271 P.2d 588, it is not obligated to so exercise its discretion where the complaint shows that an actual controversy does exist; and in a case such as this where a multiplicity of actions would result unless the rights of the parties were first declared and relief given accordingly in the same action, it would be an abuse of discretion to deny relief. *Kessloff v. Pearson*, 37 Cal.2d 609, 233 P.2d 899; *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747.

[4] The complaint having stated a cause of action for declaratory relief, the court had jurisdiction of the entire matter and jurisdiction to render the money judgment here appealed from.

[5] Appellant's third point is that the court committed error in overruling his objections to certain testimony. He first complains that the witness Johnson, an officer of plaintiff bank, was permitted to identify the stop-payment order received by respondent from Grabell over his objection that it was "irrelevant, incompetent, immaterial, hearsay and not binding" on the defendant Corbin. That the evidence was material is self-evident, and it is likewise evident that it was not hearsay inasmuch as the witness did not testify to any conversation but merely to a fact—to-wit, the receipt of the stop-payment order by the bank, and the fact that when received it had been signed by Grabell.

[6] Appellant next complains that the defendant Grabell was permitted to testify that neither he nor his corporation had been indebted to Diamond, over his objection that the question called for the conclusion of the witness and was hearsay. The question did not call for hearsay, nor did the answer given constitute hearsay. The fact as to whether Grabell was indebted to Diamond was a circumstance directly connected with and determinative of the controversies between the parties and the declaration of the rights and obligations which the court was called upon to make. It was therefore a part of the *res gestae* and was not objectionable as hearsay. Further, the question did not call for any conversation, but for a fact within the knowledge of the witness.

[7] In a sense, the question did call for the conclusion of the witness; but the lack of indebtedness is a fact within the knowledge of the witness which he necessarily draws not from the existence of any fact but from the very want of facts. Here unless the witness were allowed to testify to the ultimate fact of there being no indebtedness, he would have to testify, in

order to establish that fact, to the want of innumerable relationships¹ which might give rise to a debtor-creditor relationship. Practicality and common sense should govern in applying the rules of evidence, and we think it was within the discretion of the trial court to admit this evidence and allow the appellant to cross-examine the witness to bring out any facts from which a contrary conclusion might be drawn by the court (19 Cal.Jur.2d 14). The court here did not in any wise limit the appellant's right to cross-examine the witness nor did the appellant attempt to cross-examine so as to establish facts from which the conclusion of indebtedness might be drawn.

[8-11] Appellant next contends that finding XII of the trial court is contrary to the evidence. This assignment of error is entirely defective in form inasmuch as appellant makes no attempt to direct our attention to the evidence given upon the subject of the character of Diamond's title to the check or of Corbin's knowledge of it, and we would be justified in ignoring this assignment of error. We have, however, examined the transcript and find that the finding is amply sustained by the evidence.

By the finding in question, the court found that at the time Corbin took the check from Diamond, Corbin had notice of an infirmity in the instrument and a defect in the title of Diamond. By finding X the court had already found that there was an infirmity in Grabell's title in that he received the check subject to an agreement on his part that he would not negotiate it until certain machinery had been delivered to Grabell, and that this machinery was not delivered. Corbin testified that at the time he purchased the check from Diamond, Diamond told him of the conditions upon which he held the check and told him that he was not then entitled to cash it. Corbin thus had actual notice of an infirmity in Diamond's title and did not become a holder

in due course. Civ.Code, § 3133, subd. 4, § 3137; Newton Nat. Bank v. Strand Baking Co., 224 Iowa 536, 277 N.W. 491; Anthon State Bank v. Bernard, 198 Iowa 1345, 201 N.W. 59, 61; C. I. T. Corp. v. Smith, 318 Ill.App. 46, 48 N.E.2d 735; General Securities Co. v. Sunday School Pub. Board, 22 Tenn.App. 590, 125 S.W.2d 160; West v. First Baptist Church of Taft, 123 Tex. 388, 71 S.W.2d 1091, 1093.

The court made further findings that Corbin did not act in good faith in purchasing the check and in failing to make inquiry of Grabell concerning the check; but these findings are of no importance inasmuch as the evidence clearly shows actual knowledge on Corbin's part of the infirmity in Diamond's title.

The last assignment of error made by appellant concerns finding XIII. By this finding the court found that the bank paid the check to Corbin by mistake. Appellant's attack on this finding is two-fold. He first claims that it is beyond the issues raised by the pleadings. It is true that the complaint does not use the word *mistake* and that it is far from a model pleading insofar as alleging mistake is concerned. It, however, alleged probative facts from which the ultimate fact of mistake could be inferred and it was therefore sufficient to tender that issue; and the finding was not beyond the issues raised and tried.

Appellant next contends that there was no evidence to support the finding. But the evidence shows the receipt of the stop notice by the bank, and its knowledge of it and the payment of the check; and the court was justified in drawing the inference that the bank must have acted inadvertently in paying the check despite the notice which was in its files. There is no merit in the assignment of error.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

1. Lender and borrower, employer and employee, lessor and lessee, vendor and vendee, buyer and seller—all of these,

as well as others, might give rise to the debtor-creditor relationship and therefore to indebtedness.

LOEW'S Incorporated, a corporation,
Petitioner,
v.

The SUPERIOR COURT of the State of
California, In and For the COUNTY OF
LOS ANGELES, Respondent.*

Civ. 21851.

District Court of Appeal, Second District,
Division 1, California.

Sept. 5, 1956.

Hearing Granted Oct. 31, 1956.

Mandamus proceeding to compel Superior Court, Los Angeles County, Burnett Wolfson, J., to set aside order staying injunction pending national bank's appeal from judgment. The District Court of Appeal, White, P. J., held that national bank waived protection of federal statutory prohibition against state court injunction against national banks, by filing action under California statute to quiet title to personalty which, after trial on merits, was adjudged to be owned by bank subject to defendants' rights with which the bank was enjoined from interfering.

Peremptory writ issued.

Opinion, 300 P.2d 63, vacated.

1. Appeal and Error ⇨82(1), 112

An order of superior court staying injunctive provisions of a judgment pending appeal was a special order after final judgment and was appealable regardless of whether such order was void and regardless of whether such order was provided for by any of the prescribed methods of procedure.

2. Banks and Banking ⇨279

Federal statute providing that no injunction shall be issued against a national banking association or its property before final judgment in any action in any state court is for the protection of every national banking association, either solvent or insolvent. 12 U.S.C.A. § 91.

3. Banks and Banking ⇨278, 280

Congress is presumed to have used the word "execution", in federal statute pro-

*Appeal Dismissed by Stipulation of the

viding that no attachment, injunction or execution shall be issued against a national banking association or its property before final judgment in an action in any state court, in its generally accepted meaning rather than as a writ in the nature of attachment. 12 U.S.C.A. § 91.

See publication Words and Phrases, for other judicial constructions and definitions of "Execution".

4. Execution ⇨1

A writ of execution is part of the remedy to effectuate an action by enforcement of judgment.

5. Execution ⇨1

An execution is the end of the law, giving the successful party the fruits of his judgment.

6. Banks and Banking ⇨278, 279, 280

The words "final judgment" as used in federal statute providing that no attachment, injunction or execution shall be issued against a national banking association or its property before final judgment in any action in any state court, refer to judgment from which no appeal can be taken and not merely judgments rendered. 12 U.S.C.A. § 91.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

7. Appeal and Error ⇨447

Banks and Banking ⇨279

National bank waived protection of federal statutory prohibition against state court injunction against national banks, by filing action under California statute to quiet title to personalty which, after trial on merits, was adjudged to be owned by bank subject to defendants' rights with which the bank was enjoined from interfering, and hence statute did not entitle bank to stay of injunction pending bank's appeal from judgment. 12 U.S.C.A. § 91; West's Ann.Code Civ.Proc., § 738.

8. Quietling Title ⇨1

Equitable principles apply in a quiet title action. West's Ann.Code Civ.Proc., § 738.

Parties Jan. 10, 1957.

9. Injunction ☞36(1)

Injunction is a proper inherent remedy to terminate expensive and troublesome litigation over ownership and right of possession of property. West's Ann.Code Civ. Proc., § 526, subd. 6.

10. Quieting Title ☞51

In an action to quiet title, even though defendant does not file a cross-complaint or ask for any affirmative relief, a decree declaring that defendant has title, and enjoining plaintiff from further setting up a claim thereto, is a proper form of judgment. West's Ann.Code Civ.Proc., §§ 526, subd. 6, 738.

Loeb & Loeb, John L. Cole, Alfred I. Rothman, Laurence M. Weinberg, Los Angeles, for petitioner.

Hugo A. Steinmeyer, Robert H. Fabian, W. H. Taylor, Jr., Los Angeles, for real party in interest, Bank of America Nat. Trust & Savings Ass'n.

WHITE, Presiding Justice.

Petitioner, Loew's Incorporated, seeks a writ of mandate requiring the Superior Court of Los Angeles County to set aside and vacate its order of June 6, 1956, " * * * that the motion of plaintiff (Bank of America) for a stay of injunction pending appeal be granted and that the operation and effect of that certain judgment heretofore entered in the above-entitled action on the 4th of April 1956 in Book 3070 at page 292 of Judgments in the Office of the County Clerk of Los Angeles County, California, be stayed pending the final determination of the appeal therefrom and 30 days thereafter and that the status quo shall be preserved during that period."

The petition seeking to prohibit the making of that order was filed herein on June 6, and on June 8 after the making of said order a supplementary petition seeking mandate in lieu of prohibition was filed.

The judgment so "stayed" was made in an action commenced by the Bank of Amer-

ica to quiet its title to certain personal property, and provides as follows:

"It Is Ordered, Adjudged and Decreed:

"1. Except as hereinafter otherwise specified in paragraphs 3 to 8, both inclusive, plaintiff, Bank of America National Trust and Savings Association, a national banking association, is the owner of the following described personal property, free and clear of all claims and demands whatsoever;

"All properties of every kind and character relating to the feature-length motion picture photoplay entitled 'Mr. Peabody and the Mermaid', hereinafter in this paragraph 1 called the 'Picture', based upon a story by Guy Jones and Constance Jones and a screenplay by Nunnally Johnson, having as principal players William Powell and Ann Blyth, and which was produced by Inter-John, Incorporated, including, but without limiting the foregoing general language, the following:

"(a) All of the literary, musical dramatic and other material upon which * * *

"(b) All physical properties of the picture * * *

"(c) To the extent necessary to complete the picture, all assignable rights * * *

"(d) All insurance * * *

"(e) All copyrights * * *

"(f) The right to exploit * * *

"(g) All rent, revenue, income, compensation and profits * * *

"2. * * * * *

"3. Plaintiff may not advertise or announce William Powell's name in general advertising or publicity * * *

"4. Plaintiff may not use William Powell's name or likeness in or in connection with any so-called 'commercial tie-ups' * * *

"5. Plaintiff may not cause or permit to be made or issued 16mm. or other non-standard prints of said motion picture except * * *

"6. Plaintiff shall give credit to William Powell as a star or co-star on all positive prints * * *

"7. Plaintiff may not double or 'dub' (as that term is understood in the motion picture industry) any of William Powell's acts, poses, plays or appearances, or his voice, either in English or in any foreign language or languages, unless * * *

"8. Plaintiff, its successors and assigns, are hereby enjoined, for the benefit of Loew's, its successors and assigns, from doing any act prohibited by any of the provisions of the foregoing paragraphs 3 to 7, both inclusive, and are ordered and directed, for the benefit of Loew's, its successors and assigns, to perform and observe the provisions of said paragraphs 3 to 7, both inclusive * * *

"9. * * *

"10. Except for and subject to the rights of Loew's arising out of the provisions of paragraphs 3 to 8, both inclusive, Loew's, and all persons claiming by, through or under it, are hereby perpetually enjoined and restrained from asserting any claim or demand whatsoever in, to or on the rights and properties described in paragraph 1, or any part thereof, or the proceeds derived therefrom, adverse to plaintiff."

In said quiet title action, trial upon the merits was completed, and the facts contained in the following summary were found true.

On and after January 20, 1948, Inter-John, Incorporated, a corporation, borrowed money from the Bank and gave a promissory note therefor, secured by a chattel mortgage upon the properties described in the judgment. Inter-John failed to pay off a portion of the loan and, pur-

suant to the chattel mortgage, the properties were sold at public sale and purchased by the Bank, which then commenced the instant action to quiet its title to said properties.

Inter-John's ownership of the properties so mortgaged by it and sold to the Bank was subject to the terms of a "loan-out agreement" between Loew's and Universal, and written instruments executed by Loew's, Universal and Inter-John in 1947. Under said contracts Inter-John had no right to do any of the things covered by the injunctive provisions of the judgment hereinbefore set forth.

From 1934 until 1953 Loew's and its predecessor, Metro-Goldwyn Mayer Corporation, had a contract with William Powell for all his services and were the owners of all the results and proceeds thereof. Large sums of money had been invested by them in building and maintaining his reputation and the value of the pictures in which he appears.

"The restrictive provisions * * * were included in the loan-out agreement for the purpose of protecting Loew's property rights in the services and performances of William Powell and in the results and proceeds thereof and for the purpose of protecting Loew's investment in Motion Pictures produced and to be produced by it in which William Powell appears."

Loew's had no knowledge of Inter-John's dealings with the Bank, but the Bank's representative knew of the loan-out agreement and the restrictions for the protection of Loew's investment therein contained.

Proposed findings, conclusions and judgment were served by mail on March 20, 1956 and dated and signed March 30, 1956, and the judgment was entered April 4, 1956. On or about April 6, 1956, petitioner duly served and filed notice of entry of said judgment.

The Bank's motion for a new trial was duly heard, considered and denied by order made and entered May 9, 1956. On May

22nd the Bank filed its notice of motion for reconsideration of order denying new trial, and on May 29, 1956, so moved.

Contemporaneously with its notice and motion for reconsideration of order denying plaintiff's motion for new trial, the Bank filed a notice of motion for "Stay of Injunction Pending Appeal", and so moved.

A minute order was made June 4 and entered June 7, 1956, reading as follows: "Motion for reconsideration of order denying plaintiff's motion of new trial denied. Motion for stay of injunction pending appeal granted".

[1] On June 6, 1956, the court made the order first hereinbefore quoted that the Bank's motion "for a stay of injunction pending appeal be granted", which order is sought to be vacated by this proceeding. On the same day the Bank appealed from the judgment. The real effect of the order is to modify the judgment so as to grant an injunction effective 30 days after the final determination of the appeal from the judgment, instead of the injunction included in the judgment effective from the date of the judgment. Said order of June 6 is "a special order after final judgment" and is "appealable regardless of whether it is void and regardless of whether it is provided for by any of the prescribed methods of procedure". *Phelan v. Superior Court*, 35 Cal.2d 363, 370, 217 P.2d 951.

The *Phelan* case, *supra*, is not authority for the Bank's statement that an appeal furnishes a plain, speedy and adequate remedy in lieu of the relief sought by the instant proceeding. In the *Phelan* case, the order, made after a final judgment for money, reduced the amount of money. The order, from the consequences of which petitioner seeks relief in the instant proceeding, is in effect an order that—although the Bank has no right to do certain things as already adjudged after a complete trial upon the merits—the Bank shall, nevertheless, not be restrained from doing those things until 30 days after the judgment shall have become final. Under the facts

of the instant action, an appeal from the order "staying * * * the operation and effect of" the judgment could not preserve petitioner's rights under the judgment; and, in the event the judgment in favor of petitioner should be affirmed on appeal, the acts prohibited by the judgment might already have been done, so that, even if the Bank loses its appeal, the judgment could accomplish nothing except to quiet the Bank's title to the moving picture properties without regard to the limitations subject to which the Bank acquired the properties.

The Bank, in its answer, urges that "* * *" respondent superior court, having exercised its discretion to issue the order staying the injunctive provisions of the judgment, its act is not reviewable on mandamus", and in that regard cites the following cases: *Hilmer v. Superior Court*, 220 Cal. 71, 73, 29 P.2d 175; *Lincoln v. Superior Court*, 22 Cal.2d 304, 313, 139 P.2d 13; *O'Bryan v. Superior Court*, 18 Cal.2d 490, 496, 116 P.2d 49, 136 A.L.R. 595; *Bauer v. Superior Court*, 208 Cal. 193, 198, 281 P. 61; *Kerr v. Superior Court*, 130 Cal. 183, 185, 62 P. 479; *People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 471, 46 P. 383; *Friedland v. Superior Court*, 67 Cal.App.2d 619, 623, 155 P.2d 90; *Parker v. Superior Court*, 16 Cal.App. 2d 580, 583, 60 P.2d 1021; *Greene v. Superior Court*, 133 Cal.App. 35, 38, 23 P.2d 785.

An examination of these cases discloses that many of them stem, directly or indirectly, from *Strong v. Grant*, 99 Cal. 100, 101, 33 P. 733, 734, decided in 1893, wherein it was said: "The rule is so well established that it may be said to be universal that the writ of mandamus cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion."

However, in the *Matter of Ford*, 1911, 160 Cal. 334, 346, 347-348, 116 P. 757, 761, 35 L.R.A., N.S., 882, it is said: "* * *

And, while the general rule announced in *Strong v. Grant*, that a writ of mandate cannot be issued to correct the errors of a court in passing upon questions regularly submitted to it in the course of judicial proceedings or to control the exercise of its discretion undoubtedly obtains, it is not universally true that such writ will not issue to control such discretion or to require a judicial tribunal to which a matter for determination is submitted, to act in a particular way. * * *

"* * * 'Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one." * * *'"

Each of the cases cited by the Bank in this regard is based upon the holding of *Strong v. Grant*, *supra*, or is distinguishable from the instant action. It would serve no useful purpose to consider them in detail here.

In *Robinson v. Superior Court*, 1950, 35 Cal.2d 379, 218 P.2d 10, 13, it appeared that a motion "was denied on the sole ground of lack of jurisdiction", and it was held that "if the effect is to preclude a hearing and judgment on the merits of a matter properly before the court, and there is no other adequate remedy, mandate will lie to test the question of jurisdiction. * * * a denial of relief on the sole ground of lack of jurisdiction is not a decision on the merits. * * *"

In the instant action there was a decision on the merits, and then an order nullifying that decision. The parties to an action are entitled to more than a trial on the merits; they are entitled to the relief accorded them by law. In the instant action, the trial court found petitioner en-

titled to injunctive relief, made its judgment accordingly, and denied the Bank's motion for a new trial.

The Bank's motion for the stay of judgment pending appeal was based upon the fact that it is a national bank, and its claim that no court of the State of California has the power to enjoin a National Bank in any respect whatsoever, and that the Bank cannot be subjected to any injunction, prior to the completion of the last appeal and the finality of the judgment. No other reason has been given, and we have been able to find none, for the trial court's order staying the effect of its judgment pending appeal.

If, as found by the court, the Bank's ownership of the motion picture properties is subject to certain limitations, certainly it would not preserve the status quo pending appeal to permit the Bank to do the very acts which it has no right to do, among them the manufacture of non-standard films and the sale and use of them for advertising purposes. Since it was found by the court that exceptions and limitations had been included in the agreements for the purpose of maintaining the value of pictures made and to be made starring William Powell, it cannot be presumed that such acts during the pendency of the appeal will not render the judgment worthless in the event it is eventually affirmed.

In support of its contention that the superior court had no power to issue an injunction against it, and that, therefore, the order staying said injunctive provisions of the judgment, is correct and should not be interfered with by this court, the Bank sets forth the following argument: "The pertinent provision of Section 91 of Title 12 of the United States Code [Annotated] reads as follows:

"* * * (N)o attachment, *injunction*, or execution shall be issued against such (national banking) association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."

"It is respectfully submitted that the statute means just what it says, and the courts have so found."

An examination of the last cited statute, however, brings to light the fact that the language quoted is immediately preceded by the portion of the section here quoted, as follows:

"§ 91. Transfers by bank and other acts in contemplation of insolvency. All transfers * * * made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, * * * shall be utterly null and void; and no attachment, injunction, * *."

[2] Despite the apparent intent of Congress as expressed in the statute, it has been held that Section 91 is for the protection of every national banking association, either solvent or insolvent. *Pacific National Bank of Boston v. Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567; *Van Reed v. People's National Bank*, 198 U.S. 554, 559, 25 S.Ct. 775, 49 L.Ed. 1161; *Dennis v. First National Bank of Seattle*, 127 Cal. 453, 454, 59 P. 777.

Each of the last above cited cases and others to which we have been referred involves an attachment before trial or other provisional remedy, while the instant proceeding concerns a prohibitory injunction after a complete trial upon the merits.

The question as to the error of the judgment in the instant action will, no doubt, be determined upon the Bank's appeal from the judgment now pending. Assuming, but not deciding, that the decisions last above cited are here controlling, the trial court was, nevertheless, authorized to "stay the operation and effect" of the judgment, or to correct judicial error therein, only in accordance with statutory procedure. *Stevens v. Superior Court*, 7 Cal.2d 110, 112-114, 59 P.2d 988. In the *Stevens* case, supra, a writ of prohibition issued to restrain the superior court from proceeding

with a new trial after motion therefor had been denied, the order denying the motion for new trial had been set aside and vacated, and an order granting a new trial had been made some three weeks later. It was there held that the order denying the new trial was judicial and not a clerical error, and could not be corrected by the trial court in that manner.

In the instant action, an order denying a new trial was made four weeks before the stay of injunction was granted.

The bank's contention is that by its order "staying the injunctive provisions of the judgment" the court was not in any manner attempting to set aside or amend judicial error or to modify or vacate the injunction; that "all the superior court did was exercise its inherent power to stay the injunctive provisions of a judgment previously made". In support of this proposition, the Bank cites *Tulare Irrigation District v. Superior Court*, 197 Cal. 649, 660, 668, 671, 672, 242 P. 725; and *City of San Diego v. Southern California Telephone Corp.*, 42 Cal.2d 110, 120, 266 P.2d 14.

In the *Tulare* case, supra, a writ of prohibition sought to prevent a stay of injunction was denied. There, the superior court made its findings and conclusions that the Lindsay-Strathmore Irrigation District should be permanently enjoined from pumping water from its land in the Tulare watershed to irrigate producing citrus groves outside of that watershed; that the owners of those groves would lose almost their entire value if and when their use of the water were so enjoined; and the superior court notified the parties that, because of defendant's intention to diligently and in good faith prosecute an appeal from the judgment to be made, and because without a stay of the injunction any appeal by defendant would be entirely nugatory and valueless, as a part of the judgment or concurrently therewith, the superior court would stay the effective date of said injunction pending final determination on appeal, and that "in making

the contemplated order he intends to impose upon the defendant and appellant such terms and conditions as to him may seem just and equitable, and that such terms and conditions will, in his judgment, provide adequate security for compensating the complainants on account of any damage or loss * * *." [197 Cal. 649, 242 P. 735.]

City of San Diego v. Southern California Tel. Corp., 42 Cal.2d 110, 266 P.2d 14, 21, is an appeal from a judgment for the amount determined to be due the City from the Telephone Company for a new franchise as provided by a judgment which had become final after appeal, 92 Cal.App. 2d 793, 208 P.2d 27. On appeal, the amount determined by the superior court was held erroneous and the judgment reversed. The judgment which had already become final (from which the computation of the amount required as a prerequisite for a new franchise was to be made) "did not issue an injunction and thereafter stay its effect pending appeal. Instead, it provided that the injunction would not take effect until thirty days after the judgment became final. Until that time, there was nothing to be stayed. * * *"

At page 120 of 42 Cal.2d, at page 21 of 266 P.2d in the *City of San Diego v. Southern*, supra, the court said: "Since the judgment was affirmed on the previous appeal, the City is foreclosed from challenging the conditions attached to issuance of the injunction. * * * Aside from the rights of the company, it was clearly in the public interest that the trial court withhold issuance of an injunction and thus assure continued telephone service pending outcome of the appeal. * * *

"* * * The judgment did not give either the City or the company more or less rights in the interim than either had had under the expired franchise.

"The City contends that the trial court did not have power to stay its injunction unless * * *. A trial court is not so limited. It may protect the parties on appeal by providing that its injunction or

order is stayed, under conditions that protect the appellant by preserving the subject matter of the appeal pending outcome thereof and at the same time protect the respondent by saving to it the benefits of the judgment in the event of an affirmance."

The *Tulare* and *San Diego* cases, supra, involved injunctions which by the provisions of the judgments themselves were not to become effective until a later date, and in each of those cases the trial court had found that, unless the effect of the injunction were so delayed, in the event of a reversal on appeal, the appellant's victory would be valueless. In each, the trial court also provided protection for respondent in the event of an affirmance.

In the instant action, there is no finding that the fruits of success on the appeal will be lost to appellant by permitting the injunction to become immediately effective as provided in the judgment, and no protection is provided for respondent's rights in the event of an affirmance. From the record in the instant proceeding it appears that the only ground suggested by the Bank for the order "staying the injunction" until "30 days after the judgment shall become final" is that "the plaintiff is a national banking association and no injunction will lie against it until after final judgment".

Clearly the cited cases are not applicable to the question here presented and no decisions in point have been found by our independent research.

We are in accord with the contention of the real party in interest, the Bank, that cases concerning the trial court's power to "set aside or amend judicial error or at least modify and vacate the injunction are not applicable" because the Bank concedes that its petition for a stay could not have been granted under the statutory provisions for modification of a judgment upon motion for a new trial or upon motion to set it aside for mistake or inadvertence. Therefore, we will not here discuss the cases cited by petitioner to that effect.

Because we regard the following cases as helpful in the determination of the issues

with which we are here confronted, we shall discuss them:

Sontag Chain Stores Co., Ltd. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689, was a proceeding in prohibition to restrain the Superior Court from entertaining a motion to vacate a judgment. That judgment "permanently enjoined the defendant labor unions from picketing or creating any disturbance in the vicinity of petitioner's stores". It had become final several months before the motion to vacate it was made upon the ground that the trial court "did not correctly apply the law to the facts then before it". Petitioner there seeking prohibition asserted "that the decree in controversy cannot be set aside for mere judicial error, error of law, or change of decision. * * *". At page 94 of 18 Cal.2d, at page 690 of 113 P.2d, Mr. Justice Edmonds, speaking for the court, said:

"As a declaration of the general rule, petitioner's statement is correct. It is well settled that a final judgment of a court of competent jurisdiction may not be impeached collaterally for mere errors or irregularities committed by the court in the exercise of its jurisdiction or in the course of the proceedings, even though the error is one of law, and appears on the face of the record. * * * The reason for the rule is that there must be an end to litigation, and hence it is the long established policy of the law to, so far as possible, prohibit the further contest of an issue once judicially decided and to accord finality to judgments.

"But the reason for the rule ceases and the rule fails to apply in the case of a preventive injunction of the type here under review. This is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly been held, is always subject, upon a proper showing, to

modification or dissolution by the court which rendered it. The court's power in this respect is an inherent one. Its action is determined by the facts and circumstances of each particular case, with a view to administering justice between the litigants, and it has the power to modify or vacate its decree when the ends of justice will be thereby served.

"* * * This inherent power * * * may be exercised either where there has been a change in the controlling facts upon which the injunction rested, or the law has been changed, modified or extended, or where there the ends of justice would be served by modification. * * *

"In California cases cited by petitioner, language may be found which is at variance with the views above expressed. [Citing cases.] But a review of these authorities reveals that, in many instances, the decree under consideration was not of the nature or classification of the one here in question, and also that earlier pronouncements have been modified or distinguished by later rulings. *Tulare Irr. Dist. v. Superior Court*, 197 Cal. 649, 130 P.2d 725; *Wheeler v. Superior Court*, 82 Cal.App. 202, 255 P. 275. For present purposes it is sufficient to state that no California case is cited which touches the precise point here under discussion, or which is here controlling. * * * 'Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.'

In the Sontag case, *supra*, petitioner in seeking prohibition to prevent the vacation of the injunction, conceded that the injunction was erroneous under the law. That point is not conceded in the instant proceeding. On the contrary, petitioner here urges that Section 91 of Title 12 of the United States Code Annotated was inapplicable because: (1) There had been a final judgment entered by respondent court; and (2) The statute applies only to pro-

visional remedies invoked prior to trial on the merits.

[3-6] Were it not that "execution" is prohibited as against a national bank in the same clause and upon the same terms as "injunction", we might be inclined to agree with petitioner. True, none of the cited cases construing and applying Section 91 involves an execution or an injunction which is part of a judgment on the merits. While an injunction may be granted prior to judgment, an execution may not. If the section is read as prohibiting the issuance of an execution prior to judgment, it has no meaning or effect whatever. Petitioner urges that by the word "execution" as used in Section 91, Congress referred to a writ "in the nature of attachment" issued prior to or without judgment under the laws of some states. But, Congress is presumed to have used the word "execution" in its generally accepted meaning. A writ of execution "is part of the remedy to effectuate the action by the enforcement of the judgment". *United States v. Nourse*, 9 Pet. 8, 34 U.S. 8, 27, 9 L.Ed. 31. An execution is the end of the law. It gives the successful party the fruits of his judgment. *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 221, 29 P. 627; *Painter v. Berglund*, 31 Cal.App.2d 63, 70, 87 P.2d 360. Therefore, in order to make the section effective as to executions, the words "final judgment" must be held to refer to judgments from which no appeal can be taken and not merely judgments rendered. Using that construction in the instant action permits the portions of the judgment favorable to the bank—quieting its title to personal property, subject to certain rights of defendant, and enjoining defendant from claiming any other rights in or to said property—to stand; and, at the same time, nullifies the portion of the judgment enjoining the bank's interference with and destruction of the rights of defendants.

[7] However, by the filing of the instant action, the Bank waived any advantage it might otherwise have had under said Section 91 of Title 12 of the United States

Code. As stated by Justice Bridges, speaking for the Supreme Court of Washington, *State ex rel. Southern Alaska Canning Co. v. Superior Court for King County*, 128 Wash. 100, 222 P. 203, 205: "That statute [Sec. 91] cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it.

"Being of the view that it was the duty of the court to issue the injunction, or restraining order * * * the writ applied for is granted." The writ sought and granted in the case just cited was to prevent the superior court from vacating its order restraining the bank from interfering with the property pending trial.

The instant action was brought by the Bank under the provisions of Section 738 of the Code of Civil Procedure of the State of California, which provides: "An action may be brought by any person against another who claims an * * * interest in * * * personal property, adverse to him, for the purpose of determining such adverse claim * * *."

[8-10] "Equitable principles apply in a quiet title action". *Gonzalez v. Hirose*, 33 Cal.2d 213, 217, 200 P.2d 793, 796. An action under Code of Civil Procedure 738 is brought to "finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to." *Peterson v. Gibbs*, 147 Cal. 1, 5, 81 P. 121, 123; *Altman v. Blewett*, 93 Cal.App. 516, 523, 269 P. 751; *Hendershott v. Shipman*, 37 Cal.2d 190, 194, 231 P.2d 481. Injunctive relief incident to a decree quieting title is an ancient remedy growing out of the "bill of peace" in a court of chancery. It is a proper inherent remedy to terminate expensive and troublesome litigation over the ownership and right of possession of property. An injunction is issued to prevent a multiplicity of judicial proceedings. Section 526,

subd. 6, Code of Civil Procedure. "In an action to quiet title, even though defendant does not file a cross-complaint or ask for any affirmative relief, a decree declaring that defendant has title, and enjoining plaintiff from further setting up a claim thereto, is a proper form of judgment. [Citing cases.]" (Ridgway v. Ridgway, 95 Cal.App.2d 46, 50, 212 P.2d 6, 9.)

Mr. Justice Peters, speaking for the court, in *Empire Star Mines Co. v. Butler*, 62 Cal. App.2d 466, 530, 145 P.2d 49, 80, said: "Moreover, litigants are entitled to reasonable repose from future unnecessary litigation. The plain and direct manner of giving this repose is by enjoining the defeated party from continuing to perform the acts found to be wrongful. If he has no intent to continue the wrongful acts he is not injured by the decree. If he has such intent the injunction protects the successful party from the necessity of bringing successive actions for damages. Thus, in quiet title suits, in the discretion of the court, the decree frequently includes an injunctive provision."

The Bank commenced this action to quiet title and prayed that the court determine "all adverse claims of said defendants", that said defendants "be forever barred from asserting any claim or demand whatsoever in, to or on said property, or any part thereof, adverse to plaintiff", and further prayed that "the court grant such other and further relief as it may deem just and proper". Since the Bank prayed that the court adjudicate the rights of the respective parties, quiet the title in and to such property, and for the injunctive relief that defendants be barred from asserting any claim or demand whatsoever in or to said property in which the Bank's title was quieted, the latter waived any exemption it might otherwise have had from an injunction against its interference pending appeal with the rights of Loew's. Having invoked, by its complaint, the provisions of section 738 of the Code of Civil Procedure and injunctive relief being applicable to such quiet title action, the Bank cannot now be heard to

stay the provisions of a judgment which they themselves asked for in their prayer. To permit the Bank so to do would be both unfair and inequitable.

The demurrer of the Bank, real party in interest, is overruled and it is ordered that a peremptory writ of mandate issue, requiring the respondent court to set aside and vacate its order of June 6, 1956, granting the motion of plaintiff Bank for stay pending appeal of the injunctive provisions of the judgment dated March 30, 1956, in action No. 599,919 in the respondent court.

DORAN and FOURT, JJ., concur.

Hearing granted; McCOMB, J., not participating.



In re ESTATE of Jack R. RADOVICH, etc.,
Deceased.

Robert C. KIRKWOOD, State Controller,
Appellant,

v.

CITIZENS NATIONAL TRUST AND SAVINGS
BANK OF LOS ANGELES, and
George Radovich, Respondents.*

Civ. 21604.

District Court of Appeal, Second District,
Division 3, California.

Sept. 13, 1956.

Rehearing Denied Oct. 4, 1956.

Hearing Granted Nov. 8, 1956.

The Superior Court of Los Angeles County, Victor R. Hansen, J., entered a judgment fixing inheritance tax, and the State Controller appealed. The District Court of Appeal, Vallée, J., held that where deceased, prior to his death, entered into an oral agreement with the natural parents of seventeen year old boy that if the boy would live with the deceased and consider himself the son of the deceased, deceased would treat the boy as if he were his natural son and would adopt him, and the boy lived with the deceased for twenty years,

* Opinion vacated 308 P.2d 14.

but there were no adoption proceedings in accordance with statute, and court correctly decided that boy was entitled to distribution of all of the estate of the deceased, the boy was not entitled to be treated as an adopted child of the deceased for inheritance tax purposes.

Judgment reversed with directions to render a judgment in conformity with opinion.

1. Adoption ⇨6, 21

Agreement between deceased prior to his death and parents of seventeen year old boy that if boy would live with deceased and consider himself the son of the deceased, the deceased would treat the boy as if he were his natural son and would adopt him was valid, and boy, who lived with deceased until his death, was entitled to distribution of all of the estate of the deceased. West's Ann.Prob.Code, § 1080.

2. Adoption ⇨1

Adoption exists only by virtue of the statutory law. West's Ann.Civ.Code, §§ 221-229.

3. Adoption ⇨1

The rights and obligations springing from adoption are entirely matters of statutory regulation. West's Ann.Civ.Code, §§ 221-229.

4. Adoption ⇨17

The mode prescribed by statute for adoption of a child is the measure of the power, and one claiming that an adoption has been accomplished, must show that the statute has been complied with. West's Ann.Civ.Code, §§ 221-229.

5. Adoption ⇨1

An adoption is effective only when it is done in the manner laid down by the Civil Code. West's Ann.Civ.Code, §§ 221-229.

6. Adoption ⇨3

Statutes governing adoption must be read into statutes of succession. West's Ann.Civ.Code, §§ 221-229; West's Ann.Prob.Code, § 257.

7. Adoption ⇨21

To establish a person's right to inherit from person claimed as an adopting parent, there must be proof of an act of adoption done in accordance with statute. West's Ann.Civ.Code, §§ 221-229; West's Ann.Prob.Code, § 257.

8. Adoption ⇨1

Only after adoption in conformity with the laws of the state do the person adopting and the person adopted sustain the legal relation of parent and child and have all rights and subject themselves to all duties of that relation. West's Ann.Civ.Code, §§ 221-229, 228.

9. Adoption ⇨21

Only an adopted child, who is deemed a descendant of one who has adopted him, is the same as a natural child for purposes of succession. West's Ann.Civ.Code, §§ 221-229; West's Ann.Prob.Code, § 257.

10. Taxation ⇨856

A cardinal purpose of the inheritance tax law is to coordinate the assessment of the tax as closely as possible with the substantive probate law regulating the distribution of the estate of a deceased. West's Ann.Rev. & Tax.Code, §§ 13307, 13310, 13407, 14510.

11. Taxation ⇨856, 889

Generally, the State assesses the privilege of succeeding, gives preferences, and computes inheritance tax on the interests of heirs, legatees, and devisees, and degree of relationship, if any, to deceased. West's Ann.Rev. & Tax.Code, §§ 13307, 13310, 13407, 14510.

12. Estoppel ⇨62(2)

There can be no estoppel as against the State in the fixing of inheritance taxes. West's Ann.Rev. & Tax.Code, §§ 13307, 13310, 13407, 14510.

13. Estoppel ⇨62(2)

When a party fails to take steps prescribed by the State to effectuate a statutory adoption, fact that agreement is enforced by permitting a child to take same share of estate as he would have taken had he been legally adopted, does not bar

the State from standing on the facts as they actually exist in classifying the child for inheritance tax purposes. West's Ann. Rev. & Tax.Code, §§ 13307, 13310, 13407, 14510; West's Ann.Civ.Code, §§ 221-229; West's Ann.Prob.Code, § 257.

14. Taxation ~~8~~875(2)

Where deceased, prior to his death, entered into oral agreement with natural parents of seventeen year old that if boy would live with deceased as son of deceased, deceased would treat boy as if he were his natural son and would adopt him, and the boy lived with deceased for twenty years, but there were no adoption proceedings in accordance with statute, and court correctly decided that boy was entitled to distribution of all of the estate of the deceased, boy was not entitled to be treated as an adopted child of deceased for inheritance tax purposes. West's Ann.Rev. & Tax.Code, §§ 13307, 13310, 13407, 14510; West's Ann.Civ.Code, §§ 221-229; West's Ann.Prob.Code, § 257.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Walter H. Miller, Chief Asst. Inheritance Tax Atty., Los Angeles, William R. Elam, Los Angeles, and Milton A. Huot, Asst. Inheritance Tax Attys., Sacramento, for appellants.

Louis Thomas Hiller, Nat Wilk, Los Angeles, Scudder & Forde, and George A. Forde, Pacific Palisades, for respondents.

VALLÉE, Justice.

Appeal by the state controller from a judgment sustaining respondents' objections to the report of the inheritance tax appraiser, and fixing the inheritance tax.

On July 6, 1954 Judge Clark, in a proceeding to determine interests in the estate, rendered a decree that George Radovich has the equitable status of an adopted son of the decedent. On June 29, 1955 Judge Hansen, after hearing objections to the inheritance tax appraiser's report, rendered judgment fixing the inheritance tax, computing it by allowing George Radovich the

status of a "Class A" transferee. It is from the latter judgment that the appeal was taken.

The deceased Jack R. Radovich died intestate on October 3, 1953, a resident of Los Angeles County. He had never married, had no issue of his body, and left no father or mother. Coadministrators of the estate were appointed.

In June 1954 George Radovich filed a petition to determine his interest in the estate. The petition was heard by Judge Clark. The facts as found by Judge Clark, which are not in dispute, are as follows:

In 1934 in Los Angeles when George Vukoye, now known as George Radovich, was about 17 years old, his natural parents and Jack Radovich entered into an oral agreement whereby Jack promised and agreed that if George would live with him and consider himself his son, Jack would treat George as if he were his natural son and would adopt him. The natural parents of George and George relied on Jack's promises and consented to the oral agreement. George went to Jack and lived with him until Jack's death. From the time George went to live with Jack he worked in Jack's liquor store until the latter's death.

Under the oral agreement Jack promised and agreed that if George would go to live with him and be his son, Jack would give George all of the rights of a natural son, would regard him as his own son, and would adopt him. The natural parents of George relied on the promises and agreed to and did relinquish to Jack all of their rights in George. From the time of the agreement until Jack's death, George performed all the duties of a child toward a parent and Jack publicly acknowledged George as his own son and heir to his estate. Since the agreement George has at all times been known as and has used the name of George Radovich and the same is presently his legal name. George, pursuant to the oral agreement and his performance thereof and by reason of the failure of Jack to fully perform the obliga-

tions assumed by him, occupies in equity the equitable status of an adopted son and by reason thereof is entitled to distribution of all of Jack's estate.

Jack never instituted any statutory proceedings in California or elsewhere for adoption of George.

In July 1954 Judge Clark rendered a decree that George, by reason of the oral agreement of adoption made with Jack and the performance of George thereunder, has the equitable status of an adopted son of Jack and is entitled to distribution of all of Jack's estate, save and except a part thereof which George had assigned in writing to blood relatives of Jack. This decree became final.

Thereafter the inheritance tax appraiser filed his report, found that George was a stranger to the blood of Jack, allowed a specific exemption of \$50 as a "Class D" transferee, and computed the inheritance tax due at the rate of a stranger under sections 13310 and 13407 of the Revenue and Taxation Code. George and the administrators filed objections to the report under section 14510 of the Revenue and Taxation Code. The objections were heard before Judge Hansen, who found: the decree of Judge Clark had never been appealed from and was final; the same facts as found by Judge Clark; by reason of the decree of Judge Clark, George was able to succeed to the estate and be distributed the property thereof only by virtue of the establishment of his status as an adopted son and that George inherited the property "from the said estate" as a result of having the status of an adopted son; the determination made by Judge Clark was the determination that George was adopted when under the age of 21 years by the deceased in conformity with the laws of this state; George was able to succeed to the estate only by virtue of his having the status of an adopted son and not as a stranger; pursuant to section 13307 of the Revenue and Taxation Code, George as an adopted son was a "Class A" transferee. Judgment was rendered accordingly. The controller appeals.

The controller asserts the findings and decree of Judge Clark did not have the effect of an order of adoption as provided in sections 221 to 229 of the Civil Code; did not purport to determine that George was adopted by the decedent in conformity with the laws of this state; did not purport to fix and could not fix the status of George for the purpose of computing the inheritance tax so as to be binding on the controller; for the purpose of the tax laws, George is a stranger to the deceased and is a "Class A" transferee and within the class covered by section 13310 of the Revenue and Taxation Code.

George and the administrators contend the decree of Judge Clark is a judgment *in rem*, binding on the controller, and that that decree was tantamount to the finding of an adoption in conformity with the laws of this state.

A "Class A transferee" means one who is the lineal issue of the decedent and one "whose relationship to the decedent is that of a child adopted by the decedent in conformity with the laws of this State, provided such child was under the age of 21 years at the time of such adoption." Rev. & Tax.Code, § 13307. Generally a stranger to the blood of the decedent is a "Class D transferee". Rev. & Tax. Code, § 13310.

[1] There can be no question but that the agreement was valid and that Judge Clark correctly decided George is entitled to distribution of all of the estate of the decedent. In re Estate of Grace, 88 Cal. App.2d 956, 962-967, 200 P.2d 189, and cases there discussed. In any event, that decree is a final judgment. We will not reach the problem whether the decree rendered by Judge Clark is to be given the effect of *res judicata* in the proceeding to fix the inheritance tax since it merely adjudicated that George has the equitable status of an adopted son of Jack and is entitled to distribution of all of Jack's estate. We assume, solely for the purpose of this decision, that in the proceeding before Judge Hansen it was an adjudicated

fact that George has the equitable status of an adopted son of Jack and is entitled to distribution of all of Jack's estate.¹

The findings in the inheritance tax proceeding that, by reason of the decree of Judge Clark, George was able to "succeed" to decedent's estate and be distributed the property of the estate only by virtue of his status as an adopted son; that he "inherited" the property of the decedent as a result of having the status of an adopted son; that the determination of Judge Clark was a determination that George "was adopted by the decedent in conformity with the laws of this state"; that he was able to succeed "only by virtue of his having the status of an adopted son and not as a stranger"; and that he was a Class A transferee, cannot be sustained.

[2-5] The procedure for the adoption of children was unknown to the common law. Adoption of McDonald, 43 Cal.2d 447, 452, 274 P.2d 860; In re Adoption of Parker, 31 Cal.2d 608, 612, 191 P.2d 420. The Legislature from the earliest years of statehood has provided a statutory scheme under which adoptions might be carried out. In re Barents, 99 Cal.App.2d 748, 750, 222 P.2d 488. Adoption exists only by virtue of the statutory law. Matter of Cozza, 163 Cal. 514, 522, 126 P. 161. The rights and obligations springing therefrom are entirely matters of statutory regulation. In re Estate of Calhoun, 44 Cal. 2d 378, 380, 282 P.2d 880; In re Estate of Jobson, 164 Cal. 312, 315, 128 P. 938, 43 L.R.A.,N.S., 1062; In re Estate of Moore, 7 Cal.App.2d 722, 724, 47 P.2d 533, 48 P. 2d 28. The mode prescribed by statute for adoption of a child is the measure of the power, and one claiming that an adoption has been accomplished must show that the statute has been complied with. In re Estate of McCombs, 174 Cal. 211, 214, 162 P. 897. And an adoption is effective only when it is done in the manner laid down

by the code. Adoption of McDonald, 43 Cal.2d 447, 452, 274 P.2d 860; In re Adoption of Parker, 31 Cal.2d 608, 617, 191 P.2d 420.

[6-9] The statutes governing adoption must be read into the statutes of succession. In re Estate of Winchester, 140 Cal. 468, 470, 74 P. 10; In re Estate of Hampton, 55 Cal.App.2d 543, 551, 131 P.2d 565; In re Estate of Jones, 3 Cal.App.2d 395, 396, 39 P.2d 847. To establish a person's right to inherit from the person claimed as an adopting parent, there must be proof of an act of adoption done in accordance with the statute. In re Estate of McCombs, 174 Cal. 211, 214, 162 P. 897. It is only after adoption in conformity with the laws of this state that the person adopting and the person adopted sustain the legal relation of parent and child and have all the rights and are subject to all the duties of that relation. Civ.Code, § 228; In re Estate of Taggart, 190 Cal. 493, 498, 213 P. 504, 27 A.L.R. 1360. It is only an adopted child who is deemed a descendant of one who has adopted him, the same as a natural child, for purposes of succession. See Prob.Code, § 257, as amended in 1955.

In *Wooster v. Iowa State Tax Commission*, 230 Iowa 797, 298 N.W. 922, 925, 141 A.L.R. 1298, the court held that one who stood in the relation of an adopted daughter by estoppel—i. e., had been taken into the adoptive parents' home and treated as a daughter by the parents but had not been legally adopted—was not, by reason of the fact that the foster parents and those in privity with them were estopped to question her status as an adopted child, entitled to the right of inheritance as an heir by reason of a legal adoption as though the statutory proceedings for adoption had been fully complied with; that "taking a child into a family and treating it as natural offspring is not adoption." *Wooster* says a decree such as that made by

1. See Probate Code, § 1080; In re Estate of Bloom, 213 Cal. 575, 580, 2 P.2d 753; In re Estate of Holt, 61 Cal.App. 464, 466, 215 P. 124; In re Estate of Ampu-

sait, 131 Cal.App. 533, 537-539, 21 P.2d 691. Cf. *Rediker v. Rediker*, 35 Cal.2d 796, 800-804, 221 P.2d 1, 20 A.L.R.2d 1152.

Judge Clark does not change the status of either party but merely enforces a contract which has been fully performed by one side; that the principle involved is property recompense measured in the amount fixed in the statutes of descent and distribution.

[10-12] Will George be treated as a Class A transferee by reason of the fact that the transfer to him is made in pursuance of a contract entered into by the decedent? A cardinal purpose of the inheritance tax law is to coordinate the assessment of the tax as closely as possible with the substantive probate law regulating the distribution of the decedent's estate. In *re Miller*, 31 Cal.2d 191, 199, 187 P.2d 722. Generally speaking the state assesses the privilege of succeeding, gives preferences, and computes the tax on the interests of heirs, legatees, and devisees, and the degree of relationship, if any, to the decedent. *Cohn v. Cohn*, 20 Cal.2d 65, 67, 123 P.2d 833; 85 C.J.S., Taxation, § 1163, p. 981. There can be no estoppel as against the state in the fixing of inheritance taxes. "Resort to estoppel where the statutory requirements are not met would not only defeat the safeguards prescribed by the Legislature but would amount to the creation of a method of adoption—by private agreement of the parties—not recognized at common law or by statute." In *re Adoption of Parker*, 31 Cal.2d 608, 617, 191 P.2d 420, 425.

An Iowa statute gave a specified exemption to "legally adopted sons and/or daughters" in fixing the inheritance tax. Code of Iowa 1939, § 7312.1, I.C.A. § 450.9. Another statute specified the rate of tax when property passed to any child, "including a legally adopted child * * * entitled to inherit under the laws of this state". Code of Iowa, 1939, § 7313, I.C.A. § 450.10. In *Wooster v. Iowa State Tax Commission*, supra, 230 Iowa 797, 298 N.W. 922, 141 A.L.R. 1298, it was held that the state in making a classification for inheritance tax purposes is not in such privity with a foster parent as to be bound

by an estoppel of such parent to question the status as an adopted child of one not formally adopted, and that a decree establishing the rights of a child under an agreement to adopt it, not performed on the part of the foster parents, is not a judgment *in rem* determining status so as to be binding upon the taxing authorities as respects exemption and rate of tax upon property received by an adopted child.

A Montana statute, R.C.M.1947, § 91-4409, prescribed a lower rate of inheritance tax when property passed to "any child adopted as such in conformity with law" than when the property passed to a stranger to the blood of the decedent. In *re Clark's Estate*, 105 Mont. 401, 74 P.2d 401, 114 A.L.R. 496, is on all fours with the case at bar. The facts were substantially the same. The trial court fixed the tax of George John Pale, a person in the shoes of George Radovich, on the basis that he was a stranger to the blood of the decedent. On review the court held, 74 P.2d 413:

"The courts have uniformly assumed the validity of executory contracts to adopt. 1 Am.Juris., § 16, p. 630. Contracts to adopt, not performed by effectual adoption proceedings during the life of the adoptive parent, will, upon the latter's death, be enforced to the extent of decreeing that the child is entitled to such right of inheritance from the estate of the adoptive parent as a natural child would enjoy, where the child in question has fully performed the duties to the adoptive parent, when circumstances require the relief as a matter of justice and equity. [Citations.]

"Since the courts will specifically enforce contracts to adopt where they have been performed by the child, at least to the extent of securing to the child the share of the estate which it would have inherited if the adoption were completed, it is argued that George John Pale was adopted in conformity with law. In 2 C.J. § 27, page 401, it is said: 'In upholding such a

remedy, the courts do not hold that the child is entitled to the right of inheritance as an heir. They do not undertake to change the status of either party, but merely to enforce a contract which has been fully performed on one side.' * * *

"The distinction was pointed out in *Burns v. Smith*, 21 Mont. 251, 53 P. 742, 69 Am.St.Rep. 653. "The question that confronts us here is: Does the plaintiff claim to be an heir of the deceased? Or is not her claim adverse to the law? She is not an heir at law, nor does she claim under or through an heir of the estate. Whatever claim she has, we think, results and comes to her under the contract alleged to have been made with the deceased in his lifetime as set out in the complaint." [Citations.]

"The trial court correctly held that George John Pale was not a child adopted as such in conformity with law, and therefore its determination of the amount of tax due was correct in this respect."

See 2 C.J.S., Adoption of Children, § 27, p. 401.

Lamb's Estate v. Morrow, 140 Iowa 89, 117 N.W. 1118, 18 L.R.A.,N.S., 226, held that articles of adoption, not acknowledged, recorded, nor complying with the statutes, being insufficient to make the adoption valid, are insufficient to establish heirship in the adopting parents' property; and that a proceeding to assess an inheritance tax not being in equity, one claiming as an heir, under irregular adoption proceedings, cannot rely upon equitable circumstances.

[13] The inheritance tax law allows the status of an adopted child to be fixed

by one method only—by statutory adoption. When such status has been thus fixed the adopted child becomes entitled to the classification and preference provided by the statute for property passing to a statutory adopted child. Manifestly when a party fails to take the steps prescribed by the state to effectuate a statutory adoption, the fact the agreement is enforced by permitting the child to take the same share of the estate as he would have taken had he been legally adopted does not bar the state from standing on the facts as they actually exist in classifying for inheritance tax purposes.

[14] The inheritance tax law excludes all grafting of children upon another family stock otherwise than by adoption proceedings conforming to the law of this state governing the subject. George has no statutory right to inherit or to succeed to the estate. His right comes solely from the agreement. The conclusion necessarily follows that he is not a child adopted by the decedent in conformity with the laws of this state. He does not have the status of an adopted child or any right of inheritance as such. Neither the decree of Judge Clark nor the facts found by Judge Hansen changed his previous status to that of an adopted child.

We hold George Radovich is not entitled to the preference or exemption and rate of inheritance tax of a child adopted by the decedent in conformity with the laws of this state, and is not a Class A transferee, but is a Class D transferee.

The judgment appealed from is reversed with directions to render a judgment in conformity with this opinion.

SHINN, P. J., and PARKER WOOD, J., concur.

144 Cal.App.2d 334

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Erwin E. HASSEN, Defendant and
Appellant.

Cr. 5545.

District Court of Appeal, Second District,
Division 1, California.

Sept. 5, 1956.

Prosecution for forgery arising out of defendant's alleged attempt to lull holders of junior trust deeds into a feeling of security by producing invalid receipts of first trust deed holder indicating that defendant was keeping up payments. The Superior Court of Los Angeles County, John G. Barnes, found defendant guilty of forgery and denied motion for new trial from which defendant appealed. The District Court of Appeal, White, P. J., held that testimony of corporate employee whose name was allegedly forged to trust deed payment receipt that she did not sign same nor authorize any person to do so, together with records of corporation showing no payments for which receipts were allegedly given, sufficiently sustained finding that receipt was false and that person who signed another's name to it did so without authority.

Affirmed.

1. Criminal Law Ⓒ409

No person can be convicted of a crime on extrajudicial admissions alone and the corpus delicti must be proven independent of admissions.

2. Criminal Law Ⓒ409

In prosecution for forgery arising out of defendant's alleged attempt to lull holders of junior trust deeds into a false sense of security by producing forged receipts of payments on first trust deed, evidence of person whose name was allegedly forged to receipt that she did not sign same or authorize any one to do so, together with

records showing no payments for which receipts were supposedly given, sufficiently proved corpus delicti independent of defendant's admissions. West's Ann.Pen. Code, § 470.

3. Criminal Law Ⓒ563

Proof of corpus delicti does not necessarily involve or require proof that the crime charged was committed by the accused.

4. Criminal Law Ⓒ563

Prosecution is not required to establish corpus delicti to the same degree of certainty as is required to establish the fact of guilt, and slight or prima facie proof is all that is necessary.

5. Criminal Law Ⓒ563

The corpus delicti may be proven by circumstances shown in evidence or by inferences reasonably drawn therefrom and direct or positive evidence is not essential.

6. Criminal Law Ⓒ563

Where a prima facie case is presented that a crime was committed, evidence is sufficient to establish corpus delicti.

7. Corporations Ⓒ402

A corporation may not authorize, without the person's consent, the use of an employee's personal signature for the signing of corporate receipts. West's Ann.Pen. Code, § 470.

8. Forgery Ⓒ44

Evidence sustained conviction for forgery arising out of defendant's alleged attempt to lull holders of junior trust deeds into sense of false security by producing forged receipts showing payments to first trust deed holder. West's Ann.Pen.Code, § 470.

9. Criminal Law Ⓒ330

Where the subject matter of a negative averment in indictment or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, generally, burden of proof as to such averment or fact is upon defendant.

10. Criminal Law Ⓒ317**Forgery** Ⓒ35

In prosecution for forgery where defendant raised question that it had not been sufficiently proven that he was without authority to sign name to receipt, burden was on defendant to show such authority and court could consider fact that he did not take witness stand or present any witnesses to testify in his behalf. West's Ann. Pen.Code, § 470.

11. Criminal Law Ⓒ338(1)

In prosecution for forgery arising out of defendant's alleged attempt to lull holders of junior trust deeds into false sense of security by producing forged receipts evidencing payments to first trust deed holder, there was no error in refusal to admit irrelevant testimony to effect that first trust deed holder did not intend to require defendant to make payments on trust deed.

12. Criminal Law Ⓒ1023(10)

Statute does not authorize an appeal to be taken from a verdict.

Jerry Giesler, Robert A. Neeb, Jr.,
Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, containing six counts, defendant was accused as follows: (1) Count I—the crime of Grand Theft in violation of Section 487, subdivision 1, of the Penal Code, a felony, in that on or about August 4, 1954, at or in the County of Los Angeles, the defendant did wilfully, unlawfully and feloniously take a certified check of the value of \$5,400, which was the personal property of Zenith National Insurance Company; (2) Counts II, III, IV and V—the crimes of Forgery in violation of Section 470 of the Penal Code, a felony, in that on or about June 7, 1954, August 16, 1954, September 10, 1954, October 8, 1954, at or in the County of Los

Angeles, the defendant, with intent then and there to cheat and defraud M. A. Showers, Morris Miller and Frank Fishman, did wilfully, unlawfully, fraudulently and feloniously make, alter, forge and counterfeit a certain receipt on each of the above dates in writing, for the payment of money, each in the sum of \$5,407.20, and did then and there utter, publish and pass the same, knowing that said receipt was false, altered, forged and counterfeited, as aforesaid, with intent then and there to cheat and defraud the said M. A. Showers, Morris Miller and Frank Fishman; (3) Count VI—the crime of Forgery in violation of Section 470 of the Penal Code, a felony, in that on or about September 8, 1954, at or in the County of Los Angeles, with intent then and there to cheat and defraud Morris Miller and Bank of America National Trust and Savings, a corporation, did wilfully, unlawfully, fraudulently and feloniously make, alter, forge and counterfeit a certain Beneficiary's Statement, dated September 8, 1954, in connection with the Bank of America, Beverly-Wilshire Branch, Escrow No. 213-7141, and did then and there utter, publish and pass the same, knowing that said Beneficiary's Statement was false, altered, forged and counterfeited, as aforesaid, with intent then and there to cheat and defraud the said Morris Miller and Bank of America National Trust and Savings, a corporation, and M. A. Showers.

The defendant was arraigned, made a motion under Section 995, Penal Code, which the court granted as to Count I and denied as to the other counts, and he then entered his plea of "Not Guilty".

The cause was called for trial and a jury was selected and sworn. Pursuant to stipulation of counsel and the defendant personally consenting, trial by jury was waived and the jury was discharged.

By stipulation of counsel, and the defendant personally consenting, the evidence received by the court and jury was submitted to the court to determine the guilt or innocence of the defendant on Count V

only. As to the remaining counts, II, III, IV and VI, the court declared a mistrial pursuant to stipulation of counsel. Thereafter, these latter counts were dismissed.

Defendant was found guilty of forgery as charged in Count V of the information. Motion for a new trial was denied and defendant was sentenced to imprisonment in the County Jail for the term of one year. Execution of sentence was suspended and defendant was granted conditional probation.

From the order denying his motion for a new trial and from "the verdict", defendant prosecutes this appeal.

The following will serve as an epitome of the evidence relating to Count V only (on which count alone defendant was convicted).

Four trust deeds came into existence relating to property on the corner of Rossmore and Rosewood Streets in Los Angeles.

The defendant was the last purchaser of this property and bought it on February 27, 1953.

On January 29, 1954, the Guarantee Mutual Life Company, holder of the first trust deed, sold the first trust deed to Zenith National Insurance Company. Up to and including January 4, 1954, the Hassen family, Erwin E. Hassen Foundation and Hassen Hospitals, Inc., were the only stockholders of Zenith Company.

After purchasing the property, the defendant stated to Mr. Morris Miller, a shareholder of the Country Club Villa Corporation, and holder of the second trust deed on the above property, that he could not make the payments on the first trust deed. Thereafter, the defendant and Miller had a number of conversations concerning payments on the three trust deeds, and later Miller filed an action against the defendant in August, 1953. This suit was settled and part of the settlement provided that the defendant shall pay the amounts which become due on the first trust deed and thereafter provide Miller with a receipt of

such payment within ten days after such payment accrued.

Count V charges the defendant with having forged the name of M. A. Showers, cashier of Zenith National Insurance Company, on a receipt of the Zenith Company, showing that the October payment on the first trust deed was made. The defendant conveyed this receipt to Miller who believed that this receipt represented that the October payment on the first trust deed was in fact made.

Mrs. Cornwell, cashier of Zenith Company, who was M. A. Showers prior to her marriage and signed documents of the Zenith Company with her signature "Mary Ann Showers" or "M. A. Showers" testified that she did not sign the October corporate receipt, nor did she authorize any one any time to sign her name to that document, nor did she at any time receive \$5,407.20 described in that document.

The records of Zenith Company revealed that no principal payments had been made on the first trust deed after March 1, 1954. People's Exhibit No. 8 represented a principal and interest payment on the first trust deed.

Mr. Miller discovered that the October corporate receipt, People's Exhibit No. 8, was not valid in November, 1954. Subsequently, the defendant admitted to Miller that he had given him an invalid receipt and described how he had copied the signature of "M. A. Showers" thereon. At a later meeting between Miller and the defendant, the defendant tried to "grab" an envelope in Miller's possession which contained a photostatic copy of the October corporate receipt which the defendant had given him.

As his first and main ground for reversal of the judgment and order in the instant case appellant earnestly contends that proof of the *corpus delicti* of the crime of forgery charged in Count V was lacking. In this regard appellant relies on the claim that in a forgery prosecution it must be shown that the instrument was false and

that this is not proven until it is shown that the person who signed another's name did so without authority. *People v. Whiteman*, 114 Cal. 338, 344, 46 P. 99. That the only manner in which the prosecution could show lack of authority in this case would be to show that the Zenith Insurance Corporation itself gave no authority for the receipt here in question to be issued and that this required the prosecution to produce all of the minutes and by-laws of the corporation dealing with authority to act for the corporation, or to have shown by a complete set of minutes and by-laws what persons were authorized to do certain acts in behalf of the corporate entity. Corporations Code, section 832; *People v. Hidalgo*, 134 Cal.App. 293, 294, 25 P.2d 270. Appellant argues that the necessity for such proof assumes importance in this case because the corporation was admittedly a closely knit family corporation, founded by defendant and controlled by him and his family.

[1-6] While it is true, as contended by appellant, that it is a well established doctrine that no person can be convicted of a crime on extra-judicial admissions alone and that the *corpus delicti* must be proven independent of admissions, we are satisfied that the evidence, leaving entirely out of consideration the statements and admissions of appellant, sufficiently proves the *corpus delicti*. Proof of the *corpus delicti* does not necessarily involve or require proof that the crime charged was committed by the accused, *People v. Cowan*, 38 Cal.App.2d 231, 240, 101 P.2d 125; *People v. Cowling*, 6 Cal.App.2d 466, 471, 44 P.2d 441; *People v. Wilt*, 40 Cal.App.2d 124, 127, 104 P.2d 387; *People v. Shapiro*, 40 Cal.App.2d 321, 323, 104 P.2d 688; *People v. Flores*, 34 Cal.App. 393, 394, 167 P. 413, and it is well settled that the prosecution is not required to establish it by proof to the same degree of certainty as is required to establish the fact of guilt. Slight or *prima facie* proof is all that is necessary. It may also be proved by circumstances shown in evidence, or by inferences reasonably

drawn therefrom; direct or positive evidence is not essential. When a *prima facie* case is presented that a crime was committed the evidence is sufficient. *People v. Hudson*, 139 Cal.App. 543, 544, 34 P.2d 741; *People v. Clark*, 70 Cal.App. 531, 544, 233 P. 980; *People v. Wiesel*, 39 Cal.App.2d 657, 664, 104 P.2d 70; *People v. Van Scoyoc*, 25 Cal.App.2d 416, 418, 77 P.2d 485; *People v. Seymour*, 54 Cal.App.2d 266, 275, 128 P.2d 726.

With the foregoing rules in mind the record reveals that there was before the court evidence that:

(1) After the appellant purchased the Casa Blanca Hotel (Rossmore and Rosewood Streets), thereby becoming obligated to make payments on the four trust deeds on that property, he became delinquent in his payments. This led to a suit by Miller, holder of the second trust deed, which was settled on condition that the appellant supply Miller with receipts of payments on the first trust deed within 10 days after they accrued.

(2) In October, 1954, appellant gave to Miller a receipt from Zenith National Insurance Company, holder of the first trust deed, signed by "M. A. Showers", cashier of Zenith Company, indicating that the October payment of \$5,407.20 was made. Similar receipts for the months of June, August and September in similar fashion were earlier delivered to Miller by the appellant. Possessed of these receipts, Miller was secure in the belief that all the payments due on the first trust deed had been made up to and including October 8, 1954.

(3) Mrs. Mary Ann Cornwell, the former Mary Ann Showers, or M. A. Showers, cashier of Zenith Company, testified that the signature on the October, 1954, receipt was not her signature, and that she did not at any time authorize anyone to sign her name thereto, nor did she ever receive the \$5,407.20 described thereon. In like fashion she testified in regard to June, August and September receipts. All the above receipts were written on stationery

from memoranda pads of the type available and used by Zenith Company.

(4) The records of Zenith National Insurance Company do not reflect the first trust deed payments for the months of June, July, August, September and/or October, 1954. In fact, the records reveal that no principal payments on the first trust deed were made after March 1, 1954.

(5) In September, 1954, Miller attempted to borrow money on his second trust deed and pursuant thereto gave to the appellant a beneficiary statement obtained from the Bank of America for the defendant to take to Zenith Company to have that company insert thereon the balance remaining on the first trust deed. The defendant returned this document to Miller with the figure \$290,000 in the appropriate space and bearing the signature "M. A. Showers". The defendant stated to Miller that he had observed "M. A. Showers" sign the document and, in Miller's presence, wrote thereon, "Witness E. E. Hassen" after Miller indicated that the document ought to have been witnessed.

Mrs. Cornwell testified that she did not sign the beneficiary statement, nor did she at any time authorize anyone to sign her name to that document.

(6) Miller discovered that the above corporate receipts, and the October, 1954, receipt, were invalid in November, 1954, and thereafter had several conversations with the defendant relative thereto. At one of these meetings the defendant attempted to "grab" an envelope in Miller's possession which contained photostatic copies of the above receipts.

All of the foregoing evidence was admissible under the stipulation after trial by jury had begun and when a jury was waived and the cause submitted to the court on Count V, at which time it was agreed that all of the evidence presented up to that time as to all counts was to be considered by the court in determining appellant's guilt or innocence as to Count V. In *People v. McKenna*, 11 Cal.2d 327, 332, 79 P.2d 1065, 1068, it is stated, "The crime

of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. Sec. 470, Pen.Code. * * * the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine. [Citing cases.]"

Measured by the foregoing rules and the testimony hereinabove narrated, we are satisfied that the *corpus delicti* as to Count V was legally established. There can be no doubt that Morris Miller acted upon the fictitious receipt as being genuine and that it was given to him by appellant with intent to defraud.

[7] We are convinced that appellant's argument that since the receipts were corporate receipts the "lack of authority" element could only be proved by showing that the corporation itself gave no authority for issuance of the receipt lack substance. Conceding that the Zenith Company through its officers could authorize the issuance of corporate receipts the corporation was without power to authorize the signing by appellant of the name of "M. A. Showers". This was her personal signature and because she was an employee, the corporation was not authorized, without her consent, to assign the use of her personal signature to appellant or any one else. Appellant relies upon the case of *People v. Hidalgo*, 128 Cal.App. 703, 18 P.2d 391, and *People v. Lundin*, 117 Cal. 124, 48 P. 1024. These authorities do not aid appellant because they are easily distinguishable from the facts and circumstances present in the case now engaging our attention. The conviction in the *Hidalgo* case was reversed because the defendant was charged with having forged and passed a check drawn by "Baker Ice Co., L. Baker, H. Spencer" and there was no evidence at the trial that L. Baker or H. Spencer were not authorized to draw checks on this account. The bank records revealed that it was authorized to honor a signature by "J. M. McKenzie, Manager of the corporation, or any other, by said J. M.

McKenzie." (Emphasis added.) No showing was made that J. M. McKenzie did not authorize L. Baker and H. Spencer to draw the checks, which were the subject of the forgery. Moreover, the court stated that it was necessary for the prosecution to show that neither of these persons was authorized to sign the checks, and if authorized that neither of them had signed the checks or authorized his name to be signed by the defendant thereto. Since the prosecution made no such attempt, and since neither J. M. McKenzie nor any other officer of the corporation was called as a witness, the evidence failed to show lack of authority.

In the Lundin case the defendant was convicted of forgery for having passed a check signed by one John F. Johnson, but no testimony was introduced that the accused was not authorized to sign the name of the witness John F. Johnson to the check.

In the instant case, the witness Mary Ann Showers or M. A. Showers, whose name was signed to the receipt in question, not only testified that the receipts which purportedly bore her signature were not signed by her but that she did not either orally or in writing authorize any one to sign her name to those receipts. What stronger evidence of "lack of authority" could be presented?

Since the *corpus delicti* was adequately and legally established, we deem it unnecessary to here set forth in detail the voluminous evidence received while the cause was on trial before the jury other than to say that all of it was properly before the court in considering Count V, pursuant to stipulation as follows:

"Mr. Crail: Your honor please, as far as the People are concerned, we will stipulate that the case insofar as Count five is concerned, that the evidence thus far received may be submitted to the Court to determine the guilt or innocence of the defendant on that particular Count.

"The Court: Very well.

"Mr. Higgins (Attorney for defendant): We so stipulate, your Honor. You so stipulate personally, do you not, doctor?

"The Defendant: Yes.

"Mr. Higgins: I have explained to the defendant, your Honor, that all of the testimony that has been produced in this trial is to be considered by your Honor with reference to his guilt or innocence as to Count 5 of the Information. You understand that, do you, doctor?

"The Defendant: Yes.

"The Court: Very well."

[8] Suffice it to say that when all of the evidence is considered it reveals a course of conduct on the part of appellant teeming with fraud and replete with intrigue, deception and duplicity, all of which not only establish the *corpus delicti* but fully warranted the court in finding the accused guilty of the crime of forgery as charged in Count V of the information. As stated by respondent, it "convincingly displays the defendant's felonious intent to deceive and defraud the junior secured creditors. It was the defendant's intent to lull the holders of the junior trust deeds into a feeling of security by producing the invalid receipts of the first trust deed holder, indicating, thereby, that the defendant was keeping up these payments."

[9] It is also noteworthy that appellant did not take the witness stand, nor did he present any witnesses to testify in his behalf. From a reading of the record in this case we are impelled to the view that it presents a situation wherein the rule referred to as, "the rule of convenience or necessity" might properly be applied. The rule is thus stated in 16 Cor.Jur. 530, quoted with approval in *People v. Osaki*, 209 Cal. 169, 191, 286 P. 1025, and *People v. Agnew*, 16 Cal.2d 655, 663, 107 P.2d 601, 605, "Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or oth-

erwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him.'"

[10] Particularly applicable to the case at bar is the language of the court in *People v. Caldwell*, 55 Cal.App.2d 238, 251-252, 130 P.2d 495, 502, as follows: "While the information accused appellant of a forgery necessitating proof that he did not have the authority * * * to affix the * * * name to the certificate or to the indorsement upon it, appellant did not take the stand to throw any light upon that subject. Under the circumstances * * appellant should have assumed some of the responsibility of defeating the accusation rather than of maintaining the attitude of expecting the prosecution to fail in its proof. * * * His proof of possession of any such authority would instantly have dispelled the web that entangled him, and if such proof existed it lay peculiarly within his knowledge." See also *People v. Terrill*, 133 Cal. 120, 65 P. 303.

That recognition of the rule of convenience does not deprive the accused of the presumption of innocence was the holding in *People v. Cline*, 79 Cal.App.2d 11, 15, 179 P.2d 89, while in *People v. Osaki*, supra, 209 Cal. at page 186, 286 P. at page 1031, our Supreme Court said: "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence, § 2486."

[11] Finally, appellant assigns as prejudicial error the action of the court in sustaining objections to certain questions propounded on cross-examination of the witness Edgar S. Wilkinson, President of Zenith Corporation. While we are not directed to any particular questions to which it is claimed that objections were erroneously sustained, we have examined the record and in the light of appellant's brief it appears that he was attempting to

show that Zenith Corporation was arranging to acquire the trust deed in question for the express purpose of making it unnecessary for appellant to make payments of principal and that the only reason there was ever any foreclosure which affected the trust deed holders on the property was because the Insurance Commission questioned the transaction, "and this was all contrary to what Dr. Hassen (appellant) expected to happen". We fail to perceive the materiality of the testimony attempted to be elicited as being within the issues framed by the information or established by the evidence, and therefore conclude that the objections were properly sustained on that ground as well as on the ground, in some instances, that the questions called for hearsay testimony.

Appellant also contends he was entitled to ascertain from the witness what the latter knew about Zenith Corporation's arrangement to forego payments on the loan because of appellant's announced position that all of his acts were with the knowledge and consent of the insurance company officers. The objections to this line of questioning were properly sustained. The only "announced position" of appellant that we can find in the record was a statement made by defense counsel while arguing an objection to a question propounded to the witness Wilkinson on cross-examination. There is no testimony as to such a position in the record. Neither appellant himself or any other witness testified with reference thereto. And, as heretofore pointed out, the Zenith Corporation was without authority to authorize appellant to sign the name of Mary Ann Showers or "M. A. Showers" to the receipt in question without her consent.

[12] For the foregoing reasons, the attempted appeal from the "verdict" is dismissed since the trial by jury was waived, and for the further reason that the statute does not authorize an appeal to be taken from a verdict. The order denying defendant's motion for a new trial is affirmed.

DORAN and FOURT, JJ., concur.

144 Cal.App.2d 439

CREDIT BUREAU OF SAN DIEGO, Inc.,
a corporation, Plaintiff and Appellant,

v.

Raymond B. BEACH and James W. Thompson, Defendants,

and

Glenn R. Prescott, Defendant and
Respondent.

Civ. 5419.

District Court of Appeal, Fourth District,
California.

Sept. 13, 1956.

Action on agreement allegedly signed by copartner when defendant was a member of the partnership. The Superior Court, San Diego County, Dean Sherry, J., rendered judgment for defendant. Plaintiff appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence supported finding that partnership was not in existence when the agreement was signed.

Affirmed.

1. Partnership Ⓒ285

When a partnership is dissolved the authority of one partner to create a new obligation for the partnership is revoked and his agency for his copartner ends.

2. Partnership Ⓒ296(3)

Evidence supported finding that partnership was not in existence when defendant's former partner signed the agreement in behalf of partnership.

3. Appeal and Error Ⓒ1010(2)

A judgment cannot be reversed on appeal merely because the preponderance of the evidence may appear on the side of one party or the other, but only when there is a total absence of competent evidence to sustain material findings.

4. Partnership Ⓒ293

The use of neon signs for short time between date of creation of partnership and date of dissolution did not, on theory of estoppel, require partner to assume bur-

dens of agreement which was entered into after dissolution by the other partner and which related to use of signs, where partner received no particular benefits.

5. Principal and Agent Ⓒ23(1)

Evidence failed to show any ostensible agency of former business associate to sign agreement for defendant. West's Ann. Civ.Code, §§ 2300, 2307, 2310, 2311.

6. Principal and Agent Ⓒ119(1)

Where a third person relies upon an ostensible agency, he must give evidence of similar transactions in which the act of the agent was authorized or recognized.

Ruel Liggett, San Diego, for appellant.

Carlyle O. Buckner, San Diego, for respondent.

— — — — —
GRIFFIN, Acting Presiding Justice.

Plaintiff, as assignee of the claim of San Diego Neon Sign Company, a corporation (hereinafter referred to as the sign company) brought this action to recover, \$2,771.50, plus interest and attorneys' fees, from defendants Raymond B. Beach, Mrs. Glenn R. Prescott, and James W. Thompson, individually and against the first two named as doing business as Beacon Inn, based upon a claimed assignment of a Neon sign agreement between the sign company and defendant Thompson. Beach defaulted and judgment was entered in plaintiff's favor against him. Thompson appeared by answer and cross-complaint, denied the allegations of the complaint and alleged, as against defendants Beach and Prescott, that if defendant Thompson was held liable under plaintiff's complaint he should have judgment against them accordingly. Trial was had and judgment was rendered in favor of plaintiff and against Thompson and Beach, but the trial court held that there was not sufficient evidence produced to show any liability on the part of Mrs. Prescott. Judgment was rendered in favor of Thompson on his cross-complaint against Beach alone. This appeal is by plaintiff from that portion of the judg-

ment denying it any relief against Glenn R. Prescott.

The factual background shows that defendant Thompson and wife owned the Beacon Inn, near Cardiff. The sign company built, on his order, certain electric Neon signs and installed them upon the inn and leased these signs to Thompson under a 36-months lease at \$111.50 per month. The latest agreement was dated October 20, 1952, and contained certain conditions showing that title to the signs always remained in the sign company; that upon default or sale of the premises all amounts became due and the owner could terminate all rights of the user to said signs; that all conditions thereof were binding on the assigns and the interest of the user would be transferrable only upon the written consent of the owner. On September 4, 1953, the Thompsons entered into an escrow agreement, individually signed by all parties, agreeing to sell to defendant Raymond B. Beach and Glenn Riley Prescott, as tenants in common, the Beacon Inn, and its fixtures and furniture, subject to certain deeds of trust and a chattel mortgage. Therein is a clause reciting:

"We, Thompson, will hand you Assignment of that certain Neon Sign Contract with the San Diego Neon Company, with an unpaid balance of \$1500.00 no adjustment to be made; *tem* and conditions therein contained are hereby approved."

Immediate possession was to be given to defendants Beach and Prescott. It appears that defendants Prescott, and Beach as manager and operator, took over the inn about September 4, 1953. Thompson remained for about 30 days to acquaint Beach with its operation. Defendant Prescott returned to Arizona where she resided. She testified that she and Beach "entered into a partnership contemplating the purchase of the Beacon Inn" and that between September 4 and October 12, they were receiving profits and paying the current operating charges. Both defendants Beach and Mrs. Prescott, in accordance with the escrow

agreement, on September 10, 1953, joined the seller in signing and publishing a notice of intention to sell and purchase the business under section 3440.1 of the Civil Code. Thereupon the sign company filed in escrow a statement of the amount claimed due under the lease. It then appears that on October 10th or 12th, 1953, defendant Prescott entered into an agreement with defendant Beach to sell her interest in the property to Beach and, according to the testimony of Beach and Mrs. Prescott, she "walked out" and was "out of the picture" and claimed that their purported partnership was then terminated. Thereafter Beach and Thompson ran the business. Beach subsequently sold it to a Mr. Mouzas, and operated it for him under lease until the Board of Trade took it over. During this period Mrs. Prescott and Beach signed amendments to the escrow agreement, including one dated September 9, 1953, authorizing the vesting of the property conveyed to Raymond B. Beach and Glenn Riley Prescott to show an undivided $16\frac{2}{3}$ interest in Beach and $83\frac{1}{3}$ interest in Prescott. On December 5, 1953, in accordance with their previous agreement, there was an amendment to the escrow agreement filed in the original escrow which was signed individually by defendants Beach, Thompson and Prescott, providing for a grant deed of Mrs. Prescott's interest in the property to Beach, assumption of certain obligations by Beach, and execution of a trust deed on the property in favor of defendant Mrs. Prescott, with interest thereon from October 12, 1953, the date of the claimed dissolution of partnership. The escrow, showing title in Mouzas, was finally closed in June, 1954.

The pivotal question upon which plaintiff claims Mrs. Prescott is liable for the balance of the payments on the Neon Sign Agreement signed by Thompson, is based upon a certain printed, undated "Assignment of Agreement" in evidence, which recites in general that the assignor, James W. Thompson (who concededly signed it) assigns unto "Raymond B. Beach & Glenn R. Prescott" all of his rights as user under

the contract of October 20, 1952". Therein the assignee agrees also to be liable for payments of sums due thereon, plus attorneys' fees. Under the undated acceptance clause of the assignee appears the typewritten names "Raymond B. Beach & Glenn R. Prescott" and the printed word "By", followed by the signature of Raymond B. Beach. Then follows a paragraph signed by the sign company agent consenting to the assignment. As to each paragraph there is a printed space providing as follows: "Dated —, 19—". All three separate agreements were undated.

It is conceded that defendant Prescott never did sign this Assignment Agreement. She testified that she knew nothing about it until she was sued as a party defendant in this action on or about April 15, 1955. She denied specifically and generally that defendant Beach was her partner at the time of its execution and claimed he had no authority to execute it in her behalf; and that she did not approve nor ratify his actions in so doing. It is the testimony of Beach that the sign company called him into its office; that the assignment had been typed by the sign company and its agent directed him to sign at the place indicated; that he "signed it for himself" and did not intend to bind her and "figured she had to sign it too"; that he did not remember the date when he signed it but "it must have been in September or October, 1953"; and that he could not remember whether he was then in partnership with Mrs. Prescott.

The president of the sign company testified he did not know the date when the assignment was executed and did not know the date when he received it back from the title company. There is a letter in evidence written by the sign company to the escrow company dated September 15, 1953, enclosing their claim for \$3,083, or requesting a signed Assignment of Agreement by all parties as per forms enclosed. There is another letter from the sign company dated December 8, 1953, stating that it was reducing its claim by \$223 and upon receipt of

said amount and the signed assignment it would release its claim in escrow.

It is the claim of the plaintiff that there was a partnership in existence at the time the assignment was signed; that Beach, as one of such partners, had the authority to sign for the partnership and to bind Mrs. Prescott under the assignment; that the partnership was not dissolved on October 12, but continued in existence until the close of the escrow; that if Beach was not so authorized, Mrs. Prescott was estopped to accept the benefits of the agreement without assuming the burdens; and that a quasi contract or ostensible agency arose by which she became bound by the agreement, citing such authority as Sections 2300, 2307, 2310 and 2311 of the Civil Code; *Fairbanks v. Crump Irrigation & Supply Co.*, 108 Cal. App. 197, 291 P. 629, 292 P. 529; *Ralphs v. Hensler*, 97 Cal. 296, 32 P. 243; *Corporation of America v. Harris*, 5 Cal.App.2d 452, 43 P.2d 307; *Gaine v. Austin*, 58 Cal. App.2d 250, 136 P.2d 584; *Dreifus v. Marx*, 40 Cal.App.2d 461, 104 P.2d 1080; and *Safway Steel Products, Inc., v. Lefever*, 117 Cal.App.2d 489, 256 P.2d 32.

The trial court found generally in favor of Mrs. Prescott's contentions and specifically found that on October 12, 1953, Beach arranged to buy her interest in the partnership and that to accomplish this, further amended instructions were filed in the same escrow; that the partnership only extended to October 12, 1953; that Glenn R. Prescott never signed nor executed said agreement; that Beach executed it for himself alone and not as an authorized act of hers or the partnership; that she never ratified his conduct; that payments were made in September and October on the contract by checks signed "Beacon Inn, Raymond B. Beach", and no payments were subsequently made; and that plaintiff produced no sufficient evidence showing the contract was signed by Beach during the time he was a copartner with Mrs. Prescott, and consequently she is not personally liable to pay plaintiff anything under the lease agreement.

Further, it should be noted that in the closing of the escrow, an auditor submitted a report on the conduct of the business between September 4, 1953, and October 12, 1953, and apportioned the debts between Beach and Prescott for that period in the final settlement.

[1-3] When a partnership is dissolved the authority of one partner to create a new obligation for the partnership is revoked and his agency for his copartner ends. *Maryland Casualty Co. v. Little*, 102 Cal.App. 205, 211, 282 P. 968. The evidence was sufficient to support the court's finding in this respect. *Young v. Young Holdings Corporation, Ltd.*, 27 Cal.App.2d 129, 80 P.2d 723. It is scarcely necessary to add that a judgment cannot be reversed on appeal merely because the preponderance of the evidence may appear to be on the side of one party or the other, but only when there is a total absence of competent evidence to sustain material findings. *Corporation of America v. Harris*, 5 Cal.App.2d 452, 457, 43 P.2d 307.

[4] As to the claimed estoppel, the use of the signs for the short time between the date of the creation of the partnership and the date of its dissolution would not necessarily amount to an estoppel as a matter of law. No particular benefits were conferred upon Mrs. Prescott. The court found that the used signs had no trade-in value. Apparently Beach continued to use them for himself and while operating for the new owner, Mouzas. According to the evidence, the sign company endeavored to collect the amount due from them and never made any demand on Mrs. Prescott for the amount claimed due. On June 8, 1954, Thompson, through his attorney, demanded that Mouzas refrain from using his sign containing the name of "Thompson", which was in large letters, because it violated the agreement of sale. The sign company subsequently removed them on Mouzas' orders. Mouzas then ordered a new sign from the sign company.

[5] It does not affirmatively appear that Mrs. Prescott had full knowledge of the

assignment transaction and therefore, with such knowledge, she acted in such a manner that it might be unquestionably inferred that she acquiesced in the transaction and accordingly created a quasi contractual right in favor of the sign company. It does not appear that an ostensible agency of Beach to sign the assignment for Mrs. Prescott arose. This was the only instrument in which it was claimed by anybody that he had such authority as her agent. In all other agreements, amendments to the escrow, and other transactions, the individual name of Mrs. Prescott was demanded and furnished.

[6] It is a general rule of law that where a third person relies upon an ostensible agency, he must give evidence of similar transactions in which the act of the agent was authorized or recognized. 1 Cal.Jur. p. 742, sec. 42.

The judgment in favor of defendant Prescott is affirmed.

MUSSELL, J., and BURCH, J. pro tem.,
concur.



144 Cal.App.2d 245

**Evelyn Kipp MUELLER, Plaintiff and
Respondent,**

v.

**Herman W. MUELLER, Defendant and
Appellant.**

Civ. 8834.

**District Court of Appeal, Third District,
California.**

Aug. 30, 1956.

Rehearing Denied Sept. 25, 1956.

Hearing Denied Oct. 24, 1956.

Wife's divorce action. The Superior Court, Sacramento, County, James H. Oakley, J., granted wife an interlocutory decree of divorce upon the ground of extreme cruelty, granted wife custody and support of children, alimony and made a division of

property. Husband's motion for new trial was denied and he appealed from judgment on the motion. The District Court of Appeal, Schottky, J., held that where parties in divorce action were married eighteen years and had three minor children, the division of property and award of alimony sufficient so that it was not necessary that wife seek outside employment, was proper.

Judgment modified and affirmed.

1. Husband and Wife ⇨257

Where a spouse invests in a business before marriage and continues to operate the business after marriage, the division of profits into community and separate property is proportionate to what share of the profits originated from spouse's personal efforts and what share of the profits grew out of capital investment and this is determined from surrounding facts.

2. Husband and Wife ⇨249

Where husband invested in a business before marriage and after marriage wife worked in the business, location of business was changed with new furniture, fixtures and equipment added, profits from business were used to purchase a home and other property stipulated to be community property, worth of business multiplied and record did not disclose how separate property of husband was to be traced, original investment was so intermingled with community property as to constitute all community property.

3. Husband and Wife ⇨249

Where separate property of one spouse has been so intermixed with community property that the separate property cannot be traced, all the property is considered as community property.

4. Good Will ⇨1

A professional practice may, under certain circumstances, have a transferable good will attach to it.

5. Husband and Wife ⇨249

Where a general dental laboratory had been operated for more than twenty years and employed several men to do work for

dentists practicing in a wide area and net income of business averaged \$12,500 a year, good will attached to the business which could be counted as an asset of the community.

6. Divorce ⇨253

Where a dental laboratory business, established many years and serving a wide area, averaged \$12,500 annual net income, a valuation of \$25,000 for the good will of the business, used in determining community assets upon divorce, was not excessive.

7. Divorce ⇨240(5)

Where husband had a net income of between \$15,000 and \$20,000 per year, alimony award of \$250 per month to wife was not excessive and was not an abuse of discretion.

8. Divorce ⇨252

In divorce action brought by wife under statute authorizing divorce for extreme cruelty, it was the right and duty of the court to divide the property in such proportions as a court, from all the facts of the case and the condition of the parties, deemed just. West's Ann.Civ.Code, § 146, subd. 1.

9. Divorce ⇨240(2), 252

Where parties in divorce action, brought by wife on ground of extreme cruelty, were married eighteen years and had three minor children, a division of property and award of alimony sufficient so that it was not necessary that wife seek outside employment, was proper.

10. Divorce ⇨254

Where an interlocutory divorce decree purported to distribute community property between husband and wife, it would be modified by striking all words presently disposing of community property and inserting words to the effect that parties would be entitled at time of entry of a final decree, to portions of community property mentioned in the interlocutory decree.

Albert L. Wagner, and Thompson & Thompson, Sacramento, for appellant.

Pierce & Brown, Sacramento, for respondent.

SCHOTTKY, Justice.

Evelyn Mueller and Herman Mueller were married in 1935. Three children were born to them, Joan in 1936, Gary in 1939, and Neil in 1952. Differences arose between them, and after more than eighteen years of married life Mrs. Mueller filed an action for divorce. Following a trial she was granted an interlocutory decree of divorce upon the ground of extreme cruelty, was granted the custody of the children and was awarded alimony of \$250 per month and support for the three children of \$275 per month. The interlocutory decree also made a division of the property of the Muellers. Mr. Mueller's motion for a new trial was denied and he has appealed from said judgment.

Appellant husband does not challenge the decree in so far as it determines the marital status, the custody of the children or the amount awarded for their support, but appellant does make a vigorous attack upon the division of the property and upon the amount of alimony awarded respondent wife. Before discussing the specific contentions of appellant we shall give a brief summary of factual situation as shown by the record.

In 1926, when he was 19 years old, Mr. Mueller, a dental technician by trade, acquired a dental laboratory business for \$6,500. He testified that at the time of his marriage in 1935 the value of all his property, including this business, including money in the bank, and everything except his 1931 Pontiac automobile, was \$7,000, so it is apparent that there was little, if any, increase in the value of appellant's property between the date he purchased the dental laboratory business and the date of his marriage to respondent.

Mrs. Mueller started to work in the laboratory immediately after the marriage, doing general office work, stenography, and bookkeeping, and continued to work full time until the first child was born. After the birth of Joan and Gary, in addition to

taking care of two children she continued for fifteen years to give one week a month to keeping the books.

During the marriage the size of the business increased greatly. Mr. Mueller employs five men in addition to himself. The laboratory does work for dentists as far north as Alturas, as far east as Reno, as far west as Fairfield, and as far south as Newman. The income from the business also increased tremendously.

At the time of the trial the property of appellant and respondent had increased to assets valued by the court at \$128,883.89.

The court awarded respondent wife the following items of property:

The family home located at 2765 Land Park Drive, valued at	\$26,750.00
Household furniture and furnishings valued at	5,000.00
A 1950 Cadillac automobile valued at	1,800.00
Stocks valued at	1,803.12
Cash in the sum of	6,092.82
Present cash value of certain life insurance policies	9,569.60

The court awarded appellant husband the following:

Real property on Unsworth Avenue, Sacramento, equity valued at	700.00
(Gross value \$8,500.00, but subject to lien of \$7,800.00)	
Cabin at Thirty-Mile Stone, valued at	4,500.00
A one-third interest in Hamilton Jewelers, valued at	33,449.68
Proprietary interest in General Dental Laboratory, including book value of tangible assets of \$10,215.76; one Chevrolet automobile, \$1,050.00; and good will, \$25,000.00; less accounts payable, \$1,184.28; note payable to Anglo California National Bank, \$11,000.00; also less accrued taxes and payroll, \$999.62; valued at	23,081.86
Promissory note of Rose Hara valued at	10,896.33

The interlocutory decree provided further that "To equalize the respective distributing shares of the parties in and to the community property, defendant shall make, execute and deliver to plaintiff his promissory note in the sum of \$10,301.16 payable in installments of not less than \$100 per month, together with interest at the rate of five and one half per cent (5½%) per annum with unpaid balance due on or before seven (7) years from date," said note to be secured by a lien in favor of respondent upon the interest of appellant in Hamilton Jewelers.

Appellant's first contention is that the court erred in attempting to distribute the community property at the time of entering the interlocutory decree. He cites Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656, and numerous other cases which lay down the rule that the portions of an interlocutory decree purporting to make an immediate distribution of property are erroneous. Respondent in reply does not question the rule but asserts that appellant should be estopped to make this contention because appellant's counsel at the trial "repeatedly asserted to the court that one of the objects of the trial would be to have the court make a present division of the community property." The record shows that prior to the taking of testimony there was a discussion between counsel for the respective parties and the court as to a division of the property, and while there was no specific mention of present or immediate distribution, the court could well have, and undoubtedly did, infer from the statements of counsel that the parties did desire an immediate division of the property. However, in the instant case it is stated in respondent's brief and not disputed by appellant in his reply brief that appellant has not delivered to respondent any of the property awarded to her in the interlocutory decree, and therefore the error complained of is one "which may and should be corrected by striking out the words of present disposition and inserting words to indicate that the disposition will be made in the

final decree." Slavich v. Slavich, 108 Cal. App.2d 451, 457, 239 P.2d 100, 103.

Appellant makes a number of contentions in his attack upon the division of the property. These contentions center upon the finding as to the proprietary interest in General Dental Laboratory, which, as hereinbefore set forth, was awarded to appellant. The dental laboratory business was found by the court to be community property and appellant points to the evidence that nine years prior to his marriage he purchased said business for \$6,500 and argues that the court erred in failing to find what part of the business was his separate property. Respondent in reply points to testimony of appellant that at the time of the marriage the value of his business was \$6,500 and points also to the fact that no testimony was introduced to trace any part of the \$6,500 from the date of the marriage, or to show whether it was represented in fixtures or furniture which must have become obsolete or which may have been left when the business moved. Respondent points also to the testimony of appellant that the success and value of the business was due entirely to his skill and ability and argues that under the circumstances shown by the record, whatever may have been the separate interest of appellant in said dental laboratory business, it was hopelessly commingled with community earnings. Respondent quotes the following from *In re Estate of Fellows*, 106 Cal.App. 681, at page 684, 289 P. 887, at page 888:

"* * * it is incumbent upon the party contending for the separate estate to clarify the history of the property and to demonstrate, not to an exactitude, but to that degree of proof that clearly and convincingly satisfies an unprejudiced mind, that the property is separate property. *Freese v. Hibernia Sav. & Loan Soc.*, 139 Cal. 392, 73 P. 172. The burden of proof is upon the claimant of the property as separate estate."

Also at page 683 of 106 Cal.App., at page 888 of 289 P.:

"In the absence of evidence to the contrary, it must be assumed that the horses were lost by death and that the tools, implements, etc., were discarded at some period during the twenty-seven years of married life, as useless."

[1] The general rule is well expressed in 10 Cal.Jur.2d, pages 686, 687:

"If, however, one of the spouses invests his or her separate property in a business and conducts that business during marriage, the resulting profits are community and separate property in proportion to the amounts attributable to that spouse's personal efforts and to capital investment, respectively.

"What amount of the profits of a business conducted by one of the spouses is due to the personal efforts of that spouse and what amount is attributable to his or her capital investment must, in each case, be determined from the surrounding facts and circumstances."

[2, 3] In the instant case the record shows that respondent worked with appellant in said business after the marriage, that the profits from the business were used to buy a substantial home and other property including real property, stocks and an interest in the Hamilton Jewelry Company. It was stipulated in open court that all of this property was community property, which indicates strongly that the parties after their marriage regarded said dental laboratory business and the profits thereof as community property. While it is true that appellant paid \$6,500 for the business nine years prior to the marriage, it is also true that the location of the business was changed after the marriage and that new furniture, fixtures and equipment were added. In the absence of any evidence in the record to trace any of the property that was in the business at the time of the marriage, and in view of the manner in which the proceeds of the business were invested and regarded by appellant and re-

spondent, the court may well have concluded that any portion of the present value of the dental laboratory business that could be said to be traceable back to original investment was so intermingled with undisputed community property that it should be regarded as community property. For as stated in 10 Cal.Jur.2d, pp. 702, 703:

"But the presumption in favor of community property applies to commingled property so that the burden of proof rests upon the party claiming a part as his separate property. Accordingly, if separate property or funds which have been commingled with community property cannot be traced, the entire mass is treated as community property."

[4] Appellant next contends that the court erred in determining that the value of the dental laboratory should include an amount of \$25,000 which the court designated as good will. As hereinbefore set forth, the court found that the value of the business was \$23,081.86, and in determining that value listed the tangible assets at \$10,215.76, the Chevrolet at \$1,050, the good will at \$25,000, and listed the liabilities as accounts payable, \$1,184.28, notes payable, \$11,000, and accrued expenses, \$999.62.

Appellant argues that no good will attaches to a business which, appellant states, depends solely on his personal skill and ability. Appellant asserts that "goodwill has uniformly been held not to attach to a business or profession dependent upon the personal skill or ability of the owner." However, we believe the general rule to be as stated in 24 Am.Jur. 808, as follows:

"Frequently, it has been held that salable good will can exist only in commercial or trade enterprises and that it cannot arise in a professional business depending upon the personal skill and confidence in a particular person. This view seems traceable to the early and narrow definition given to good will by Lord Eldon. The better doctrine, however, appears to be that good will also exists in a professional prac-

tice or in a business which is founded upon personal skill or reputation. Where a person acquires a reputation for skill and learning in a particular profession, as, for instance, in that of a lawyer, a physician, or an editor, he often creates an intangible but valuable property by winning the confidence of his patrons and securing immunity from successful competition for their business, and it would seem to be well settled that this is a species of good will which may be the subject of transfer."

And in 38 C.J.S., Good Will, § 6, page 953, it is said:

"No rigid and unvarying rule for the determination of the value of good will has been laid down by the courts; each case must be determined on its own facts and circumstances. The determination of the question must, within proper limits, be left to the jury, whose conclusion must rest on evidence legitimately tending to establish value and supporting the verdict.

"In determining the value the profits are necessarily taken into account, and the value is usually estimated at so many years' purchase on the amount of such profits."

[5] But even if we assume, as does appellant, that no good will attaches to a business which depends solely upon the personal skill and ability of an individual, it does not follow that no good will attached to the dental laboratory business here involved. For the record shows that this General Dental Laboratory business has been operated by appellant for more than twenty years; that appellant employs five men in addition to himself; that it does work for dentists as far north as Alturas, as far east as Reno, as far west as Fairfield and as far south as Newman; that the average net income of said business for the five-year period preceding the separation of appellant and respondent was approximately \$12,500. We do not believe

that the court was compelled to accept appellant's testimony that the business was dependent solely upon the personal skill and ability of appellant and that no good will value attached to the business. We believe that the question of whether or not good will attached to the dental laboratory business was one of fact for the trial court to determine, and that the court's determination that good will did attach is supported by substantial evidence.

[6] Appellant next contends that even if it be held that good will did attach to the dental laboratory business, the amount of \$25,000 fixed by the court was grossly excessive.

The trial judge stated in his memorandum opinion:

"* * * Concerning the good will value, the evidence ranged from no value whatsoever to over \$34,500.00. Concededly this item can be an estimate only. The Court is convinced there is substantial value, but is not willing to put it as high as did plaintiff's accountant. It being an estimate only, though a substantial one, the Court has assigned the \$25,000.00 figure."

The testimony of George Harbinson, a certified public accountant called as a witness by respondent, was to the effect that good will of the so-called personal services businesses can be determined using two formulas: (1) the establishing of all or a percentage of one year's average gross income, (2) by ascertaining the average net income over a period of years, subtracting the portion allocable to salary and by capitalizing the difference over a period of years. The figure which Mr. Harbinson arrived at in applying both of these methods was \$34,578.15. Capitalization was for four years.

There was testimony of witnesses for appellant which in many respects was contrary to the testimony of Mr. Harbinson, but it is evident that the trial court believed Mr. Harbinson's testimony that good will did attach to the dental laboratory business, al-

though the court placed a lesser value on the good will than did Mr. Harbinson.

While there is much force in the able and earnest argument of appellant that no good will should attach to the dental laboratory business and that the value placed on the good will by the court was excessive, we believe that both issues were questions of fact for the trial court to determine. It was for the trial court to weigh and evaluate the evidence and a careful study of the record convinces us that there is substan-

tial evidence to support the findings of the trial court.

[7] Appellant's final contention is that the sum of \$250 per month awarded as alimony for respondent "is excessive and an abuse of discretion in view of the large value of the properties awarded to respondent and the numerous obligations imposed on appellant." He lists monthly payments that he is required to make, totaling the sum of \$1,152, as follows:

Alimony payable to plaintiff,	\$ 250.00
Maintenance payable for children,	275.00
Regular premiums due on \$40,000.00 life insurance,	250.00
Installments on \$10,301.00 note of defendant,	100.00
Interest of 5½% on foregoing note required,	56.00
Interest on \$9,569.00 value policies, until paid,	52.00
Interest on \$11,000.00 Anglo California Bank note,	50.00
Interest on \$7,800.00 Anglo California Bank note,	42.00
One-third interest on Hamilton Jewelry note,	12.00
Maintenance of aged, needy mother, paid,	65.00

It should be noted that the \$11,000 note to the Anglo California Bank was hereinbefore listed as a liability of the dental laboratory business that was awarded to appellant. It should be noted further that appellant lists the insurance premiums that he must pay in order to keep his life insurance, but respondent was awarded only \$9,569.60 as the present cash value of said policies and the court ordered that appellant should keep said policies in force until respondent received this amount. There is nothing to prevent appellant from paying said amount by receiving the cash surrender value of said policies or using other funds to pay respondent said sum of \$9,569.60 if he chooses to keep said policies in force.

The matter of the allowance of alimony is within the sound discretion of the court. In view of the fact that the record shows that appellant has a net income from all sources of between \$15,000 and \$20,000 per year, we do not believe that the court abused its discretion in awarding respondent the sum of \$250 per month as alimony.

[8] It must be borne in mind that in the instant case the respondent was granted a

divorce upon the ground of extreme cruelty. Subsection 1 of section 146 of our Civil Code provides:

"If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just."

The court had before it evidence as to all the property and income of appellant and respondent, and while it may be argued that it was the desire of the parties that the property should be divided as nearly equally as possible, it was still the right and duty of the court to divide the property in "such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." For as stated in *Lazar v. Superior Court*, 16 Cal.2d 617, at page 620, 107 P.2d 249, at page 250:

"* * * A husband and wife may contract with one another concerning matters of property and support, Civ.

Code, secs. 158, 159; *Huntsberger v. Huntsberger*, 2 Cal.2d 655, 43 P.2d 258. But such agreements are subject to close scrutiny by a court in a subsequent divorce action and may be approved, modified or rejected by such court in the exercise of the powers given it under sections 139 and 146 of the Civil Code."

[9] We have hereinbefore held that the evidence was sufficient to support the court's determination that the dental laboratory business was community and also to support the valuation placed on the good will thereof. The court had a right to take into consideration the fact that appellant would receive and would continue to conduct the dental laboratory business from which the net income was in excess of \$12,000 per year, and would also receive the one-third interest in the Hamilton Jewelry Company from which he would derive about \$3,200 per year. The court also had a right to take into consideration the fact that respondent would receive the family home, furniture and furnishings, and automobile, valued at \$33,550, and other property, from all of which there was little income. The respondent was awarded the custody of the three minor children aged 18, 15 and 2 years, and we do not believe that the court was required to make a division of the property and an award of alimony that would make it necessary for respondent, after eighteen years of married life and with the responsibility of caring for the minor children, to seek outside employment. We believe that upon the record in the instant case, even if a substantial part of the dental laboratory business could be considered the separate property of appellant and even if the valuation placed upon the good will was excessive, the division of the property by the court could not be held to be an abuse of discretion. For the trial court had all of the evidence before it and made what it deemed to be a proper division, and we cannot conceive how appellant would gain by a retrial of the division of the property.

[10] In view of the foregoing the interlocutory decree is modified by striking therefrom all words presently disposing of the community property and inserting words to the effect that upon the entering of the final decree the parties are entitled to have assigned to them the portions of the community property mentioned in the decree. As so modified the judgment is affirmed as of the date of its entry. Respondent to recover costs.

PEEK, J., and McMURRAY, J. pro tem., concur.



144 CalApp.2d 377

JUDSON PACIFIC-MURPHY CORPORATION, a California corporation, Peter Kiewit Sons Co., a Nebraska corporation, Stolte, Inc., a California corporation, Fred J. Early, Jr., Co., a California corporation, individually and as doing business under the name and style of Judson Pacific Murphy-Kiewit, a joint venture, Petitioners and Appellants,

v.

Frank B. DURKEE, as Director of Public Works of the State of California, Respondent and Respondent,

United States Steel Corporation, a New Jersey corporation, Intervener and Respondent.

Civ. 17119.

District Court of Appeal, First District, Division 1, California.

Sept. 11, 1956.

Mandamus proceedings by second lowest bidders on steel contract for contemplated bridge construction to restrain Director of Public Works from awarding contract to steel company which had submitted lowest bid, and to compel director to award contract to petitioning corporations. The Superior Court, City and County of San

Francisco, Frank T. Deasy, J., entered order denying petition for writ of mandate and discharging alternative writ. Petitioners appealed. The District Court of Appeal, Peters, P. J., held, in part, that fact that bid on steel contract was submitted by bridge division of steel corporation, though corporation and not division held contractor's license, would not invalidate acceptance of bid and award of contract to steel corporation, where identity of bidder, as corporation, not division, was clear before acceptance, and objection was raised by second lowest bidders in their attempt to restrain award.

Judgment affirmed.

1. Mandamus ⇨92, 187(10)

Neither trial nor appellate court had power to order Director of Public Works to award steel contract for contemplated bridge construction to second lowest bidders, even if contract awarded to lowest bidder was, as claimed by second lowest bidders, a nullity, in view of fact that in notice to contractors director expressly reserved right to reject any and all bids, and of statute imposing duty on director to exercise judgment whether best interests of state would be served by award of contract to lowest bidder. West's Ann.Gov.Code, § 14335.

2. States ⇨98

Under statute providing that if Director of Public Works deems acceptance of lowest responsible bid not in best interests of state, he may reject bid and proceed by day's labor or advertise for other bids, and reservation of right of rejection in call for bids, Director of Public Works has duty of exercising his judgment whether it is in best interests of State to award contract to lowest bidder. West's Ann.Gov.Code, § 14335.

3. States ⇨98

The lowest qualified bidder on public contract has no legal right to compel the acceptance of his bid. West's Ann.Gov. Code, § 14335.

4. Bridges ⇨20(2)

Fact that bid on steel contract for contemplated bridge construction was submitted by bridge division of steel corporation, though corporation and not division held contractor's license, would not invalidate acceptance of bid and award of contract to steel corporation, where identity of bidder, as corporation, not division, was clear before acceptance, and objection was raised by second lowest bidders in their attempt to restrain award. West's Ann.Bus. & Prof.Code, § 7117.

5. States ⇨98

The competitive bidding statutes, and those requiring licenses for bidding on public works, are for the benefit of the public, and not for the benefit of bidders or licensees. West's Ann.Bus. & Prof. Code, § 7117.

6. Mandamus ⇨167

Where Director of Public Works alleged, in return to mandamus petition by second lowest bidders on steel contract seeking to restrain director from accepting bid by low bidding steel company, that steel company was the duly qualified and responsible low bidder for contract, this allegation constituted allegation that steel company's contractor's license had not been suspended or revoked, and controverted allegation of petition that steel company's license had ipso facto been suspended by its failure to notify state board of termination of employment of its designated responsible managing employee. West's Ann.Bus. & Prof.Code, § 7068(b).

7. Administrative Law and Procedure ⇨228

Failure to pursue an administrative remedy is, in most cases, a bar to court action. West's Ann.Bus. & Prof.Code, §§ 7068(b), 7090.

8. Licenses ⇨38

Statute requiring corporation holding public work contractor's license to notify state board within ten days of termination of employment of person corporation had designated as its responsible managing employee, and providing that if licensee fails to notify board, its license shall be ipso

facto suspended, is not self-executing; statute means that when any of facts set forth in statute are made to appear to proper authorities, such authorities shall suspend license until failure to comply is remedied, and that such suspension shall date back to date of offense. West's Ann. Bus. & Prof.Code, § 7068(b).

9. Bridges ⇨20(2)

In view of fact that statute providing for ipso facto suspension of public works contractor's license of corporation which fails to notify state board of termination of employment of its designated responsible managing employee is not self-executing, statute did not excuse failure of second lowest bidders on steel contract for contemplated bridge construction to exhaust their statutory administrative remedy before resorting to court action to attack award of contract to steel company as lowest bidder. West's Ann.Bus. & Prof.Code, §§ 7068(b), 7090.

10. Licenses ⇨38

Statute providing that the suspension or revocation of license as a public work contractor may also be embraced in an action otherwise proper in any court involving licensee's performance of his legal obligation as contractor, is limited to cases where the question involved is the licensee's performance of his legal obligation as a contractor; statute does not apply to case of suspension of corporate license because of failure of corporation to notify state board of termination of employment of its designated responsible managing employee. West's Ann.Bus. & Prof.Code, §§ 7068(b), 7106, 7106.5.

11. Mandamus ⇨154(4)

Where petition, in mandamus proceeding by second lowest bidders on steel contract for contemplated bridge construction to restrain Director of Public Works from accepting bid of and awarding contract to lowest bidder, on claim that corporate lowest bidder's contractor's license had been automatically suspended by its failure to notify state board of termination of employment of its designated responsible

managing employee, did not allege that petitioners had exhausted their available administrative remedy, under statute conferring disciplinary powers on registrar of contractors, petition did not state cause of action. West's Ann.Bus. & Prof.Code, §§ 7068(b), 7090.

12. Mandamus ⇨187(9)

Any claimed irregularity in proceedings before contractor's state license board, in reference to alleged failure of steel company to notify board of termination of employment of its designated responsible managing employee as required by statute, could not be corrected on appeal by unsuccessful contract bidders, from judgment refusing to restrain, by mandamus, director from accepting bid of steel company on steel contract for contemplated bridge construction, where unsuccessful bidders had not appealed from administrative determination which was adverse to their contention in mandamus proceedings. West's Ann.Bus. & Prof.Code, § 7068(b).

13. Evidence ⇨48

Undisputed fact that contractor's state license board had investigated complaint of unsuccessful bidders and had refused to take action against successful bidder, and that same issue unsuccessful bidders raised in mandamus proceeding had been passed upon by board, would be judicially noticed by court on appeal by unsuccessful bidders from judgment refusing to restrain, by mandamus, Director of Public Works from awarding contract to successful bidder. West's Ann.Bus. & Prof.Code, § 7068(b).

14. Mandamus ⇨174

Failure of court, in mandamus proceeding by unsuccessful bidders on steel contract for contemplated bridge construction to restrain Director of Public Works from awarding contract to successful bidder, to find on issue of suspension of contractor's license of incorporated successful bidder by its failure to notify board of termination of employment of its responsible managing employee, was not error, where board, having at least concurrent jurisdiction, had decided issue adversely to aggrieved bid-

ders. West's Ann.Bus. & Prof.Code, § 7068(b).

Clark, Heafey & Martin, Gerald P. Martin, Oakland, for appellants.

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., Robert E. Reed, Hollo-way Jones, Jack M. Howard, Emerson W. Rhyner, San Francisco, for respondent State of California.

Thomas Ashby, San Francisco, for inter-
vener and respondent U. S. Steel.

PETERS, Presiding Justice.

Judson Pacific Murphy-Kiewit, a joint venture corporation,¹ brought this proceeding to prevent the state Director of Public Works from awarding a steel contract for the new Carquinez Bridge to the American Bridge Division, United States Steel Corporation, the lowest bidder, and to compel the Director to award the contract to Judson, the second lowest bidder. It is the main contention of Judson that American Bridge Division, United States Steel Corporation, was not properly licensed and qualified to bid on the work, and that, therefore, the contract should have been awarded to it.

The facts are that on October 14, 1955, the State Department of Public Works, Division of Highways, issued a notice inviting sealed bids for the steel work on the Carquinez Bridge. The notice provided that the bids would be opened on November 30, 1955, and that the award of the contract would be made within nine days thereafter. The notice expressly provided that the contract was conditional upon the issuance and sale of revenue bonds to be issued to finance the project. The bids were opened on November 30, 1955. American Bridge Division, United States Steel Corporation, an operating division of United States Steel Corporation, bid \$9,-489,126. This was the low bid. Judson's

bid, the second lowest bid, was \$34,834.48 higher. The other two bids submitted were \$2,000,000 and \$4,000,000, respectively, higher than the lowest bid.

When the bids were opened, Judson orally protested the acceptance and filing of the low bid on the ground that American Bridge Division, United States Steel Corporation, had no contractor's license and therefore could not perform the work. A similar written protest was made by Judson on December 3, 1955.

The low bid reads as follows:

"Name of Bidder: American Bridge Division, United States Steel Corp.

"Business Address: 564 Market Street, San Francisco, Calif.

"Place of Residence: 525 William Penn Place, Pittsburgh 30, Penna."

The accompanying and required bidder's bond is made out similarly, and has attached to it a required list of officers and directors of the bidder. The list is admittedly the officers and directors of United States Steel Corporation. The low bidder also gave the number of its contractor's license as 128593 which admittedly is the contractor's license issued to United States Steel Corporation.

Within the nine days following the opening of bids, the State Highway Engineer requested an opinion of the Registrar of Contractors as to whether the contract could be awarded to the low bidder as named. The Registrar referred the inquiry to the Attorney General. He ruled that the low bid was valid, and that a contract properly could be awarded to the United States Steel Corporation based upon that bid. Thereupon, the State Highway Engineer recommended to the Director of Public Works that the low bid be accepted and that the contract be awarded to United States Steel Corporation. On December 7, 1955, the Director awarded the contract to United States Steel Corporation subject to the condition of the sale of revenue bonds.

1. A joint venture corporation consisting of several California corporations, and hereafter referred to as Judson.

On December 8, 1955, Judson filed a petition for mandate and for injunctive relief in an attempt to restrain the Director from awarding the contract to United States Steel Corporation, and to compel the Director to award the contract to Judson as the next lowest, qualified and responsible bidder.

On December 15, 1955, the United States Steel Corporation, by leave of court, filed a complaint in intervention. It alleged that it is a New Jersey corporation authorized to do business in California; that it was fully qualified and legally authorized to bid on the work here involved; and that it submitted a proper bid. An exhibit to the complaint in intervention is a letter from the Division of Highways to the intervener dated December 7, 1955, awarding the contract to intervener and requiring that such contract be executed in the name and under the seal of the United States Steel Corporation.

On December 16, 1955, several things occurred. Petitioner was permitted to amend its pleadings by adding a new paragraph, alleging that the bid of American Bridge Division, United States Steel Corporation, was submitted under a contractor's license issued to United States Steel Corporation; that such license qualified United States Steel Corporation to contract by and through its responsible managing employee, C. E. Webb; that petitioner is informed and believes and so alleges that C. E. Webb terminated his employment with intervener about May 19, 1955; that United States Steel Corporation failed to notify the Contractor's State License Board of such termination within 10 days as required by section 7068(b) of the Business and Professions Code; that under that section such failure, *ipso facto*, resulted in the suspension or revocation of the license of intervener.

Also on December 16th Durkee, as Director of Public Works, filed a demurrer and a return by way of answer, in which he averred that the bid was received from United States Steel Corporation, and not

from any other entity; that American Bridge Division of the United States Steel Corporation is an 'operating' division of the company and not a separate entity; that United States Steel Corporation has a valid license numbered 128593; that United States Steel Corporation was qualified to bid on construction work in this state.

On the same date, December 16th, petitioner filed an answer to the complaint in intervention in which it made certain denials, and affirmatively alleged that at the time the challenged bid was submitted United States Steel Corporation was not a duly qualified and licensed contractor in this state.

On these pleadings the proceeding was taken under submission by the trial court. On December 21, 1955, the court entered its order denying the petition for a writ of mandate and discharging the alternative writ. Petitioner appeals.

[1] It will be noted that appellant in its petition prays that respondent be ordered to reject intervener's bid and be ordered to award the contract to Judson. It is quite clear that neither the trial court nor this court has the power to order respondent to award the contract to Judson, even if the contract awarded to United States Steel Corporation were a nullity. This is so because the notice to contractors expressly notified prospective bidders that the Director of Public Works reserved the right to reject any or all bids. Moreover, section 14335 of the Government Code provides that "If the director deems the acceptance of the lowest responsible bid or bids is not for the best interests of the State, he may reject all bids and proceed by day's labor or advertise for other bids in the manner required by this chapter."

[2, 3] It is apparent that were the court to order respondent to award the contract to Judson as the next lowest qualified bidder (assuming, contrary to the fact, that United States Steel Corporation was not qualified), it would be substituting the court's judgment and discretion for those of respondent.

ent. Clearly, the call for bids and the law confers on the Director the duty of exercising his judgment as to whether it is in the best interests of the state to award the contract to the lowest bidder. The lowest qualified bidder has no legal right to compel the acceptance of his bid. *Charles L. Harney, Inc., v. Durkee*, 107 Cal.App.2d 570, 237 P.2d 561; see also *Stanley-Taylor Co. v. Board of Supervisors*, 135 Cal. 486, 67 P. 783; *Laurent v. City and County of San Francisco*, 99 Cal. App.2d 707, 222 P.2d 274. At the oral argument appellant conceded that this is the law.

The basic question raised by appellant is whether or not the acceptance of the bid by, and the award of the contract to, respondent were proper and valid. The major argument of appellant is that the bid was submitted by the "American Bridge Division, United States Steel Corporation" and that no contractor's license has ever been issued to any such entity, and therefore that bidder is not qualified to do business in California. It is also pointed out that the records of the Registrar of contractors do not show that the American Bridge Division, United States Steel Corporation, was a part, segment or division of the United States Steel Corporation.

The point is highly technical and without merit. Admittedly, "American Bridge Division, United States Steel Corporation" has no license issued to it. We do know, and of this fact the court can take judicial notice, *McPheeters v. Board of Medical Examiners*, 74 Cal.App.2d 46, 168 P.2d 65, that until late in 1951 the American Bridge Company did have a license. The correspondence between the United States Steel and the Contractor's State License Board discloses that late in 1951 United States Steel applied for and received license 128593. Attached to the application for this license was the information that " * * * on December 31, 1951, the subsidiary operating companies of the United States Steel Corporation will cease doing business as individual and separate organizations, and will merge their activities into that of the United States Steel Com-

pany * * *" After listing the subsidiary companies, of which American Bridge Company was one, it is stated: "The former subsidiaries will continue their present identity as operating divisions of the United States Steel Company, with no substantial change in operating personnel or business policy." License 128593 was then issued to United States Steel Company, which designation was later properly changed to United States Steel Corporation.

[4] It is obvious that no serious objection has been or can be made to the manner in which the bid was accepted. If there ever was any doubt as to the identity of the low bidder it is quite clear that it was cleared away before the bid was accepted or the award made. Certainly, it is not a vital defect that United States Steel Corporation elected to submit its bid through one of its operating divisions. No one was misled. The corporation is the legal entity legally responsible for performance of the contractual obligations set forth in the contract. It is true that section 7117 of the Business and Professions Code requires the licensed contractor to act "in the name of the licensee as set forth upon the license," and that failure to do so subjects the licensee to disciplinary action. But such technical violation of the statute does not, *per se*, invalidate the contract.

[5] It must be remembered that competitive bidding statutes, and those requiring licenses for bidding on public work, are for the benefit of the public and not for the benefit of bidders or licensees. It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.

The other contention of the appellant came into the case as an apparent afterthought. The petition for mandate was filed December 8, 1955. The sole points raised

in that petition were that the bid had been made by American Bridge Division, United States Steel Corporation, and that that entity was unlicensed, and that the purported acceptance by United States Steel Corporation was invalid. Then on December 16, 1955, appellant, in open court, was granted permission to add a new paragraph to its petition. It is there alleged that while United States Steel Corporation is licensed, such license designated one C. E. Webb as the responsible managing employee of the licensee; that on information and belief petitioner alleges that Webb terminated his employment with United States Steel Corporation on May 19, 1955; that the licensee failed to notify the Contractor's State License Board of such termination; that such failure, *ipso facto*, suspended the license under section 7068(b) of the Business and Professions Code.

[6] Appellant contends that this allegation was not controverted by respondent and intervener and stands undenied. This is not true. While no specific reference to the paragraph appears in respondent's return, also filed on December 16th, respondent does allege that United States Steel Corporation was the duly qualified and responsible low bidder for the contract. That necessarily constitutes an allegation that intervener's license had not been suspended or revoked.

[7] It should be mentioned that appellant did not make this objection at the time the bids were opened. Nor is it alleged that Judson made any complaint to the Contractor's State License Board, the agency which, by law, has licensing power, and the power to police the industry. The proper procedure for appellant to have followed was to first proceed before that Board. Section 7090 of the Business and Professions Code confers upon the Registrar power to investigate the actions of any contractor and to suspend or revoke a license "upon the verified complaint in writing of any person". This is the administrative remedy provided by the statute which appellant should have exhausted before

filing its petition. Failure to pursue such an administrative remedy is, of course, in most cases, a bar to court action.

Appellant, while recognizing the rule requiring the exhaustion of administrative remedies, contends that that rule is not here applicable because, so it is argued, section 7068(b) of the Business and Professions Code operated to automatically suspend the license of United States Steel Corporation if Webb quit his employment and if the Board was not so notified. The section requires the applicant for a contractor's license to show experience and training in the field and provides that a corporation may qualify "by the appearance of the responsible managing officer or member of the personnel" of such corporation. The section then provides that if the individual qualifying "ceases for any reason whatsoever, to be connected with the licensee to whom the license is issued * * *, the licensee shall notify the registrar in writing within 10 days from such cessation, association or employment. * * *

"If the licensee fails to notify the registrar within the 10-day period, at the end of the period his license shall be *ipso facto* suspended. * * *

[8,9] It is obvious that this section is not self-executing. The phrase that the "license shall be *ipso facto* suspended" certainly does not mean that without action by the Board or the Registrar the license is revoked. If that were so, no one could be sure that a firm possessing an outstanding license was in fact licensed. Obviously, the section means that when any of the facts set forth in the section are made to appear to the proper authorities, such authorities shall suspend the license until the failure to comply is remedied and that such suspension shall date back to the date of the offense. The proper authority to determine this point is the Registrar. Thus, this section does not excuse the failure to allege the exhaustion of the statutory administrative remedy.

But, says appellant, the statute provides that the administrative remedy is not exclusive by conferring on the courts concurrent power to pass on the question. In this connection appellant refers us to section 7106 of the Business and Professions Code. That section provides:

"The suspension or revocation of license as in this chapter provided may also be embraced in any action otherwise proper in any court involving the licensee's performance of his legal obligation as a contractor." Section 7106.5 gives the Registrar "jurisdiction to proceed with any investigation" even though the matter is pending in a court.

[10,11] It is clear that this section does not apply to the suspension of a license under section 7068(b) of the Business and Professions Code. Section 7106, by its very terms, is limited to cases where the question involved is "the licensee's performance of his legal obligation as a contractor." Problems involving the "performance" of the "legal obligations" of a contractor only arise after the contractor has entered into a contract for the performance of some public work and some dispute has arisen. That is not this case. Certainly, it would be a strange rule of law that would permit a court to suspend or revoke a license in a proceeding such as the instant one in which the licensee was not even a party until it came in as an intervener. Disciplinary matters, such as a violation of section 7068(b) for this reason are left, and should be left, to the licensing board. If United States Steel Corporation did violate section 7068(b), obviously such violation was not connected with the "performance" of its "legal obligations" under any contract. Thus, the trial court properly determined the proceeding on the pleadings, holding, as a matter of law, that the amended petition did not state a cause of action because of the failure of the pleading to allege that an available administrative remedy had been exhausted.

It should be noted that attached to the intervenor's brief are certain appendices

which show that on December 15, 1955, one day before the amended petition was filed in the Superior Court, appellant addressed a letter to the Registrar of contractors requesting an investigation of the very question here involved. The record shows that the Registrar, pursuant to this request, investigated the charge involving Mr. Webb. Under date of April 3, 1956, the Assistant Registrar notified appellant that the Registrar had investigated all of the facts in reference to the Webb matter; and that "The results of this investigation, including affidavits from the licensee and Mr. Webb, were presented to the Attorney General for interpretation and opinion * * *.

"* * * that in view of said Opinion, the agency finds no cause to institute a disciplinary action against the United States Steel Corporation as a licensee, and is, therefore, closing the matter."

The opinion of the Attorney General states that the office had received the affidavits submitted by United States Steel Corporation "in connection with the possible disassociation of Mr. C. E. Webb as Responsible Managing Employee of the corporation. We cannot say after a review of the record that a disassociation of the Responsible Managing Employee has occurred in this case which would require a notation upon the records of the Contractor's State License Board. We believe that the information contained in the said affidavits would indicate a compliance" with certain designated rules and regulations of the Board.

[12,13] Thus, the very issue appellant now claims should have been decided by the trial court in this mandamus proceeding has been passed upon by the licensing board. The proceeding before the licensing board was commenced one day before the issue was raised in the Superior Court. The licensing board, the agency primarily charged with the duty of policing contractors, on the advice of the Attorney General has found no violation, and so, of course, found no suspension of the license. At the oral argument appellant conceded that it

had not appealed from this administrative determination. Any claimed irregularities in that proceeding cannot be corrected on this appeal. These matters are not disputed, and are matters of which this Court can take judicial notice.

[14] Thus, even if, contrary to the law, the failure to plead exhaustion of an available administrative remedy was not fatal, and if, contrary to the law, appellant's amended pleading and respondent's return did present an issue of fact which should have been decided by the trial court, we now know that the Board charged with the primary duty of making such an investigation, and which has at least concurrent jurisdiction with the courts, in a proceeding started before the issue was raised in a court, has decided the issue and found no violation. Thus, no error was committed by the trial court in failing to find on the issue.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



144 Cal.App.2d 429

In the Matter of the ESTATE of Lucille
HENSEL, Deceased.

Otto HENSEL, Contestant and Appellant,
v.

Ruth Lelhy KERTZ, Petitioner and
Respondent.
Civ. 21797.

District Court of Appeal, Second District,
Division 3, California.
Sept. 13, 1956.

Rehearing Denied Oct. 4, 1956.

Hearing Denied Nov. 8, 1956.

Proceeding in the matter of the estate of deceased testatrix, wherein first testamentary trustee filed a petition to surcharge second testamentary trustee. The Superior Court of Los Angeles County, Burdette J. Daniels, J., entered an order adverse to the

first trustee, and he appealed. The District Court of Appeal, Vallée, J., held that where first trustee filed petition to surcharge second trustee, and beneficiary of trust was given notice, she was made a party by the giving of such notice and was bound thereby, and therefore it was not essential, in order to give the Superior Court jurisdiction to hear and determine the petition, that beneficiary be named as a formal party litigant.

Order reversed.

1. Trusts ⇨298

When a trust created by will continues after distribution, Superior Court does not lose jurisdiction of the estate but retains jurisdiction for the purpose, among others, of settling the accounts and passing on the acts of the trustee.

2. Trusts ⇨300

Any testamentary trustee appointed to execute a trust created by will may, from time to time, pending execution of his trust, render for settlement his accounts and report his acts as trustee.

3. Trusts ⇨322

The account and report of a testamentary trustee must give the names and post office addresses, if known, of the beneficiaries.

4. Trusts ⇨178

A testamentary trustee may petition the court from time to time for instructions as to the administration of the trust. West's Ann.Prob.Code, §§ 1120, 1200.

5. Trusts ⇨171

The Superior Court, in exercise of its probate jurisdiction, has power to control trustees in the management of testamentary trusts.

6. Courts ⇨198

The character and extent of the jurisdiction of the Superior Court sitting in probate is a matter under legislative control alone, and procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by statute. West's Ann.Prob.Code, § 1120.

7. Courts ⇨198

The jurisdiction of a Superior Court sitting in probate is a jurisdiction in rem. West's Ann.Prob.Code, § 1120.

8. Courts ⇨202(1)

When prescribed procedure of the Probate Code dealing with the giving of notice of hearing of matters before Superior Court sitting in probate is followed, notice that proceeding is pending and will be had at a specified time and place is deemed to have been given to all interested persons. West's Ann.Prob.Code, § 1120.

9. Trusts ⇨298

Jurisdiction of Superior Court sitting in probate was continuing and attached to corpus of testamentary trust when it passed from executor to trustees, and the law with respect to probate of estates of decedents applied. West's Ann.Prob.Code, §§ 927, 1120, 1200, 1202.

10. Executors and Administrators ⇨507(2)

On the rendering of an account by an executor or administrator, if notice is posted as the law requires and the representative causes notice to be mailed or personally served on interested persons, who have given notice of appearance, or who have requested notice, jurisdiction of the res is conferred on the court and all interested persons who are brought before it, and after such notice has been properly given, it becomes the duty of all interested persons to keep themselves informed by diligent inquiry of subsequent continuances of the hearing. West's Ann.Prob.Code, § 1200.

11. Trusts ⇨167

In a suit in equity to remove a non-testamentary trustee, a beneficiary of the trust is not necessarily an indispensable party.

12. Parties ⇨18, 29

Where persons are so interested in controversy that they should normally be made parties in order to enable court to do complete justice, but their interests are separable from the rest, they are "necessary parties" but not "indispensable parties".

See publication Words and Phrases, for other judicial constructions and definitions of "Indispensable Parties" and "Necessary Parties".

13. Parties ⇨18, 29

One may be an "indispensable party" if his interest in the subject matter of the controversy is of such a nature that a final decree cannot be rendered between the other parties to the suit without inevitably affecting that interest.

14. Parties ⇨18, 29

Where one person seeks to establish the amount of his share in certain property or in a particular trust fund, other persons with similar interests are "indispensable parties."

15. Parties ⇨79, 82

Any failure to join a necessary party does not go to the jurisdiction of the court.

16. Trusts ⇨169(3)

In absence of a statute to the contrary, it is not necessary to exercise of jurisdiction to appoint a new trustee in case of vacancy, that beneficiaries of trust be joined in proceeding or notified in advance of court's action.

17. Trusts ⇨324

Petition of first testamentary trustee to surcharge second trustee was but an exception to the account of the second trustee.

18. Trusts ⇨298

Where first testamentary trustee filed petition to surcharge second trustee, if it should appear on the hearing of the account of the second trustee that she should be surcharged for trust assets withheld by her, Superior Court sitting in probate had jurisdiction to do so.

19. Trusts ⇨298

As an implied power stemming from power to settle a testamentary trustee's account and determine what trust property he has in his hands, Superior Court sitting in probate has jurisdiction to determine as against trustee the amount of money and property of trust estate which has come into his hands, for purpose of charging him therewith, and, in determining that ques-

tion, to determine all issues necessarily incidental thereto.

20. Trusts ⇨331

An order entered in a proceeding with respect to testamentary trust, pursuant to statutory notice, is conclusive on all parties in interest. West's Ann.Prob.Code, § 1120.

21. Trusts ⇨257

Where first testamentary trustee filed a petition to surcharge second trustee, and beneficiary of trust was given notice, she was made a party by the giving of such notice and was bound thereby, and therefore it was not essential, in order to give Superior Court, sitting in probate, jurisdiction to hear and determine the petition, that beneficiary be named as a formal party litigant. West's Ann.Prob.Code, § 1120.

22. Trusts ⇨240

If there are several testamentary trustees, each trustee is under a duty to beneficiary to use reasonable care to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust.

23. Trusts ⇨240

First testamentary trustee had duty to seek redress, if there was a breach of trust by second trustee.

24. Trusts ⇨293

Balance chargeable to testamentary cotrustees cannot be ascertained until petition to surcharge has been heard and determined.

25. Trusts ⇨293

Since each testamentary trustee is chargeable with entire estate and must account therefor, it was error to settle accounts of trustees before court determined whether one of the trustees should be surcharged for all assets alleged to have been withheld by her.

Leland J. Allen, Los Angeles, for appellant.

Frye & Yudelson, North Hollywood, for respondent.

VALLÉE, Justice.

Appeal from an order settling the first accounts current of trustees and denying an amended petition of one trustee to surcharge another.

The decree of distribution in this estate, dated January 12, 1949, pursuant to a trust created by the will, distributed half of the estate to Ruth Leihy Kertz and Otto Hensel, husband of the decedent, as trustees with directions to pay the income of the trust to the decedent's daughter, Lucy Ann Allen, during her lifetime with remainder to Otto Hensel and Ruth Kertz.

In 1954 the trustees filed separate accounts current. Ruth Kertz filed objections to the account of Hensel. Hensel filed a petition to surcharge Ruth Kertz as trustee. The petition charged various acts of malfeasance on the part of Ruth Kertz; that there was a conflict of interests between her duties as trustee and her individual interests; that she had manipulated the assets of the trust so that no income could be paid to Lucy Allen; that no income had been paid to Lucy Allen except that on October 15, 1953 the trustees paid her \$385.26 from the corpus of the trust; that she should have received at least \$300 a month from the trust. The petition prayed that the court, among other things, determine the net income of the trust from the date of the decree of distribution and surcharge Ruth Kertz therewith. Ruth Kertz filed an answer and objections to the petition. Hensel filed a supplemental account and amended petition for the purpose of surcharging Ruth Kertz as trustee "with the income and assets belonging to the trust estate and withheld by her." The amended petition elaborated on the charges against Ruth Kertz, prayed for substantially the same relief and, in addition, for instructions to her.

All of the matters mentioned came on regularly for hearing before Judge Hansen on May 10, 1955. Counsel for Ruth Kertz objected to the hearing of the original and amended petition to surcharge on the ground the subject matter was outside the

jurisdiction of the court. Judge Hansen found that all notices of the hearing had been given as required by law and that "the Court has jurisdiction to hear the Current Account of trustees, supplement account and petition re fees and surcharges," and continued all the matters.

On June 16, 1955 the various matters came on regularly for hearing before Judge Daniels. The court found "that notice of hearing on each of these matters was duly given as required by law." The court further found that "at no time was the said Lucy Ann Allen made and named as a party to any of these proceedings"; concluded that "the life beneficiary, Lucy Ann Allen, is a necessary party litigant to these proceedings and should have been included as such a party thereto," that "[t]his Court is without jurisdiction to entertain the petition to surcharge Ruth Leihy Kertz at this time"; and denied the petition to surcharge Ruth Kertz without prejudice. The petition to surcharge was denied by reason of the conclusion that Lucy Allen should have been "made and named" a party litigant. An order was made settling the accounts current of Hensel and Ruth Kertz. Hensel, as cotrustee and as a beneficiary of the trust, appeals from the order settling the accounts and denying the petition to surcharge Ruth Kertz.

The sole question for decision is: Was the court without jurisdiction to hear and determine the petition of Hensel to surcharge Ruth Kertz by reason of the fact that Lucy Allen, a beneficiary, was not named as a formal party in the petition to surcharge?

[1-4] When a trust created by will continues after distribution the superior court does not lose jurisdiction of the estate but retains jurisdiction for the purpose, among others, of settling the accounts and passing upon the acts of the trustee. Any trustee appointed to execute a trust created by will may from time to time, pending the execution of his trust, render for settlement his accounts and report his acts as such trustee. The account and report

must give the names and post office addresses, if known, of the beneficiaries. The trustee may petition the court from time to time for instructions as to the administration of the trust. "The trustee shall cause notice of the hearing to be mailed to the beneficiaries at their last known addresses, as provided in said Section 1200, whether they have requested special notice or given notice of appearance or not." Prob.Code, § 1120. In the present proceeding both Judge Hansen and Judge Daniels found as a fact that notice of hearing on each of the matters before him was duly given as required by law.

[5,6] The superior court in the exercise of its probate jurisdiction has power to control trustees in the management of testamentary trusts. A trustee may invoke the jurisdiction of the probate court under section 1120. In re Estate of Prior, 111 Cal.App.2d 464, 472, 244 P.2d 697. The character and extent of the jurisdiction of the superior court sitting in probate is a matter under legislative control alone, and procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by statute. In re Estate of Davis, 136 Cal. 590, 597, 69 P. 412.

[7,8] The jurisdiction of the superior court sitting in probate under section 1120 is a jurisdiction *in rem*. Security-First National Bank v. Superior Court, 1 Cal.2d 749, 755, 37 P.2d 69. As such it is distinguished from a proceeding *in personam* in which the court obtains jurisdiction by personal service of notice on the party, or by appearance of the defendant. (20 Cal. Jur.2d 76, § 40.) The Probate Code prescribes the manner of giving notice of the hearing of each of the matters that were before the probate court. Prob.Code, § 1120. When the prescribed procedure is followed, notice that the proceeding is pending and will be had at a specified time and place is deemed to have been given to all interested persons. In Abels v. Frey, 126 Cal.App. 48, at page 53, 14 P.2d 594, at page 596, the court stated:

"By giving the notice prescribed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive upon him, "subject only to be(ing) reversed, set aside, or modified on appeal." The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court. * * *

"A person who is interested in the estate of a deceased person, who has had the notice required by law, becomes in point of law an actor in the proceedings, and is bound by the result."

Also see *Ringwalt v. Bank of America*, 3 Cal.2d 680, 684-685, 45 P.2d 967; *In re Estate of Smith*, 4 Cal.App.2d 548, 41 P.2d 565.

Security-First National Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, at page 755, 37 P.2d 69, at page 72, declares:

"The filing of the petition setting forth the matters required by the Code sections noted [§ 1120, Probate Code; former § 1699 Code Civ.Proc.] vests jurisdiction in the probate court [citation], whether or not the allegations of the matters necessary to vest jurisdiction accord with the actual facts. [Citations.] The situation here presented calls for the same conclusions as in the case of *Murray v. Superior Court*, 207 Cal. 381, 385, 278 P. 1033, wherein it was held that the omission in the petition for the probate of the will of the names and addresses of the heirs, legatees and devisees, even if known to the petitioner,

does not deprive the court of jurisdiction, and that, when the petition is silent as to such names and addresses, they must be deemed by the clerk to be unknown, and he is not required to mail copies of the published notice. The notice required by the sections is constructive notice to every one of the pendency of the proceedings, and a hearing had and order entered pursuant thereto is conclusive upon all parties in interest. [Citations.] Absence of a personal notice in such proceeding does not deprive any person in interest of any of his constitutional rights."

[9, 10] Analogous are the principles applicable in probate proceedings generally. The jurisdiction of the probate court was continuing and attached to the corpus of the trust when it passed from the executor to the trustees, and the law with respect to probate of decedents' estates applies. In *re Estate of Smead*, 16 Cal.2d 204, 206-207, 105 P.2d 589. Probate Code sections 1200 and 1202 provide for the giving of substantially the same notice to persons interested in the estate as does section 1120. Probate Code section 1200 provides that on the filing of an account of a trustee and on the filing of a petition of a trustee for instructions the clerk shall cause notice of the time and place of the hearing thereof to be posted at the courthouse of the county where the proceedings are pending at least 10 days before the day of hearing, and that at least 10 days before the day of hearing the person filing the account or petition must cause notice of the time and place of the hearing to be mailed to all persons who have requested notice or who have given notice of appearance in the estate and that "[p]roof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that said notice has been regularly given, the court shall so find in its order, and such order, when it becomes final, shall be conclusive upon all persons." Probate Code section 927 provides that any person interested in the

estate may appear and file written exceptions to the account of an executor or administrator and contest the same. On the rendering of an account by an executor or administrator, if notice is posted as the law requires and the representative causes notice to be mailed or personally served on interested persons who have given notice of appearance or who have requested notice, jurisdiction of the *res* is conferred on the court and all interested persons are brought before it. And after such notice has been properly given it becomes the duty of all interested persons to keep themselves informed by diligent inquiry of subsequent continuances of the hearing. Prob. Code, § 1200; In re Estate of Bell, 58 Cal. App.2d 333, 336, 136 P.2d 804; Cf. In re Estate of Dam, 126 Cal.App. 70, 73-78, 14 P.2d 162.

In *Lilienkamp v. Superior Court*, 14 Cal.2d 293, at page 298, 93 P.2d 1008, at page 1010, it is said:

"Jurisdiction of the probate court is a jurisdiction *in rem*. The *res* is the decedent's estate, and the object of the probate and administration proceedings is to secure distribution to the persons entitled to share in the estate. *Edlund v. Superior Court*, 209 Cal. 690, 695, 289 P. 841. Jurisdiction is established when the appropriate petition has been filed and the notice required by the statute has been given. The usual method is by publication, or posting, as in the partial distribution proceeding here involved, or by both. By such method notice is deemed to have been given to all persons interested that the proceeding is pending. Where there is no statutory requirement therefor, personal notice to persons interested, although their interest appears, is not essential to give the probate court jurisdiction to distribute the estate to those entitled."

In re Estate of Loring, 29 Cal.2d 423, at page 429, 175 P.2d 524, at page 527, says:

"Section 1020 of the Probate Code requires that the estate be distributed

only after notice has been given as provided in section 1200 of that code. The Lorings point out that under the latter section and section 1202 of the Probate Code they could have asked that special notice of the distribution proceedings be given them and contend that they are not bound by those proceedings, since they did not choose to ask for such notice. Section 1200 provides, however, in addition to the special written notice that any person interested in the estate may request, for a posted notice to 'All persons interested to appear * * * and show cause * * why the order should not be made.' Section 1200 further provides that, if the court finds in its order that notice has been regularly given, that order, 'When it becomes final, shall be conclusive upon all persons.' A posted notice is therefore sufficient to bind a beneficiary and it appears that it is because the Legislature contemplated that he would be bound by such notice that provision was also made as a protection against possible unfairness for him to request, if he wished to do so, that he be given special written notice of the proceedings."

[11-16] In a suit in equity to remove a nontestamentary trustee, a beneficiary of the trust is not necessarily an indispensable party. "Where persons are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, but their interests are separable from the rest, they are necessary but not indispensable parties. On the other hand, one may be an indispensable party if his interest in the subject matter of the controversy is of such a nature that a final decree cannot be rendered between the other parties to the suit without inevitably affecting that interest. For example, where one person seeks to establish the amount of his share in certain property or in a particular trust fund, other persons with similar interests are indispensable parties." *Bowles v. Superior Court*, 44

Cal.2d 574, 583, 283 P.2d 704, 710. And failure to join a necessary party does not go to the jurisdiction of the court. (Id.) Nor, in the absence of a statute to the contrary, is it necessary to the exercise of jurisdiction to appoint a new trustee in case of a vacancy that the beneficiaries of the trust be joined in the proceeding or notified in advance of the court's action. Id., 44 Cal.2d at page 584, 283 P.2d at page 711. Further, in the present proceeding Lucy Allen is a represented party, represented by trustee Hensel; hence she is a party in legal effect and need not be "made and named" a formal party. "The principle applies to those who are indispensable to a complete determination of the controversy as well as to one who is merely a proper or necessary party, and we are of the view that the trustee removal action is a proper representative suit." Bowles v. Superior Court, 44 Cal.2d 574, 586, 283 P.2d 704, 712. Hensel, in seeking to have Ruth Kertz surcharged, is acting on behalf of Lucy Allen, the beneficiary.

[17-20] The petition to surcharge Ruth Kertz was but an exception to her account. Cf. In re Estate of Whitney, 124 Cal.App. 109, 11 P.2d 1107; In re Estate of Vokal, 121 Cal.App.2d 252, 263 P.2d 64. If on the hearing of her account it appeared she should have been surcharged for trust assets withheld by her, there can be no doubt but that the probate court had jurisdiction to do so. As an implied power stemming from the power to settle a trustee's account and determine what trust property he has in his hands, the superior court sitting in probate has jurisdiction to determine as against the trustee the amount of money and property of the trust estate which has come into his hands for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto. Bauer v. Bauer, 201 Cal. 267, 272, 256 P. 820; In re Estate of Fulton, 188 Cal. 489, 490, 205 P. 681. And an order entered in a proceeding under section 1120 pursuant to statutory notice

is conclusive on all parties in interest. Security-First National Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 756, 37 P.2d 69.

[21] As found by the court, Lucy Allen was given the notice prescribed by section 1120. By the giving of that notice she was made a party to the proceedings and is bound thereby. It was not essential to give the probate court jurisdiction to hear and determine the petition to surcharge Ruth Kertz that Lucy Allen be named as a formal party litigant in the proceedings.

[22,23] If there are several trustees, each trustee is under a duty to the beneficiary to use reasonable care to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust. (Rest., Trusts, §§ 184, 200, Comment d.) If there was a breach by Ruth Kertz it was the duty of Hensel to seek redress. It is the duty of Ruth Kertz to fully reimburse the trust estate and her cotrustee for all assets withheld by her, if any.

[24,25] The balance chargeable to the trustees cannot be ascertained until the petition to surcharge has been heard and determined. Since each trustee is chargeable with the entire estate and must account therefor, In re Estate of Whitney, 124 Cal.App. 109, 118-119, 125, 11 P.2d 1107, it was error to settle the accounts of the trustees before the court determined whether Ruth Kertz should be surcharged for all assets alleged to have been withheld by her.

The objection on the ground the court was without jurisdiction was made at the opening of the hearing. The court declined to rule on the objection at that time. It proceeded to take testimony for some three days, after which and the submission of briefs it ruled it was without jurisdiction. Appellant suggests that in the event of a reversal, in view of these facts we should direct that the matters be heard by the judge who heard the evidence in order that he may decide the issues and thus save time,

expense, and repetition of evidence which has already been received. That is the function of the presiding judge of the superior court who, no doubt, on application will give the matter due consideration.

The order appealed from is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



INDUSTRIAL INDEMNITY COMPANY,
etc., et al., Plaintiffs, Cross-Defendants
and Respondents,

v.

GOLDEN STATE COMPANY, Ltd., etc., et al.;
G. W. Thomas Drayage & Rigging
Company, Inc.; W. R. Ballinger & Son, a
corporation, and Minna M. Ballinger, et
al., Defendants, Cross-Complainants and
Appellants.*

Civ. 16940.

District Court of Appeal, First District,
Division 2, California.

Aug. 29, 1956.

Rehearing Denied Sept. 28, 1956.

Hearing Granted Oct. 26, 1956.

Action for declaratory relief regarding rights of former subscribers of a reciprocal insurance exchange under agreement transferring its business to plaintiff indemnity company. Defendants brought cross-actions in such subscribers' behalf to recover plaintiff's insurance business on ground of disloyal diversion thereof from the exchange by an underwriters partnership, whose members substantially owned plaintiff's stock, as exchange's attorney in fact. From a judgment of the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., dismissing the complaint for declaratory relief and directing that declared net value of exchange's business, property and assets, returned to attorney in fact, be distributed thereby to such subscribers, defendants and cross-

* Opinion vacated 316 P.2d 966.

complainants appealed. The District Court of Appeal held that plaintiff, having illegally acquired exchange's business by breach of trust and in violation of law, could not retain profits subsequently secured from such subscribers as customers, but that cross-complainants could not recover plaintiff's anticipated future profits.

Judgment reversed, with directions.

1. Trusts ⇨247

Equity courts are concerned as much with preventing fiduciaries from benefiting from breaches of their trusts as with protecting trust beneficiaries from losses which they otherwise would not have sustained.

2. Trusts ⇨247

In considering remedies to be afforded trust beneficiaries for trustees' breaches of trust, courts look with particularly jealous eye on trust relation and hold trustees to highest standard of good faith.

3. Insurance ⇨12½

An indemnity company, illegally acquiring business of reciprocal insurance exchange, whose attorney in fact was a partnership members of which substantially owned company's stock, under invalid transfer and assumption agreement, cannot retain profits subsequently secured by company from exchange's former subscribers as customers because of such breach of trust and violation of law, though it might have obtained such customers in another way. West's Ann. Insurance Code, § 1101.

4. Trusts ⇨231(1)

A trustee's relation to trust estate prevents him from dealing therewith in such a way as to make personal profit for himself, and he is accountable for all profits obtained by him as result of pursuing such illegal course, though estate was not injured thereby.

5. Trusts ⇨231(1)

While restitution is ordinarily used to restore property to owner unjustly deprived thereof, a constructive trustee, receiving from beneficiary a benefit greater than loss suffered by beneficiary, must surrender

such benefit, as trustee would be unjustly enriched if permitted to retain benefit, though not at beneficiary's expense.

6. Trusts ⇨231(1)

A trustee making a profit through violation of his duty to beneficiary can be compelled to surrender profit to beneficiary, though not made at his expense.

7. Trusts ⇨231(1), 247

Equity should not countenance reward of trustees for their violation of law by windfall of large sum of money which they would have been bound to pay beneficiaries had trustees' conduct been legal, if such result can be afforded by following established equitable principles, and one of recognized forms of relief is beneficiary's recovery of profits accruing to trustee who breaches his trust.

8. Appeal and Error ⇨1097(1)

Opinion of District Court of Appeal, holding that reciprocal insurance exchange's former subscribers had right to exchange's business taken over by indemnity company under invalid transfer and assumption agreement, though not to business built up by such company in general, and directing superior court to grant subscribers' representatives such relief as would enable them to recover for subscribers business and assets obtained by company in consequence of agreement, did not prevent representatives from recovering amount of profits made by company from such subscribers as customers, but was intended merely to direct that representatives recover whatever they might be entitled to in equity for wrongful taking over of exchange's business.

9. Insurance ⇨12½

The Insurance Code section, providing that insurer, suffering loss because of violation of section providing that insurer's officers shall not receive any money or valuable thing for negotiating, procuring or aiding in purchase or sale of property by or to insurer or be pecuniarily interested in any such purchase or sale, may recover damages sufficient to compensate insurer for such loss, does not preclude representa-

tives of reciprocal insurance exchange's former subscribers from recovering for them amount of profits made by indemnity company from such subscribers as customers after company's wrongful acquisition of exchange's business under invalid transfer and assumption agreement; such profits being recoverable, not as damages, but by way of restitution. West's Ann. Insurance Code, §§ 1101, 1103.

10. Money Received ⇨1

Since purpose of restitution, sought either in equity or at law, is not to compensate plaintiff for his loss, but to restore what defendant received, courts look to inequity of allowing defendant to retain it rather than damage sustained by plaintiff.

11. Insurance ⇨12½

The statute declaring trustee, using or disposing of trust property in manner not authorized by trust, but in good faith, with intent to serve beneficiary's interests, liable only to make good whatever beneficiary lost by trustee's error, does not affect liability of indemnity company to reciprocal insurance exchange's former subscribers for profits made from them as customers by such company after acquiring business of exchange, whose attorney in fact was a partnership, members of which substantially owned company's stock, under transfer and assumption agreement in violation of Insurance Code, though company acted in good faith. West's Ann. Civ. Code, § 2238; West's Ann. Insurance Code, §§ 1101, 1106.

12. Criminal Law ⇨32

Ignorance of law is no excuse for its violation, but intentional doing of act prohibited by law is sufficient to constitute violation thereof.

13. Insurance ⇨12½

To ascertain indemnity company's net profits, secured from reciprocal insurance exchange's former subscribers as customers after company's wrongful acquisition of business of exchange whose attorney in fact was a partnership members of

which substantially owned company's stock, under invalid transfer and assumption agreement, for purpose of determining amount recoverable from company by subscribers' representatives because of such breach of fiduciary duties and violation of statute, company's expenses properly allocable to such subscribers' policies should be deducted from premiums therefor. West's Ann. Insurance Code, § 1101.

14. Insurance ⇨12½

Since trust beneficiary's recovery from trustee of profits made thereby from breach of duty to beneficiary is allowed by way of restitution, regardless of beneficiary's loss, reciprocal insurance exchange's former subscribers' representatives cannot recover from indemnity company, acquiring business of exchange whose attorney in fact was a partnership members of which substantially owned company's stock, under invalid transfer and assumption agreement, company's anticipated future profits from such subscribers as customers. West's Ann. Insurance Code, § 1101.

15. Insurance ⇨12½

An equity court has power, in exercise of sound discretion, to reserve, in its judgment awarding reciprocal insurance exchange's former subscribers' representatives amount of net profits made from such subscribers as customers by indemnity company, to which exchange's business was transferred under invalid transfer and assumption agreement, right to award by supplemental judgments future profits made by company as they actually accrue. West's Ann. Insurance Code, § 1101.

16. Appeal and Error ⇨1078(1)

The District Court of Appeal should not decide, on appeal thereto from superior court's judgment, a question not briefed by parties.

17. Equity ⇨65(2)

Equity should not reward wrongdoer by giving him rights under contract illegally breached and repudiated by him, as no one can profit from his own wrong. West's Ann. Civ. Code, § 3517.

18. Insurance ⇨12½

Where liquidation of reciprocal insurance exchange under agreement transferring its business to indemnity company, stock of which was substantially owned by members of underwriters partnership acting as exchange's attorney in fact, proceeded to point of no return, so that parties could not be put in statu quo by restoration of going business to exchange, before District Court of Appeal held agreement illegal, courts cannot legalize liquidation ex post facto, nor treat it as legal by attributing it to underwriters' agreement, and hence cannot award company, as partnership's assignee, sum accumulated under such agreement to cover liquidation costs and partnership's compensation for services as liquidator.

19. Insurance ⇨12½

Representatives of liquidated reciprocal insurance exchange's former subscribers are entitled to reasonable value of exchange's business and assets transferred to indemnity company under invalid transfer and assumption agreement, but any reasonably necessary charges connected with such assets and all reasonable expenses necessarily involved in discharging exchange's obligations are properly deductible in determining net value of assets taken over by company, so that actual costs reasonably incurred by it in liquidating exchange's business should be allowed to it.

20. Insurance ⇨12½

Where underwriters partnership performed services as liquidator of reciprocal insurance exchange in good faith under underwriters' agreement providing for payment of percentage of premiums received by exchange as compensation for such services until an indemnity company took over exchange's business under illegal transfer and assumption agreement before expiration of many policies written by exchange, and thereafter ceased to perform such services because of good-faith belief that assumption agreement was valid and superseded underwriters' agreement, such

company, to which partnership assigned its rights to such fees, should be allowed only portion thereof properly allocable to services performed by partnership before take-over as related to total services partnership would have performed had its services continued under underwriters' agreement until expiration of policies.

21. Interest ⇨22(1), 38(1)

Whether any interest should be charged on amount of judgment and, if so, how much, depends on particular circumstances, which may be such that mere restoration of property or its value thereof, without interest, would be all that justice requires.

22. Interest ⇨19(1)

Charging or withholding of interest on unliquidated amounts awarded by judgment lies in equity courts sound discretion.

23. Interest ⇨39(2)

Where legality of transfer and assumption agreement, under which reciprocal insurance exchange's business was transferred to indemnity company, stock of which was substantially owned by underwriters partnership acting as exchange's attorney in fact, was never questioned during period of over four years between effective date of agreement and decision of District Court of Appeal, on its own initiative, that agreement was void as violating Insurance Code, company should not be charged interest for such period on amount directed by subsequent judgment of such court to be distributed by partnership in liquidation of exchange to former subscribers thereof, especially as long and complicated accounting would be required to determine sum justly due such subscribers.

24. Interest ⇨22(1)

Generally, where accounting is required to determine sum justly due judgment creditors, interest thereon is not allowed them.

25. Insurance ⇨12½

The superior court did not err in failing to decree restoration of business of reciprocal insurance exchange as going concern many years after its absorption by indemnity company, to which exchange's business was transferred under illegal transfer and assumption agreement, but properly decreed restoration to exchange's former subscribers' representatives of money value of such business. West's Ann. Insurance Code, § 1101.

26. Insurance ⇨12½

The superior court did not err in failing to order restoration of reciprocal insurance exchange's name and insignia to it and enjoin use thereof by indemnity company, to which exchange's business was transferred under illegal transfer and assumption agreement, as it was no longer an exchange to which anything could be restored, and representatives of exchange's former subscribers would receive restitution of value of such business, with all assets of exchange, in amount to be determined after accounting, plus net profits to company from its illegal taking over of exchange's business, of which such name and insignia are part.

27. Insurance ⇨12½

In indemnity company's action for declaratory relief regarding rights of reciprocal insurance exchange's former subscribers under agreement transferring exchange's business to company in violation of Insurance Code section, a corporation filing petition, as one of exchange's owners, for judgment pursuant to decision of Court of Appeals reversing judgment for plaintiffs and against such subscribers' representatives as cross-complainants, with directions to grant cross-complainants relief enabling them to recover for subscribers business and assets obtained by company in consequence of agreement, was not entitled to order that corporation represent all subscribers in another trial on ground that cross-complainants were not properly representing them, as cross-

complainants took only realistic approach to case.

28. Parties ⇨40(2)

In representative action, court is not bound to permit intervention of others of same class as plaintiffs, if their interests are being properly protected.

Park Chamberlain, Earl C. Berger, San Francisco, for appellant Robert L. Johnson Corp.

Kenny & Morris, Los Angeles, Jerome Politzer, San Francisco, Morris E. Cohn, Beverly Hills, Hyman & Hyman, San Francisco, for appellants G. W. Thomas Drayage & Rigging Company, Inc., W. R. Ballinger & Son, and Minna M. Ballinger.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondents.

PER CURIAM.

This is the second appeal in this case. It is taken by defendants on behalf of the subscribers as of December 31, 1948, of Industrial Indemnity Exchange, a reciprocal insurance exchange.

Plaintiffs Industrial Indemnity Company, et al., hereinafter called "Company", originally brought an action for declaratory relief regarding the rights of subscribers of Industrial Indemnity Exchange, hereinafter called "Exchange", under an agreement by which the business of Exchange was transferred as a whole to Company for a price to be distributed to the subscribers. Cross-actions were brought in behalf of the subscribers. It was claimed that all of the insurance business transacted by Company belonged in equity to Exchange and that this business had been disloyally diverted by Industrial Underwriters, a partnership, the attorney-in-fact of Exchange, hereinafter called "Attorney", whose partners substantially owned the stock of Company. The court on the first trial found in nearly all respects for plaintiffs and against the cross-complainants.

On appeal this court concluded, *Industrial Indem. Co. v. Golden State Co.*, 117 Cal.App.2d 519, 256 P.2d 677, 690, that the original action for declaratory relief should have been denied because the agreement to which it related was void as violating section 1101 of the Insurance Code. The respondents there contended, in an attempt to avoid the application of Insurance Code section 1101, that the agreement was not a beneficial sale of assets to the Company as prohibited by the Code but a transfer for the purpose of liquidation only. This court after reviewing the provisions of the "Transfer and Assumption Agreement" and commenting that the practical effect of the transaction was that Company acquired the whole business of Exchange as a going concern rejected this contention.

This court then reviewed the correctness of the denial of all relief to the cross-complainants. It was recognized that the attorney-in-fact in this situation was a fiduciary in relation to the subscribers and that the doctrine of corporate opportunities was applicable. It was further stated that the issues of good faith and of sufficient performance of contractual obligations are normally questions of fact. This court noted that the trial court made most elaborate findings as to all circumstances on which it based its holding that the cross-defendants did not breach their fiduciary duty. These findings were fatal to the appeal with respect to the claims of subscribers of Exchange to the business of Company since the appellants failed to show that they were not supported by the evidence. This court said: "Under these circumstances it is not for us to say that the ultimate findings of the court below are necessarily improper inferences nor can we hold as a matter of law, contrary to said findings, that the Attorney breached its fiduciary duty to subscribers when it engaged in the writing of workmen's compensation insurance through the medium of Company or that the business of Company was in equity the property of Exchange. We are the

more satisfied that this result is not unjust because the gain by Exchange of all profits of the business of Company without participation in them by any of Company's insureds would have given the subscribers of the Exchange a windfall wholly out of line with the setup of such Exchange.

"However it does not follow that cross-complainants are not entitled to any relief. Although we hold that the subscribers of Exchange are not entitled to the business built up by Company in general—and then they are necessarily not entitled either to the business of its wholly owned subsidiary, Industrial Service Company, mentioned separately on appeal—they have a right to the business taken over by Company in consequence of the Transfer and Assumption Agreement, which we have held to be invalid. If they so desire they are entitled to have that matter wound up in these equity proceedings and for that purpose the judgment denying all relief on the cross-complaints will also have to be reversed."

This court concluded:

"The judgment is reversed with directions to the trial court to deny all declaratory relief to plaintiffs on the ground that the agreement as to which it is prayed for is void as contrary to law; if defendants-cross-complainants so desire, to grant them such relief as the court will deem fit to enable them to recover in their representative capacity for subscribers the business and assets obtained by Company in consequence of the agreement herein held to be invalid, and to wind up fully all matters relating thereto; to make, if defendants-cross-complainants so desire and they have made a showing that financial advantages have been obtained by the subscribers they represent because of their services and the services of their attorneys, such orders as the court will deem fit fixing and allowing compensation for said services and providing for payment thereof out of the funds and assets recovered; the cross-appeal of defendants in the cross-

actions is dismissed; the respective parties to bear their own costs."

Following the filing of the remittitur in the Superior Court appellants filed their "Petition for Judgment and Decree Pursuant to the Opinion of the District Court of Appeal Herein." They asked the court to enter a decree determining the assets and the nature and value and extent of the business taken over by respondents in consequence of the transfer and assumption agreement and to award the same to themselves. They alleged that the District Court of Appeal directed that they be permitted to recover certain property in a representative capacity on behalf of all persons who were subscribers of the Industrial Indemnity Exchange on December 31, 1948; that the aforesaid property consisted of the business and assets obtained by the plaintiff, Industrial Indemnity Company, on January 1, 1949, in consequence of a transfer and assumption agreement held to be invalid; that said property was still in the possession of the said plaintiff, Industrial Indemnity Company, and its full amount and nature and extent had not been determined; that the District Court of Appeal had directed the Superior Court to grant appellants such relief as it deems fit to enable them to recover said property, to wind up fully all matters relating thereto, and to make such orders as it deems fit compensating appellants and their attorneys out of funds and assets recovered. An itemization of then known and discovered business and assets of Exchange for which recovery was sought followed. It was further alleged that there were other assets not yet discovered or identified which constituted the business of Exchange, and were the property and business of Exchange on December 31, 1948, and appellants sought leave to insert these items when ascertained.

Appellant Robert L. Johnson Corporation also filed a "Petition for Judgment and Decree Pursuant to Decision of the District Court of Appeal, and for Proceedings Thereunder." Appellant Johnson Corpo-

ration stated that it was bringing this petition in its own behalf, as one of the owners of Exchange, and as representative of all other similarly situated co-owners. On motion of appellants (all appellants except the Johnson Corporation will be referred to simply as "appellants") this petition of appellant Johnson Corporation was stricken from the files.

Appellant Johnson Corporation later moved the Superior Court for certain orders relating to this matter. On motion of respondents this motion of appellant Johnson Corporation was stricken from the files.

Respondents answered appellants' petition for judgment and decree and their amendment to that petition. After a lengthy trial the court made exhaustive findings of fact and set forth its conclusions of law. Judgment was entered to the effect that:

"1. That pursuant to the remittitur filed herein, Plaintiffs are not entitled to any declaratory relief in connection with the complaint for declaratory relief filed herein and any relief thereunder is denied on the ground that the agreement as to which it is prayed for is void as contrary to law and said complaint for declaratory relief is dismissed.

"2. That all business, property and assets of Exchange and subscribers at the Exchange obtained by Company in consequence of the Transfer and Assumption Agreement or at any time or in any manner have been returned to the Exchange and are now being held by Industrial Underwriters, the Attorney-in-Fact of Exchange, subject to the control and supervision of the Advisory Committee of the Exchange and the Insurance Commissioner of the State of California; That the Exchange is and has been since December 31, 1948, in liquidation; that the net value of the business, property and assets of Exchange is \$323,300.39 and said sum includes all items of any value which are any part of the business, property or assets of the Exchange or the subscribers at the Exchange; that said sum shall be distributed, in liquida-

tion of the Exchange, by Underwriters to those subscribers who had policies of insurance in effect with the Exchange as of December 31, 1948, on a basis whereby each of them will receive such proportion of said amount as his total earned premium on all policies of insurance placed with the Exchange since January 1, 1931 bears to the total earned premium since January 1, 1931 of all subscribers entitled to participate; that in determining the amount of the total earned premium of each such subscriber the Rules and Practices under Rule XV of the Manual of Rules, Classifications and Basic Rates published by the California Inspection Rating Bureau shall be used to determine the continuing identity of all subscribers in cases of changes in ownership or business form.

"3. That the Special Surplus Fund now being held by Industrial Underwriters shall be distributed and paid to Industrial Underwriters after full provision has been made, by reinsurance or otherwise to the satisfaction of the Insurance Commissioner of the State of California, for the liabilities of the Exchange.

"4. That the Exchange or the subscribers at the Exchange have no right, title or interest to or in any of the business, property or assets of Company.

"5. That pursuant to the terms of the remittitur filed herein and no financial advantage to the subscribers because of their services and the services of their attorneys having been realized, no compensation shall be awarded or allowed out of the \$323,300.39 representing the net value of the business, property or assets of the Exchange herein provided to be distributed to the subscribers, for the services of Defendants and Cross-complainants or their attorneys.

"6. That all parties are to bear their own costs in this proceeding."

Appellants appeal from this judgment and appellant Johnson Corporation appeals from the judgment and from all intermediate orders, judgments and decrees. The subscribers of Exchange had a right to recover from respondents the business taken

over by Company in consequence of the invalid transfer and assumption agreement. The remittitur from this court specifically directed the trial court, if appellants should so desire, to grant appellants "such relief as the court will deem fit to enable them to recover in their representative capacity for subscribers the business and assets obtained by Company in consequence of the agreement herein held to be invalid, and to wind up fully all matters relating thereto." The position of respondents, with which the trial court has agreed, is that the business and assets of Exchange taken over by Company in consequence of the transfer and assumption agreement consisted of the business in force on December 31, 1948, and the assets relating to this and prior business, subject to terms of certain Underwriters' Agreements to be discussed later. The value of this business was found to be \$323,300.39 and this sum was awarded to appellants.

In their petition for judgment appellants stated in part:

"6) The aforesaid business and assets of the Industrial Indemnity Exchange [taken over by Company in consequence of the invalid transfer and assumption agreement] insofar as now known and discovered consist of the following items:

* * * * *

"j) The good-will and trade name and insignia of the Industrial Indemnity Exchange and in this particular petitioners pray in the alternative for injunctive relief prohibiting the plaintiff, Industrial Indemnity Company, from the further use of the good-will and trade name and the insignia of the Industrial Indemnity Exchange, together with an award for the reasonable value of the use of said good-will and trade name and insignia by the said plaintiff and for damages for the use thereof or in the alternative for the reasonable market value of the said good-will and trade name and insignia of the Industrial Indemnity Exchange as a going business on Dec. 31, 1948 (heretofore found by this Court not to exceed \$1,574,569.23 (Finding LXXXV) in the sum of \$....."

However, appellants later amended their petition and in place and stead of the above paragraph 6j inserted another paragraph in which they claimed certain net earnings, the present value of certain future net earnings, and the value of the trade name and insignia of Exchange. All reference to good will was deleted.

This court in its prior opinion recognized that Company by reason of the invalid agreement came into possession of more than certain physical assets and business of Exchange. It was stated: "By taking over all assets, assuming all liabilities, including all outstanding policies of the Exchange and becoming directly liable thereon to the policyholders, the Company acquired the whole business of the Exchange as a going concern and would therefore benefit by the increase of its clientele." It was noted that Company was receiving an advantage not consistent with the position of a mere liquidator and that the Insurance Commissioner originally took the position in this matter that the subscribers should receive "an amount representing a reasonable going concern value of the Exchange as measured by the Value to the Company of any Exchange business it might take over in the event of consolidation. * * *'" (The commissioner later changed his view somewhat apparently because of the identity between Attorney and Company, but this court stated that this would not change the fact that the Company acquired at least the investment and the going business.) It would seem from this that it was contemplated that appellants in a proper proceeding should be able to recover an amount to compensate them for the going concern value or the good will of Exchange which was received by Company as a result of the invalid agreement. However, relief of this sort was not sought by appellants.

It should be noted that the net worth of Exchange as of December 31, 1951, as computed in accordance with the provisions of the transfer and assumption agreement was \$1,018,589.07. (At the time of the first trial this amount was estimated to be

\$1,894,347.07.) If the agreement had not been held invalid this amount would have been paid, and distributed to the subscribers.

The result is that if the present judgment stands the Company will have in fact everything, for which it agreed in the invalid agreement to pay considerably more than one million dollars to the subscribers and will pay for it only \$323,300.39.

As noted above the appellants by amendment abandoned their claim for any recovery for the value of the good will of their business as such and instead sought a recovery of the net profits derived by the Company from insurance written, and in the future reasonably expected to be written, for insureds of the Exchange at the time that its business was illegally taken over by the Company. Appellants justify this course by pointing out that, while the value of good will as such is largely speculative and difficult of exact proof, at the time of the second trial they had the actual experience of four full years of operation by the Company after it had taken over the business of the Exchange under the illegal contract and the amount of business actually done by the Company with the former subscribers of the Exchange, from which the net profits accruing to the Company from such business might be calculated by deducting from the total premiums so received by the Company a proper proportion of the Company's expenses of operation.

Respondents counter with the fact that they produced evidence, which the trial court in the findings accepted, negating any right to such recovery. This evidence may be summarized as follows: that it is the custom in the insurance business when an insurance company is purchased to value only current business and assets, no allowance being made for any going concern or good will value; that there is no such good will value because the insurance brokers review the situation annually and place their clients' insurance in whatever company, considering all relevant factors, seems most desirable and advantageous for their

clients for the ensuing policy year; there was testimony of many of the largest former subscribers, aggregating approximately one-half the business done by the Company with former subscribers of the Exchange, that they placed their business with the Company, not because the Company had acquired the business of the Exchange, but solely because they were stockholders in the Company; as to the other former subscribers of the Exchange who placed their insurance with the Company there was testimony that their brokers would not advise their clients to place their insurance with the Company because it had acquired the business of the Exchange but would canvass the field and recommend the placing of such insurance with whatever company seemed most desirable for the clients uninfluenced by the fact that the Company had acquired the business of the Exchange; and furthermore that the Exchange had in any event decided to discontinue its business. From this it is argued that the finding that the Exchange suffered no loss and hence is not entitled to any of the profit from such business is amply supported.

In assaying the validity of this position it is relevant to consider the factual situation. The sale of the business to the Company was held by us on the former appeal to be in contravention of sec. 1101 of the Insurance Code because of the fiduciary relation existing between the parties. Even though the Company was acting in actual good faith and in ignorance of the illegal nature of the contract it nonetheless breached its fiduciary relation in attempting to acquire the business of the Exchange in violation of the express prohibition of the law. By its breach of the fiduciary relation, and violation of an express statute enacted for the protection of the Exchange in just such a situation, it could not divest itself of its character as a fiduciary toward the Exchange. It remained in the position of a fiduciary of the Exchange after the making of the illegal contract as before. It is unthinkable that a fiduciary by a breach of its trust could terminate its fiduciary relation or find itself in a more ad-

vantageous position than it was before because of such breach.

[1] We are thus faced with the question: Can the Company retain the profits which it secured from the former subscribers of the Exchange following its wrongful acquisition of the business of the Exchange in breach of its fiduciary duties and in violation of a statute designed to prevent it from doing just what it in fact did? Courts of equity have traditionally been concerned as much with preventing fiduciaries from benefiting from breaches of their trust as they have been with protecting beneficiaries from losses which they otherwise would not have sustained. Cases cited *infra*.

[2] It must never be forgotten in considering the remedies to be afforded beneficiaries for breaches of trust by their fiduciaries that courts look with a particularly jealous eye upon the trust relation and hold fiduciaries to the highest standard of good faith. In a case often since quoted from, Mr. Justice Cardozo used these words: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. [Citation.] Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crown." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546, 62 A.L.R. 1.

[3] The pertinent and controlling facts are simple and may be simply stated. By breach of its trust and in violation of the law, the Company illegally acquired the business of the Exchange. It retained its fiduciary character after the illegal ac-

quisition as before. Following this illegal acquisition it acquired and benefited from a large portion of the insurance business formerly done by the Exchange. Under these circumstances it cannot lie in the mouth of the Company to say, "The Exchange lost nothing because it would not have had the business anyway. We gained nothing which we would not have gotten in any event and so we cannot be held liable." The fact remains that the Company illegally acquired the business of the Exchange. It kept and still has many of Exchange's customers. It put itself in the position to acquire those customers by its own breach of trust and violation of the law. To permit it to profit from those customers would permit it to reap a gain from its own breach of duty and illegal act. That it might have gotten these customers in another way if it had not breached its trust and violated the law does not undo the fact that it did breach its trust and violate the law and acquire them in that way. The Company illegally scrambled the eggs. Neither it nor the courts can unscramble them now, nor place Exchange in the position in which it was before. The Company must take the consequences of what cannot be undone. It cannot ask us to place it in the position in which it might have been if it had not illegally acquired and liquidated the business of the Exchange.

The Supreme Court of the United States said in *Crites, Inc., v. Prudential Ins. Co. of America*, 322 U.S. 408, 417, 64 S.Ct. 1075, 1080, 88 L.Ed. 1356: "In this type of situation 'the incidence of a particular conflict of interest can seldom be measured with any degree of certainty.' [Citation.] Proof of profits resulting from an irregular or conflicting course of conduct is sufficient."

So Mr. Justice Cardozo said in *Meinhard v. Salmon*, *supra*, 164 N.E. at page 547:

"The trouble about his conduct is that he excluded his coadventurer from any chance to compete * * *.

"No answer is it to say that the chance would have been of little value even if

seasonably offered. Such a calculus of probabilities is beyond the science of the chancery."

[4] Herein follow two equally pertinent statements of the United States Supreme Court:

"It makes no difference that the estate was not a loser in the transaction * * *. It is the relation of the trustee to the estate which prevents his dealing in such a way as to make a personal profit for himself." *Magruder v. Drury*, 235 U.S. 106, 120, 35 S.Ct. 77, 82, 59 L.Ed. 151.

"The course taken was one which a fiduciary could not legally pursue. [Citation.] Since he did pursue it and profits resulted the law made him accountable * * * for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby." *Jackson v. Smith*, 254 U.S. 586, 588-589, 41 S.Ct. 200, 201, 65 L.Ed. 418.

In *Menefee v. Oxnam*, 42 Cal.App. 81, 87-88, 183 P. 379, 382, the court used equally pertinent language: "Though it is the general rule that fraud without at least some slight injury is not ground for relief, this general rule is not an obstacle to recovery in cases of the kind here under consideration, even though there be a total absence of injury to the complaining party. * * * The rule that a coadventurer must act with utmost good faith, * * * is not intended to be remedial of actual wrong, but preventive of the possibility of it, and it matters not that there is no fraud meditated and no injury done."

[5,6] In Comment (d) to sec. 160, Restatement of Restitution, after pointing out that while ordinarily restitution is used to restore to a plaintiff property of which he has been unjustly deprived, the text continues (pp. 643-644): "There are some situations, however, in which a constructive trust is imposed in favor of a plaintiff who has not suffered a loss as great as the benefit received by the defendant. In these situations the defendant is compelled to surrender the benefit on the ground that

he would be unjustly enriched if he were permitted to retain it, even though that enrichment is not at the expense of the plaintiff. Thus, if the defendant has made a profit through the violation of a duty to the plaintiff to whom he is in a fiduciary relation, he can be compelled to surrender the profit to the plaintiff, although the profit was not made at the expense of the plaintiff".

[7,8] To make the nice calculations by hindsight which respondents ask us to make in this case would reward their violation of the law by a windfall of thousands of dollars which they would have been bound to pay if their conduct had been legal. Equity should not countenance such a result if by following established equitable principles it can be avoided. One of the recognized forms of relief is the recovery of the profits accruing to the fiduciary who breaches his trust. Restatement Trusts, sec. 205 (b); 2 Scott on Trusts, sec. 170.25, p. 909, sec. 205, p. 1098, sec. 206, pp. 1105-1106, sec. 462.2, p. 2318. There is nothing in our former opinion preventing appellants from recovering these profits. We intended in that opinion no more than to direct that appellants be allowed whatever recovery they might be entitled to in equity for the wrongful taking over of the business of the Exchange. We did not consider, much less decide, the extent and nature of that relief.

[9,10] Respondents argue that section 1103 of the Insurance Code fixes the measure of recovery for a violation of section 1101 and that the recovery of these profits cannot be brought within its terms. Section 1103 provides: "Whenever an insurer is injured or made to suffer loss by reason of any violation of the provisions of section[s] 1101 * * * such insurer may recover * * * damages sufficient to compensate such insurer for such loss."

The section deals only with damages. The profits in question are recoverable not as damages but by way of restitution, and as we have seen without regard to loss suffered by the beneficiary. The rule was clearly stated by the court in *Speed v. Transamerica Corp.*, D.C., 135 F.Supp. 176,

187, 188, quoting from Prosser on Torts: "When restitution is sought either in equity or at law a much more liberal policy has been adopted. Since the purpose is not to compensate the plaintiff's loss but to restore what the defendant has received, the courts look to the inequity of allowing him to retain it rather than to the damage which the plaintiff has sustained."

[11, 12] Nor can section 2238, Civil Code avail respondents. That section reads: "A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error." Here respondents' good faith may not be questioned, but they nevertheless violated an express statute enacted for the protection of the Exchange. Ignorance of the law is traditionally no excuse for its violation. It is sufficient that the violator intentionally does the act which the law prohibits. *People v. Dillon*, 199 Cal. 1, 7-9, 248 P. 230.

It follows that respondents were guilty of something more than the use and disposition of trust property in a "manner not authorized by the trust" which is dealt with in section 2238 Civil Code. They dealt with the trust property in violation of an express statute in a manner forbidden by the law and made a crime by section 1106 Insurance Code. Under the circumstances of this case section 2238 Civil Code is inapplicable. To apply it would permit respondents to reap a benefit from their own violation of the law.

[13] We give no consideration on this appeal to the proper calculation of such net profits other than to say that the expenses of the Company properly allocable to these policies should be deducted from the premiums to ascertain such profits. The court made no finding of the amount of such net profits in the judgment appealed from. On another trial it will make such finding based on its weighing of the evidence that may be produced on the subject at that trial.

[14] A consideration of the fact that the recovery from a fiduciary of profits made from his breach of duty to his beneficiary is allowed by way of restitution without regard to the beneficiary's loss demonstrates that there can be no recovery for anticipated future profits in the circumstances of this case. It is the profits actually accruing to the fiduciary from his breach which are the subject of restitution. Respondents cannot be made to restore what they have not received. To allow an amount for anticipated future profits would be to allow damages, not restitution, and damages are based on loss or injury to the plaintiff. Since in this case the court has found on substantial evidence that Exchange suffered no loss of profits there can be no award for such future loss by way of damages, as obviously there can be none by way of restitution.

[15, 16] Appellants suggest that the trial court in its judgment might reserve the right by supplemental judgments to award such future profits as they actually accrue. We have no doubt of the power of a court of equity to do this in the exercise of its sound discretion. Whether if the court refuses to do this such profits as they accrue may be made the basis of future action by appellants is something which has not been briefed by the parties and which we should not decide on this appeal.

[17, 18] In the Underwriters' Agreement there was a provision for the accumulation of a fund to go to the attorney-in-fact in case of liquidation of the Exchange to cover costs of liquidation and compensation to the attorney-in-fact for his services as liquidator. This amounts to \$592,322.21. His rights to this amount have been assigned by the attorney-in-fact to the Company. Following the first decision of this court holding the sale of the business of Exchange illegal, the Insurance Commissioner licensed the attorney-in-fact to continue the liquidation of the Exchange. The trial court found that the Exchange had been liquidated in accordance with the Underwriters' Agreement and that this

fund was the property of the Company under the assignment to it by the attorney-in-fact. The parties argue the question whether the void Assumption Agreement terminated the Underwriters' Agreement, appellants claiming that it did, citing *Pennsylvania Water & Power Co. v. Consolidated Gas, etc.*, 4 Cir., 186 F.2d 934; and *Virginia Dare Transportation Co. v. Norfolk Southern Bus Corp.*, 4 Cir., 176 F.2d 354, and respondents arguing that it did not, citing 17 C.J.S., Contracts, § 287, p. 674; *Indiana Flooring Co. v. Grand Rapids Trust Co.*, 6 Cir., 20 F.2d 63; *Carson v. Sinking Fund Commission*, Pa.Com.Pl., 2 Lyc. 3; and *Tearney v. Marmiom*, 103 W.Va. 394, 137 S.E. 543. This question seems somewhat beside the point. The undisputed and undisputable fact is that neither the attorney-in-fact nor the Company acted or purported to act under the Underwriters' Agreement in liquidating the Exchange. The liquidation of the Exchange was accomplished in violation of law and of the rights of the subscribers of the Exchange by the Company acting under the illegal Assumption Agreement and as owners of the business of the Exchange. What respondents are in effect saying is: "True we acted under an illegal agreement in liquidating the Exchange as its owners. But now that the court has held the agreement illegal and that we are not the owners of the business, it is proper for the court to treat our illegal conduct as if it had been legal and put us in the same position after the fact of our illegal conduct as we would have been if we had not proceeded to liquidate the business illegally but instead had liquidated the business legally under the Underwriters' Agreement." Equity should not reward the wrongdoer by giving him rights under a contract which he himself illegally breached and repudiated. It is a settled principle of equity that no one can profit from his own wrong. Section 3517 Civ.Code.

If a court could have acted promptly enough to set aside the illegal Assumption Agreement before the illegal liquidation

had proceeded to the point of no return; it is possible that the attorney-in-fact might have then proceeded with the liquidation under the terms of the Underwriters' Agreement, but by the time this court had held the Assumption Agreement illegal in 1953, the illegal liquidation had proceeded to a point where the parties could not be put *in statu quo* by the restoration of the going business to them. Equity was compelled to give them restitution in value, not in kind, and to allow the liquidation theretofore carried on in violation of express law to proceed to its conclusion. That is not to say that what had been done illegally was thereby rendered legal. The liquidation under the illegal Assumption Agreement was and remains illegal and it is that illegality that is at the heart of this action. *Ex post facto* the courts cannot legalize that illegal action nor treat it as if it had been legal by now attributing it to another agreement under which, but for the illegal Assumption Agreement, it might have been legally taken.

[19] However, we are satisfied that in striking the balance between the parties the actual costs reasonably incurred by respondents in liquidating the business should be allowed to them. Appellants are entitled to the reasonable value of the business and assets illegally taken over by the Company, but any reasonably necessary charges connected with those assets are properly deductible therefrom. All reasonable expenses necessarily involved in discharging the obligations of the Exchange are properly deductible in determining the net value of the assets taken over.

[20] What we have said necessarily disposes of the claim to an amount of compensation provided in the Underwriters' Agreement to be paid to the attorney-in-fact as compensation for his services calculated on a percentage of the premiums actually received by the Exchange. When the business was taken over illegally by the Company the policy years on many of the policies written by Exchange had not expired and it was impossible to determine

the exact amount of the premiums on which the compensation of the attorney-in-fact should be based. The attorney-in-fact assigned his rights to these fees to the Company and the trial court found that the Company was entitled to them. Appellants attack this finding on the ground that the Underwriters' Agreement under which they were payable was terminated by the illegal Assumption Agreement.

Respondents argue that since they took over the business in January 1, 1949, and continued the services formerly performed by the attorney-in-fact, the entire fee was earned by the services of the attorney-in-fact performed up to that date and the services performed by the Company after that date. Both parties seem to us somewhat to miss the mark. In our judgment respondents should be compensated for the portion of the services actually performed by the attorney-in-fact under the Underwriters' Agreement up to the date of the take-over by the Company. But the Company was not acting as attorney-in-fact under the Underwriters' Agreement after January 1, 1949, in reinsuring these existing policies of the Exchange and running out their terms. Respondents admit this fact in their brief on page 49 when they say: "Since the company was handling this business after January 1, 1949 for its own account, it obviously did not draw a separate check to its own order out of its own funds in payment of this fee." Since "the Company was handling this business after January 1, 1949 *for its own account*" it just as obviously was not handling it as attorney-in-fact under the Underwriters' Agreement on the Exchange's account. Here again respondents are asking us to treat as legally done under the Underwriters' Agreement what in fact was illegally done under the Assumption Agreement. The proper allocation of fees to the attorney-in-fact should take into account the services actually performed by the attorney-in-fact for the portion of the policy years that he acted as attorney-in-fact as related to the services performed by the Company for the

balance of the respective policy years. Respondents should be credited only with the portion of the contractual fees properly allocable to the services actually performed by the attorney-in-fact as related to the total services that he would have performed in connection with the various policies if his services had continued under the Underwriters' Agreement until the end of the policy years.

We regard this allocation as equitable for the following reasons: The attorney-in-fact in good faith performed the services, for which he was to be compensated, up to the effective date of the take-over. Thereafter he ceased to perform those services only because he believed in good faith that the Assumption Agreement was legal and valid and superseded the Underwriters' Agreement. In doing equity between the parties the attorney-in-fact should be paid for the services actually performed in good faith by him pursuant to the Underwriters' Agreement, but no compensation should be allowed for the illegal conduct of respondents after the effective date of the take-over. The contract furnishes the measure of compensation spread over the entire life of each policy. That measure can only be effectively applied under the facts of this case by an allocation of a portion of the compensation equal to the portion of the services performed by the attorney-in-fact while he was acting under the Underwriters' Agreement.

The trial court allowed no interest on its award. In this connection it seems important that respondents were not acting in bad faith but under the mistaken belief, bolstered by the approval of the Insurance Commissioner, that the Assumption Agreement was a valid and legal one.

[21] In *Title Ins. and Trust Co. v. Ingersoll*, 158 Cal. 474, 489, 111 P. 360, 366 (a trust case) we read:

"The question whether any interest should be charged, and, if any, how much, depends on the circumstances of the particular case, and they may be such that a mere restoration of the property, or its val-

ue, without any interest, would be all that justice would require. *Wheeler v. Bolton* [92 Cal. 159, 172, 28 P. 558.]”

[22] So this court recently held that in equity the awarding or refusal to award interest on unliquidated amounts is discretionary with the court. *Leonard v. Huston*, 122 Cal.App.2d 541, 265 P.2d 566.

That the courts generally agree that the charging or withholding of interest in such cases lies in the sound discretion of a court of Equity see 90 C.J.S., *Trusts*, § 338, p. 584 and cases cited in notes 60 and 61.

[23, 24] It must be borne in mind that more than four years elapsed between the effective date of the Assumption Agreement and the decision of this court in 117 Cal.App.2d 519, 256 P.2d 677. During that entire period no question was ever suggested of the illegality of the Assumption Agreement. This court was the first to raise the question on its own initiative. The charging of interest for this period would penalize respondents for their good faith action in ignorance of a law of which appellants were equally ignorant. Following this the case required, and will on another trial require, a long and complicated accounting. Under the circumstances we believe that the following language from *Stockton Theatres, Inc., v. Palermo*, 121 Cal.App.2d 616, 632, 264 P.2d 74, 85 is particularly applicable:

“Whether, therefore, it would be just and equitable that interest be charged from the date the remittiturs were returned upon such sum as after a long and complicated accounting might have been found then to have been due presented a question calling for judicial discretion in determining what equity required. This, therefore, we think presented an issue peculiarly for the trial court to determine in so far as the allowance of interest upon the amount ultimately found due be concerned, and we cannot say on this record that the trial court abused that discretion or in the refusal to allow interest prior to judgment failed to do equity. Generally speaking, where an accounting is required in order to arrive

at a sum justly due, interest is not allowed. [Citing cases.]”

Upon another trial the question of allowing interest or not, upon the whole or any part of the judgment, and if allowed, from what date or dates it should run on any amount or amounts, will be again a matter upon which the trial court may exercise its sound discretion. It is clear from the authorities cited on this point that the code sections on interest cited by appellants are not binding upon a court of equity in this type of case.

[25] Appellant Johnson argues that the trial court erred in allowing Company to absorb Exchange and in not decreeing the restoration of the business of Exchange as a going concern. Nobody can uneat an apple. Exchange had ceased to be a going concern years before the second trial and Company had in fact absorbed it. The course pursued by the other appellants was the only realistic one left to pursue because the only thing that the court could effectively decree was a restoration in terms of money of the value of a business that was gone beyond the recall of any decree of court. Appellant Johnson does not offer any workable suggestion by which the impossibility of restoring what no longer exists could be accomplished.

[26] This appellant further argues that the name and insignia of Exchange should have been restored to it and the Company enjoined from using them. One answer is that there is no longer an Exchange to which anything could be restored. The Exchange is gone beyond recall. This action on the cross-complaint is one in a representative capacity on behalf of former subscribers of the Exchange. A second answer is that on another trial cross-complainants will get restitution of the value of the business of Exchange, together with all of its assets in an amount to be determined after an accounting pursuant to the directions of this court, plus the net profits accruing to Company from its illegal taking over of the business. The name and insignia are a part of the business so taken

over and if of any value, which respondents dispute, are a part of the business and assets compensated for in this fashion.

[27, 28] Finally, appellant Johnson asks us to order that it represent all subscribers on another trial on the ground that the other appellants have demonstrated that they are not properly representing them. As we said above, the other appellants have taken the only realistic approach to the case and we find no good reason to supersede them. The court did not err in dismissing appellant Johnson's cross-complaint. In a representative action, such as this, the court is not bound to permit the intervention of others of the class if their interests are being properly protected. *Mann v. Superior Court*, 53 Cal.App.2d 272, 280-281, 127 P.2d 970.

The judgment is reversed with directions to the trial court to retry the case and award judgment in accordance with the principles herein expressed. Appellant Johnson to bear its own costs of appeal. The other appellants to recover their costs of appeal from respondents.



In the Matter of the ESTATE of Willinore M.
FOSSELMAN, Deceased.

Charles F. SALKELD, as Executor of the
Last Will and Testament of Willinore M.
Fosselman, Deceased, and Adele Marsh
Rowe, Contestants and Respondents,

v.

Harriet PALMER, Defendant and Appellant.*
Civ. 5428.

District Court of Appeal, Fourth District,
California.

Sept. 14, 1956.

Hearing Granted Nov. 8, 1956.

Proceeding on petition for probate of
two holographic documents claimed to be

* Opinion vacated 308 P.2d 336.

codicils of the last will and testament of deceased. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment denying the petition and petitioner appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding of trial court that deceased was of unsound mind when she executed documents in question.

Judgment affirmed.

1. Wills ⇨55(1)

In proceeding on petition for probate of two holographic documents claimed to be codicils of the last will and testament of deceased, evidence sustained finding of trial court that deceased was of unsound mind when she executed documents in question.

2. Wills ⇨386

Upon appeal from a judgment denying probate of a will because of mental incompetency, District Court of Appeal is not required to inquire beyond whether findings and decision of the trial court are amply supported by competent and legally sufficient evidence.

3. Wills ⇨386

Weight of conflicting testimony in a proceeding on a petition for probate of two holographic documents claimed to be codicils of the last will and testament of deceased was for the trial court.

4. Wills ⇨384

In proceeding on petition for probate of two holographic documents claimed to be codicils of the last will and testament of deceased, there was no prejudicial error in admission of testimony of a psychiatrist whose qualifications were stipulated to by counsel and who answered hypothetical questions as to deceased's mental capacity based on circumstances testified to by various witnesses, the weight of his testimony being for the trial court.

George R. McClenahan, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, for respondents.

MUSSELL, Justice.

Appellant Harriet Palmer filed a petition for probate of two holographic documents claimed to be codicils to the last will and testament of Willinore M. Fosselman, deceased. A contest was filed to the admission of said instruments by the respondents Charles F. Salkeld, as executor, and Adele Marsh Rowe, as an heir, claiming that the testatrix was of unsound mind at the time of the execution of the two documents and therefore lacked testamentary capacity. A trial of this issue was had by the court without a jury and judgment was entered denying appellant's petition. Harriet Palmer, the beneficiary named in the two documents involved, appeals from the judgment on the ground that there is no substantial evidence to sustain the decision of the trial court that the testatrix was of unsound mind when she executed the said documents; that the court committed prejudicial error in admitting the testimony of Dr. Lengyel, a psychiatrist; and that the court erred in giving undue weight to the testimony of certain witnesses called by the contestants.

Willinore M. Fosselman died in San Diego on March 25, 1955. At the time of her death she was 88 years of age and had resided in San Diego since about April 1, 1950. Prior to that date she had resided in New York and there maintained with the Bankers Trust Company of New York a security-custodian account which, at the time of her death, was of the approximate value of \$460,000. Until the time of her death, her financial affairs were largely under the supervision and control of Charles F. Salkeld, vice-president of said Bankers Trust Company.

On or about April 1, 1950, Mrs. Fosselman fell in the U. S. Grant Hotel in San Diego and suffered a fracture of her left hip. She was immediately treated by Dr. R. L. Hippen and was taken to her room on a stretcher. Later, she was removed to the Mercy Hospital where she remained for

approximately seven weeks. While she was in the hospital, she became quite confused, developed "a uremia", and for a time was in a coma. She was moved from the hospital to a residence in San Diego, purchased with her funds, and was attended there by Dr. Hippen until her death.

Dr. Hippen testified that Mrs. Fosselman was "what we generally call a senility problem. She wasn't able to care for herself entirely and she on several occasions became somewhat irrational"; that her mental progress was one of gradual deterioration and she was unable to comprehend what was going on around her; that she was never completely associated about time and "got all mixed up"; that she would occasionally know she was in San Diego or California but frequently thought she was back in New York City; that she did not associate the persons around her as nurses and never quite comprehended who they were or what they were and frequently got them mixed up with people she had known in the past; that she thought she was rather destitute and frequently was disappointed when he came to see her because she was afraid she would not be able to pay his bill; that from 1952 on she was suffering from "senile dementia", a generalized softening of the brain due to the impaired blood supply; that in this opinion from 1952 on she was unable to understand or comprehend the nature and extent of her property and the situation with reference to the people who might have been natural objects of her bounty; that her decline was accelerated by her fall in the hotel; that she had a cardiac failure and he had to give her medicine to relieve the swelling in her ankles and feet and to control a cardiac irregularity which she had developed; that perhaps from 1953 on she completely forgot about fracturing her hip, forgot she was ever in the hospital, and she was not able to discuss it at all.

After Mrs. Fosselman was released from the hospital and removed to her home, around the clock nursing care was provided for her and Mrs. Palmer, the proponent

herein, was one of the nurses so engaged. She commenced work in the spring of 1952 and worked daily from 7:00 a. m. until 3:00 p. m. until the date of Mrs. Fosselman's death on March 25, 1955. She testified that on January 12, 1955, Mrs. Fosselman stated that there was something she wanted to do before she forgot it and handed her (Mrs. Palmer) a piece of paper, stating, "Here, honey, you read this." Mrs. Palmer read it and replied, "Well, you don't have to do anything for me", and Mrs. Fosselman said, "Well, I know it. Do you think it is all right?" Mrs. Palmer replied, "Yes, it is." Mrs. Fosselman then stated, "Now, if you don't think this is all right, you take it to a lawyer and have it checked." The document which Mrs. Fosselman had handed to Mrs. Palmer was holographic and was as follows:

"Jan. 12th, 1955

"When I die, I want this house to be given to Mrs. Harriet Palmer for her to live in if she chooses.

"Willinore Fosselman
"4656-49th St."

Mrs. Fosselman then took the document to the living room and later brought it back to Mrs. Palmer, stating, "Now you are not to open this until after I die or pass away." Mrs. Palmer kept the document until after the death of Mrs. Fosselman and it is one of the two documents which were offered as codicils of the last will and testament of Mrs. Fosselman.

The day after the death of Mrs. Fosselman, according to the testimony of Mrs. Palmer, she found in the left hand corner of a drawer of Mrs. Fosselman's desk, wrapped up in Kleenex, and all sealed, another writing, dated June 17, 1953, and reading as follows:

"I give and bequeath to my friend, Harriet Palmer, the sum of ten thousand 10,000 June 17th 1953 to be paid to her after my death (death).

"Willinore M. Fosselman
"4656-49th St.
"San Diego, Cal."

This is the second document which was offered as a codicil to the last will of Mrs. Fosselman. No one had ever seen the document dated January 12, 1955, except Mrs. Palmer and her attorney until it was offered in evidence herein. Mrs. Fosselman had never discussed such codicils with her business representatives, her attorney, her doctor, or her nurses. The document dated June 17, 1953, was never seen or known to anyone until it was found tucked away in the desk drawer of Mrs. Fosselman after her death.

Charles F. Salkeld visited Mrs. Fosselman several times in San Diego during the last five years of her life. He testified that on his last visit in 1954 she could not recognize him; that she started deteriorating in October, 1950; that she was forgetful and confused; that at times she thought she was in New York; that she remembered old events but did not remember anything recent; that she constantly thought she didn't have enough money and when he tried to explain to her "it was hopeless, she couldn't absorb it"; that from the fall of 1952 on she was not aware of the nature and extent of her property or of the nature of her relationship to those who would be the natural objects of her bounty or to the people who would be affected by any wills or codicils; that she referred to members of her family as being alive when they were in fact dead; that she had the idea she owned a house in New York when she had never owned one there.

Edgar A. Luce, one of the attorneys representing Mrs. Fosselman, testified that he had visited her on the average of once a week from the time she was in the hospital until the time of her death and he recited many facts which indicated to him that she was mentally unsound. He testified that she became very confused, distracted, forgetful, repetitious and senile. He gave his opinion, as an intimate acquaintance of Mrs. Fosselman, that she did not understand or comprehend the nature and character of her property; that she was definite-

ly mentally incompetent during all the time he knew her; that she did not know anything about her property, business affairs, or who was living or who was dead among her family; that she told him Mrs. Palmer had worked for her mother in Kansas City; that he told her this was not true; that Mrs. Palmer lived in San Diego, had never been in Kansas City and that the period of time to which she referred was before Mrs. Palmer was born.

Lola R. Stephens, one of the nurses in constant attendance on Mrs. Fosselman from June, 1950, until the time of her death, testified as to many incidents, actions and statements of Mrs. Fosselman and stated that she stated many times that Mrs. Palmer had worked for her mother, although Mrs. Stephens repeatedly corrected her; that Mrs. Fosselman could not comprehend or understand any reading; that she was confused as to where she was; that she thought her brothers would pay her bills; that she hid her money in her stockings and other places, was constantly worried about finances, and was confused most of the time.

Mr. Lumpkin, who acted as Mrs. Fosselman's chauffeur, testified that she thought she had known Mrs. Palmer in Kansas City and further stated that she did not know if she were in San Diego or New York and wanted to be driven down to the lake or the river. Two other witnesses, Cecilia Burns and Mrs. Rose Ellis, testified to incidents showing confusion, lack of intelligence and comprehension and a gradual deterioration on the part of Mrs. Fosselman.

Dr. Carl Lengyel, county psychiatrist and head of the psychopathic ward of the San Diego county hospital, and whose qualifications were stipulated to by counsel, answered a long hypothetical question which was submitted to him setting out the circumstances testified to by the various witnesses and stated that in his opinion from 1952 until the time of her death Mrs. Fosselman was of unsound mind and was

suffering from brain disease due probably from cerebral arteriosclerosis and senile changes and that during that period she did not comprehend the nature of her property nor the extent thereof. He described in detail her symptoms which indicated the unsoundness of her mind and stated that he believed that she was intellectually impaired to the point that she was of unsound mind and that in his opinion she was insane during that period. The facts related to the doctor in the hypothetical questions asked of him were not objected to by counsel.

Several neighbor women who occasionally called upon Mrs. Fosselman when she was living in San Diego testified in behalf of Mrs. Palmer that they did not believe Mrs. Fosselman was insane although they admitted many of the incidents related by the contestant's witnesses such as constant repetition and confusion of mind on the part of Mrs. Fosselman.

[1] We conclude there was substantial evidence herein to sustain the decision of the trial court that the testatrix was of unsound mind when she executed the disputed documents.

As is said in *Re Estate of Frank*, 102 Cal.App.2d 126, 128-129, 226 P.2d 767, 768:

"The function of an appellate court is no different on an appeal from a judgment denying probate of a will because of mental incompetency than in any other case. 'All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In *re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689; In *re Estate of Teel*, 25 Cal. 2d 520, 154 P.2d 384.' In *re Estate of Trefren*, 86 Cal.App.2d 139, 142, 194 P.2d 574, 575."

[2] We are satisfied that the findings and decision are amply supported by com-

petent and legally sufficient evidence, and beyond this we are not required to go. *Rodgers v. Roseville Gold Dredging Co.*, 135 Cal.App.2d 6, 10, 286 P.2d 536.

[3] While several neighbors and friends of Mrs. Fosselman testified that they did not believe that she was insane, such testimony merely created a conflict in the evidence and the weight to be given to such testimony was for the trial court. *Hughes v. Grandy*, 78 Cal.App.2d 555, 567, 177 P.2d 939.

In *re Estate of Sexton*, 199 Cal. 759, 764-765, 251 P. 778, 780, the rule is stated:

"A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. In *re Estate of Motz*, supra [136 Cal. 558, 69 P. 294]; In *re Estate of Dole*, 147 Cal. 188, 81 P. 534; In *re Estate of Huston*, 163 Cal. 166, 124 P. 852; In *re Estate of De Laveaga*, 165 Cal. 607, 133 P. 307; In *re Estate of Casarotti*, 184 Cal. 73, 192 P. 1085. The actual mental condition of the testator at the time of the execution of the will is the question to be determined. In *re Estate of Perkins*, 195 Cal. 699, 235 P. 45; 26 Cal.Jur. 635."

In the instant case there was substantial evidence that Mrs. Fosselman did not have the sound and disposing mind and memory required by this rule at the time she executed the documents involved herein.

[4] We find no prejudicial error in the admission of the testimony of Dr. Lengyel, psychiatrist. The weight of his testimony was for the determination of the trial court.

The judgment is affirmed.

GRIFFIN, Acting P. J., and BURCH, J. pro tem., concur.

144 Cal.App.2d Supp. 849

Florence Lee SCHMIDT, etc., Plaintiff and Appellant,

v.

NEW PLASTIC CORPORATION, Defendant and Respondent.

C. A. 9054.

Appellate Department, Superior Court,
Los Angeles County, California.

Aug. 28, 1956.

Advertiser's action against manufacturer for services rendered under a contract which manufacturer repudiated. The Municipal Court of the Los Angeles Judicial District, John G. Barnes, J., entered judgment for manufacturer and advertiser appealed. The Appellate Department of the Superior Court, Bishop, P. J., held that where manufacturer signed a contract for advertising of its products for a period of one year, the price for which was to be paid in monthly installments, and then repudiated such contract during its life but advertiser continued performance thereof, such advertiser was entitled to recover balance of the contract price owed less cost of performance that could have been avoided by advertiser's not completing such performance after repudiation.

Reversed.

1. Damages ⇐62(4)

Either party to an executory contract has the power to stop performance of the contract by giving notice or direction to that effect and subjecting himself to liability for damages, and upon receipt of such notice the other party cannot continue to perform and recover damages based upon full performance.

2. Damages ⇐62(4)

Party to an executory contract which has been repudiated during its lifetime, must mitigate damages so far as he can without loss to himself.

3. Damages ⇐62(4)

Where manufacturer signed a one year contract with advertiser for advertising of

product at a price to be paid in monthly installments and before such contract expired manufacturer repudiated same but advertiser continued to fully perform until expiration date, advertiser was entitled to recover balance of contract price owed by manufacturer less amount of expense that could have been avoided by failure to perform after repudiation.

4. Evidence ⇐589

A court trying a case without a jury, is entitled to reject testimony of plaintiff even though she is otherwise unimpeached.

5. Damages ⇐62(4)

Where executory contract has been repudiated by one of the parties during its lifetime and savings which other party could have effected by ending performance thereof appeared so small as compared to damages for which such party would be liable if she had misjudged legal effect of notice of repudiation, in determining amount of damages for which repudiating party is liable, cost added by full performance of contract is not to be deducted.

6. Damages ⇐189

In determining amount of cost which could have been saved by party's stopping performance of executory contract after repudiation thereof by other party, it is not required that cost be established with mathematical exactness.

Sallie T. Seaver, Los Angeles, for appellant.

Murchison & Cumming, Los Angeles, for respondent.

BISHOP, Presiding Judge.

Plaintiff sought in vain to recover for services rendered under a contract repudiated, during its life, by the defendant. We have not had the benefit of findings, nor of any opinion by the trial court, to indicate to us the theory on which its judgment was based. As we should do, *In re Estate of Rule*, 1944, 25 Cal.2d 1, 10, 152 P.2d 1003, 1007, 155 A.L.R. 1319, we made the best use of the evidence that we could, to

support the judgment, but nevertheless we have reached these conclusions: that the plaintiff was entitled to damages for defendant's repudiation of the contract; and that the failure of the plaintiff to produce evidence satisfactory to the trial court, by which one factor in the established formula for such damages could be ascertained with accuracy, did not warrant the judgment that plaintiff take nothing.

The plaintiff was the only witness and the defendant, as the respondent on this appeal, does not question her story—indeed accepts it as true (with an exception to be noted). For fifteen years, the plaintiff has conducted the business of keeping some eleven hundred architects and engineers acquainted with the products of some one hundred and twenty manufacturers. On her staff she has ten trained college men who familiarize themselves with these products and then, by literature, word of mouth and demonstration, carry their information regularly and frequently to the architects and engineers. The bill for this service is footed by the manufacturers.

In March, 1953, the defendant, a manufacturer, signed up for a year's service, payable at the rate of \$60 per month. Without any fault being found with plaintiff's performance, but for reasons applicable to itself alone, on August 29, of the same year, the defendant wrote plaintiff a letter expressing its desire to cancel its contract. To this plaintiff replied that she only took subscribers for a year, and that that was the contract. She continued her services throughout the year for which the defendant had contracted and it made some payments after the date of its letter of repudiation. The pleadings and the evidence agree that only \$420 was paid of the \$720 promised.

[1,2] From the circumstances narrated, the conclusion might have been reached that the defendant acquiesced in plaintiff's insistence that the contract was binding for a year. But in this event the plaintiff would have had judgment for \$300, so we must presume that the trial court did

not favor this theory, but was of the opinion that the defendant, without legal reason, but with the power the law recognizes, had repudiated its contract with the plaintiff while it yet had some months to run. The principle that governs the situation here presented is thus stated in *Bomberger v. McKelvey*, 1950, 35 Cal.2d 607, 613-614, 220 P.2d 729, 733: "It is the general rule in California and in practically all other jurisdictions that either party to an executory contract has the power to stop performance of the contract by giving notice or direction to that effect, subjecting himself to liability for damages, and upon receipt of such notice the other party cannot continue to perform and recover damages based on full performance. [Citing cases.] This is an application of the principle that a plaintiff must mitigate damages so far as he can without loss to himself. See 5 Williston on Contracts, Rev.Ed.1937, § 1298, p. 3694."

[3] If, resolving all inferences in favor of the judgment that the evidence warrants, we come to the conclusion that this was one of the cases in which the party who fully performs, after a repudiation by the other party, may not recover the reward for full performance, the result is not a denial of any reward, but only that any cost of performance that could have been avoided must be deducted. Certainly, by full performance, the plaintiff did no harm to the defendant and did not forfeit any of her rights. At most, she incurred an expense which she could have avoided, and to the extent that this can be established, a deduction must be made from the \$300 that would otherwise be due her.

Upon which party lies the burden of proving the amount to be deducted? We find it stated in *Marconi Wireless Telegraph Co. v. North P. S. Co.*, 1918, 36 Cal.App. 653, 655, 173 P. 103, 104: "There is a class of cases in which if the obligor to the contract repudiates it before the obligee has had an opportunity to perform, the contract price is *prima facie* the measure of damages, and matters of mitigation and reduction must be shown by the obligor."

The court then cites a number of cases, the last one being *Ware Bros. Co. v. Cortland Cart & C. Co.*, 192 N.Y. 439, 85 N.E. 666, 22 L.R.A.,N.S., 272, concerning which it said: "In the last-mentioned case an advertiser desired to cancel its contract with a publisher under which the latter was to publish an advertisement once a month for 12 months for a certain sum to be paid when the contract was fully performed. The publisher refused to consent to the cancellation and continued the publication for the entire period, and upon the advertiser declining to pay therefor brought an action for the contract price. Upon the trial the plaintiff proved the contract and its performance, and rested. Thereupon the defendant produced evidence to the effect that it had canceled the contract, and rested. It was held that the contract was *prima facie* the measure of damages, and the rule applied that where a contract for future employment had been entered into and afterwards revoked by the employer, in an action for breach of contract the damages are *prima facie* the amount of wages for the full term, and the burden of proof is upon the defendant to show facts in mitigation of damages." These words were then quoted from the opinion in the New York case: "The distinguishing feature in this case, as we regard it, is that the publishing of an advertisement in a periodical is the same as the publishing in a daily or weekly newspaper, which involves the investment of no additional capital or the use of any material other than the ink used and the paper upon which it is printed, and these articles are of such trivial value as not in our judgment to change the character of the contract from one for services to be rendered."

The *Marconi* case was cited in *Landon v. Hill*, 1934, 136 Cal.App. 560, 568, 29 P.2d 281, 284, and *Carrier v. Piggly Wiggly*, 1936, 11 Cal.App.2d 180, 185, 53 P.2d 400, 402, as authority for the conclusion that the burden of proving mitigation of damages was on the defendant. It is to be noted, however, that the *Marconi* case, because of its facts, lined itself up with those

cases that hold that the burden that is upon the plaintiff to prove his damages includes the burden of proving the expense incurred in fulfilling a repudiated contract.

[4] It seems to us that our case falls within the rule first recognized in the Marconi case rather than within the latter. But even if we are wrong in so concluding, the judgment should not be affirmed. The only evidence upon the question of the saving that might have been made by acquiescing in defendant's repudiation of the contract was that of the plaintiff whose theory was that it cost her no less to serve 119 subscribers than to perform her contracts with 120 after the initial expenditure of time by her staff in getting acquainted with defendant's products. Evidently the trial court did not find her testimony convincing. The plaintiff, of course, was an interested party and the trial court was free to reject her testimony on that ground even though she was otherwise unimpeached. *Odenthal v. Lee*, 1952, 113 Cal.App.2d 666, 669, 248 P.2d 937, 939. If that to which she testified is not a correct theory for the measurement of the cost that she could have saved by non-performance, after defendant's repudiation, what theory is there that warranted the trial court in saying that the cost may have equalled \$300, and so the plaintiff was entitled to nothing? We wish we had some intimation of the line of reasoning followed by the trial court, for we are sure

its judgment was not an arbitrary decision. Respondent's brief fails to cause us to question our conclusion that even in the absence of any acceptable evidence, the finding is inescapable that the plaintiff could not have saved herself as much as \$300 by rendering no service after defendant's repudiation. A judgment for some sum, then, should have been awarded the plaintiff.

[5,6] Upon a new trial it may be that the trier of fact will conclude that the little, if any, saving that the plaintiff could have effected by ending her service to the defendant appeared so small as compared to the damages for which she would be liable if she misjudged defendant's letter, and it was not a legal repudiation of its contract, that common sense dictated that she had better perform fully. In such a case, the cost added by full performance is not to be deducted. See *Bomberger v. McKelvey*, supra, 35 Cal.2d 607, 614, 220 P.2d 729, 733-734. It is not to be expected, moreover, that that cost can be established with mathematical exactness, but this is not required. *Ross v. Frank W. Dunne Co.*, 1953, 119 Cal.App.2d 690, 700-702, 260 P.2d 104, 110. *Hensler v. City of Los Angeles*, 1954, 124 Cal.App.2d 71, 87, 268 P.2d 12, 23-24.

The judgment is reversed. The appeal from the non-appealable order denying motion for new trial is dismissed.

PATROSSO and SWAIN, JJ., concur.

47 Cal.2d 45

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert BURKE, Defendant and Appellant.
Cr. 5898.

Supreme Court of California.
In Bank.

Sept. 21, 1956.

Rehearing Denied Oct. 17, 1956.

Prosecution for possession of marijuana. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction and defendant appealed. The Supreme Court, Schauer, J., held that where police officers went to defendant's apartment without a warrant but were given permission by him to search the premises and search disclosed defendant's possession of marijuana, defendant was precluded from claiming that evidence was illegally obtained because of lack of probable cause for an arrest.

Affirmed.
Opinion, 295 P.2d 517, vacated.

1. Searches and Seizures ⇨7(27)

Where prosecution showed that defendant freely consented to search of his apartment which disclosed evidence claimed to have been illegally obtained, it was not necessary for prosecution to show that the search and seizure were reasonable as incident to a proper arrest.

2. Searches and Seizures ⇨7(28)

Where police officers, without any show of force or coercion, called upon suspected defendant at his home and asked to search premises to which defendant consented, a holding as a matter of law that defendant had acted because of an unlawful assertion of authority by the officers would be unjustified.

3. Criminal Law ⇨395

Where police officers went to defendant's apartment without a warrant but were given permission by defendant to search the premises and search disclosed defendant's

possession of marijuana, defendant was precluded from claiming that evidence was illegally obtained because of lack of probable cause for an arrest without a warrant. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇨303

Power of the trial court to strike or dismiss increased penalty proceeding as to a prior conviction, is within authority granted by statute providing that court may of its own motion or upon application of prosecuting attorney and in furtherance of justice, order an action to be dismissed. West's Ann.Pen.Code, § 1385.

5. Criminal Law ⇨303

Under statute providing that court may of its motion or upon application of prosecuting attorney order an action to be dismissed, the authority to dismiss the entire action includes the power to dismiss or strike out a part. West's Ann.Pen.Code, § 1385.

6. Criminal Law ⇨303

The striking or dismissing a charge of prior conviction regardless of whether it has been admitted or established by evidence, is not equivalent of the determination that defendant did not in fact suffer conviction and does not wipe out such prior convictions or prevent them from being considered in connection with later convictions. West's Ann.Pen.Code, § 1385.

7. Constitutional Law ⇨52

Adjudication of guilt of substantive crime and judicial determination of factors which results in increased punishment, are inherently within the province of the court even as the punishment which may or must follow the offense adjudicated, either with or without a punishment augmentation factor, is essentially for the legislature, except as it may vest an area of discretion in the court or an administrative body. West's Ann.Health & Safety Code, § 11712.

8. Criminal Law ⇨1202(1)

Conduct of prosecuting attorney in remaining silent when trial court announced its intention to strike the prior conviction

of defendant for purposes of sentencing, amounted to an assent to the ruling.

9. Criminal Law ⇨1023(1)

Order of trial court in criminal prosecution striking charge of prior conviction for purposes of sentencing defendant, was an appealable order. West's Ann.Pen.Code, § 1238, subs. 1, 6.

10. Criminal Law ⇨1136

Where state failed to appeal from order of trial judge striking from record prior conviction of defendant for purposes of sentencing, state's action indicated an acquiescence in order and sentence which followed, and state was precluded from raising propriety of trial court's action in defendant's appeal from conviction. West's Ann.Pen.Code, § 1238, subs. 1, 6.

11. Criminal Law ⇨1136

Purpose of statute providing that on appeal by defendant, court may, when requested, consider and pass on all rulings of trial court adverse to state is intended to give the people the right, on an appeal by the defendant where a judgment of conviction is reversed, to raise points that might be involved on a re-trial, but statute was not designed to give the people a right in the nature of an appeal which is governed by other sections of the code. West's Ann. Pen.Code, § 1252.

Cletus J. Hanifin, El Monte, for appellant.

Edmund G. Brown, Atty. Gen., and Robert S. Rose, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant appeals from a judgment of conviction of violation of section 11500 of the Health and Safety Code by possession of marijuana. He contends that the judgment should be reversed because evidence which he asserts was illegally obtained was admitted over his objection.

The People do not appeal, but they ask reversal of the judgment for the purpose of having defendant's sentence increased.

They contend that the trial court erred in ordering that the charge of a prior conviction of violation of section 11500 of the Health and Safety Code, a misdemeanor, which was alleged in the information and admitted by defendant, be "stricken [in effect, set aside or dismissed] in the interest of justice," and in sentencing defendant to the county jail. It is the position of the People that section 11712 of the Health and Safety Code (hereinafter quoted), which provides the punishment for violation of section 11500, requires that one who admits a prior conviction "of any offense described in this division [div. 10, Health & Saf. Code]" be sentenced to state prison. Specifically, they request "that the judgment be reversed and the case remanded with directions to enter judgment in accordance with [the People's construction of] * * * Section 11712."

We have concluded that the arguments of both parties are without merit.

Claimed Illegal Search and Seizure

Defendant was tried by the court without a jury. The following facts appear from the testimony of John Storer, a narcotic inspector: "At approximately 11:00 o'clock p.m." on March 28, 1955, Inspector Storer and three other officers, without warrant, went to defendant's apartment "To make a narcotic investigation." Also "at approximately 11:00 o'clock p.m." on that date Storer arrested defendant. When the arrest took place in relation to the other events herein described does not appear from the record; according to defendant's opening brief it took place following the discovery of the narcotics hereinafter described.

The officers had "prior information that narcotics were used on those premises." The source of this prior information does not appear.

The officers knocked and "defendant came to the door and opened it a small distance and asked who was there, and Inspector Hollingsworth stated, 'We are officers. We would like to talk to you.' The defendant stepped back and said, 'Just a moment.' He

opened the door, turned on the light, and we walked into the room. I then asked him if his name was Robert Burke and he said it was." Defendant did not state that the officers could enter the apartment "but his implication was plain. * * * Officer Hall asked him if he had ever been arrested for narcotics, and the defendant said * * * he had been arrested in 1950. Officer Hall then asked him, 'Do you have any narcotics here at the present time?' And the defendant said no. Officer Hall then said, 'You don't mind then if we search your apartment do you?' And the defendant said, 'No, go ahead.'"

In their ensuing search of defendant's apartment the officers found leafy marijuana and partially smoked marijuana cigarettes. Defendant freely admitted to the officers that the material was marijuana, that he had purchased it a week before, and that he had smoked some of it.

The marijuana was admitted in evidence over defendant's objection that it was obtained in violation of the exclusionary rule enunciated in *People v. Cahan* (1955), 44 Cal.2d 434, 282 P.2d 905. The trial court in admitting the evidence declared, "There was certainly no need for a search warrant here, because the defendant, according to the testimony of this witness, consented to the search, and the officers had a reasonable ground to believe a crime was committed there."

It is defendant's position that there was no showing of reasonable cause to justify the arrest without warrant, and thereby to justify the search without search warrant as incident to a lawful arrest, since Inspector Storer testified merely that the officers had "prior information that narcotics were used on those premises," without disclosing the source of such information. (See *Willson v. Superior Court*, (1956), 46 Cal.2d 291, 294 P.2d 36; *People v. Boyles* (1955), 45 Cal.2d 652, 656, 290 P.2d 535 [since the court must determine whether the arresting officer acted upon reasonable cause, the officers must testify to the information upon which they acted].)

[1, 2] It was not necessary here, however, for the People to show that the search and seizure were reasonable as incident to a proper arrest, for they showed that defendant freely consented to the search of his apartment which disclosed the evidence which defendant has since claimed was illegally obtained. It was not unreasonable for the officers, without any show of force or coercion, to call upon the suspected defendant at his home, or to ask him questions, or to accept defendant's statement, "No, go ahead," in answer to the inquiry, "You don't mind then if we search your apartment do you?" Under the circumstances here, as under those in *People v. Michael* (1955), 45 Cal.2d 751, 754, 290 P.2d 852, a holding that as a matter of law defendant acted because of an unlawful assertion of authority by the officers would be unjustified. (See also *People v. Martin*, (1955), 45 Cal.2d 755, 761, 290 P.2d 855.)

[3] Defendant relies upon *Amos v. United States* (1921), 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654, and *Johnson v. United States* (1948), 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. The officers here did not come to defendant's home, as it was determined that they came in the *Amos* case, (at page 317 of 255 U.S., at page 267 of 41 S.Ct.), "demanding admission to make search of it under Government authority." And as was said in *People v. Michael* (1955), supra, at page 753 of 45 Cal.2d at page 853 of 290 P.2d concerning the *Johnson* case and other cases, "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances. Since the cases that have determined this question under varying factual circumstances are difficult if not impossible to reconcile [citations], and may reflect imperfectly the factual situations before the courts that decided them, they point to no compelling solution in the present case." We conclude that defendant has shown no ground for reversal of the judgment.

The People's Request for Reversal Based on the Trial Court's Claimed Violation of Section 11712 of the Health and Safety Code

Section 11712 of the Health and Safety Code (as amended 1953) provides: "Any person convicted under this division [div. 10, which includes § 11500] for having in possession any narcotic * * * *shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years.*

"If such a person has been previously convicted of any offense described in this division * * * the previous conviction *shall be charged in the indictment or information* and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he *shall be imprisoned in the state prison* for not less than two years nor more than 20 years." (Italics added.)

The information alleged and on arraignment for plea defendant admitted a prior conviction of "Violation of Section 11500, Health and Safety Code * * *, a misdemeanor." When defendant came before the court for sentence his counsel requested that upon the showing made "the Court in this particular case strike the prior for the purposes of sentencing"; the prosecuting attorney did not oppose this request;¹ and the court ordered that "the [charge of] prior conviction [is] stricken in the interest of justice" and sentenced defendant to the county jail.

1. The following colloquy took place with reference to the striking of the prior conviction:

"Mr. Karch [defendant's counsel]:
* * * [I]n the past there have been cases where a prior has been struck just for the purpose of sentencing. I humbly request that the Court * * * strike the prior for the purposes of sentencing
* * *

"The Court: Mr. Crail [deputy district attorney], the Court has jurisdiction in this case to send the man to the County Jail, does he not?

"Mr. Crail: Not with a prior narcotic.

The procedure of "striking," or setting aside or dismissing, a charge of a prior conviction (or any of multiple counts or allegations of an indictment or information) at the time of sentence is not expressly provided for by statute but it is commonly used in trial courts, not only where the prior conviction has not been legally established, but also where the fact of the conviction has been shown but the trial court has concluded that "in the interest of justice" defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of that fact. (See, recognizing procedure of dismissing charges of prior conviction, *In re Bartges* (1955), 44 Cal.2d 241, 244-245, 282 P.2d 47; *People v. Coyle* (1948), 88 Cal. App.2d 967, 973, 200 P.2d 546; *People v. Ysabel* (1938), 28 Cal.App.2d 259, 260, 82 P.2d 476; *People v. Chadwick* (1906), 4 Cal. App. 63, 74, 87 P. 384, 389.)

[4-6] The power to strike or dismiss the proceeding as to a prior conviction is within the power referred to in section 1385 of the Penal Code, which provides that "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. * * *." The authority to dismiss the whole includes, of course, the power to dismiss or "strike out" a part. (Cf. *People v. Superior Court* (1927), 202 Cal. 165, 173, 259 P. 943.) The striking or dismissal of a charge of prior conviction (regardless of whether it has or has not

"The Court: It's possession and not sale.

"Mr. Crail: That doesn't make any difference.

"The Court: Do you have that Section there? There's been some amendment on it.

"Mr. Karch: If the Court please, that is what counsel had in mind when he requested—

"The Court: Yes, in reference to the striking of the prior, I wasn't quite sure. In the interest of justice, I am going to strike the prior."

been admitted or established by evidence) is not the equivalent of a determination that defendant did not in fact suffer the conviction (see *People v. Simpson* (1944), 66 Cal.App.2d 319, 329, 152 P.2d 339; *People v. Horowitz* (1933), 131 Cal.App.Supp. 791, 794, 19 P.2d 874); such judicial action is taken, in the words of defendant's counsel, "for the purpose of sentencing" only and "any dismissal of charges of prior convictions * * * does not wipe out such prior convictions or prevent them from being considered in connection with later convictions". (*People v. Coyle* (1948), supra, 88 Cal.App.2d 967, 973-974, 200 P.2d 546.)

The People argue that by providing in section 11712 of the Health and Safety Code that if a prior conviction, whether of misdemeanor or felony, "is admitted by the defendant, he *shall* be imprisoned in the state prison" (italics added) the Legislature intended to take from the court the power to dismiss or strike a charge of prior conviction if the defendant admits the charge. According to the People, the trial court was required to sentence defendant to state prison and the judgment should be reversed for the purpose of directing it to do so.

[7] Section 11712 is based upon section 7 of the former State Narcotic Act (Stats. 1929, ch. 216, § 7, as am. Stats. 1935, ch. 813, § 5c). Section 7 provided in material part that a person convicted of illegal possession of drugs "shall upon conviction be punished by imprisonment in the county jail or in the State prison for not more than six years; provided, however, than any person convicted [of such possession] * * * shall be imprisoned in the State prison for not less than six months nor more than ten years if such person has been previously convicted of a *felony* * * *" (Italics added.) The People rely upon *People v. Rose* (1938), 26 Cal.App.2d 513, 518, 79 P.2d 737, where the appellate court (not in connection with the problem now under discussion) said that a state prison sentence for one previously convicted of felony was "mandatory" and that "in determining the

amount or nature of the penalty to be inflicted, the legislature *may require the courts* to take into consideration the persistence of the defendant in his criminal course." (Italics added by the People.) In the *Rose* case, however, the trial court "found for the prosecution on the issue of the prior conviction" (at page 515 of 26 Cal.App.2d, at page 738 of 79 P.2d). That case (and also *In re Shull* (1944), 23 Cal.2d 745, 749, 146 P.2d 417, and *In re Basuino* (1943), 22 Cal.2d 247, 250, 254, 138 P.2d 297) concern records which disclose an express or implicit judicial determination against defendant of the factor (prior conviction in the *Rose* and *Basuino* cases, possession of a deadly weapon in the *Shull* case) from which increased punishment follows. The cited cases—and the statutes referred to—do not purport to divest the trial court (or to hold that the court constitutionally could be divested) of the power to control the proceedings before it insofar as the essentials of the judicial process are concerned; i. e., to find the defendant guilty or not guilty of any offense charged, or of a lesser included offense, or to dismiss the action *in toto* or to strike or dismiss as to any or all of multiple counts or charges of prior conviction. The statutes in question do validly—and in respect to constitutionally vested judicial power they neither purport to nor validly could do more than—prescribe the sentence which must be imposed upon the appropriate adjudication of guilt of the substantive crime and judicial determination of the factor which results in increased punishment. Such adjudication and judicial determination are inherently and essentially the province of the court even as the punishment which may or must follow the offense adjudicated, either with or without a punishment augmentation factor, is essentially for the Legislature except as it may vest an area of discretion in the court or an administrative body. (See *People v. Gowasky* (1927), 244 N.Y. 451 [155 N.E. 737, 749, 58 A.L.R. 9, 17].)

The statute provides that defendant "shall be imprisoned in the state prison" whether the conviction is "found to be true by the jury, upon a jury trial, or * * * found to be true by the court, upon a court trial, or is admitted by the defendant" (Health & Saf. Code, § 11712). The People concede that "the court has the power to strike its own findings"; but they assert that "striking a prior conviction 'in the interest of justice' * * * constitutes error where the prior conviction was not a finding of the court." Whether such action constitutes error must be resolved in any particular case upon the record in that case. The admission, conceivably, could have been inadvertent; mistaken, or deliberately false; it is, at most, evidence which must be considered in the judicial process.

[8] In the trial court the People did not object to the striking of the charge of prior conviction or advance the construction of section 11712 which they now urge. Rather, the conduct of the prosecuting attorney in remaining silent (as to that aspect of the requested action) when the trial court announced its intention to strike the charge (see footnote 1, *ante*, p. 7) amounted to assent to the ruling. (See *Exposita v. United Railroads* (1919), 42 Cal.App. 320, 323, 183 P. 576; *People v. Ganger* (1950), 97 Cal.App.2d 11, 13, 217 P.2d 41; *People v. Montgomery* (1940), 41 Cal.App.2d 574, 577, 107 P.2d 291; *Cummings v. Cummings* (1929), 97 Cal. App. 144, 149, 275 P. 245.)

[9,10] Furthermore, the People failed to appeal, although the order striking the charge of prior conviction was in its nature one of the orders specified as appealable either by paragraph 1 or by paragraph 6 of section 1238 of the Penal Code. That statute provides that the People may appeal "1. From an order setting aside the indictment, information, or complaint; * * * 6. From an order modifying the verdict or finding by reducing the degree of the offense or the punishment

imposed." The trial court's action was in substance "an order setting aside [a part of] the * * * information"; having set aside that part of the information charging a prior conviction the court properly made no finding on that issue. The People contend, implicitly or explicitly, not only that it was error to set aside the charge but that on the record the court was bound to let the information stand as filed, to accept the defendant's admission, and to make a finding and to enter sentence in accord therewith. If for purposes of this decision we accept the People's above stated contention then it would follow that the purpose and ultimate effect of the court's order were the same as those of "an order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed." Regardless of whether the action of the trial court be regarded as "an order setting aside [a part of the] * * * information" or as "an order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed," it would appear that the People, if they were successfully to attack such action, must not only not have assented to it but must have taken an appeal. The failure of the People to appeal, like their silence when the dismissal order was made, indicates acquiescence in the order and the sentence which followed. (See *American Enterprise, Inc., v. Van Winkle* (1952), 39 Cal.2d 210, 221, 246 P.2d 935.)

[11] The People argue that their failure to appeal is immaterial because of the provision of section 1252 of the Penal Code that "On an appeal by a defendant, the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General." But the "statute here involved was intended to give the People the right, on an appeal by the defendant, *when a judgment of conviction is reversed, to raise points that might be involved on a retrial.*

The statute was not designed to give the People a right in the nature of an appeal. The right of appeal is governed by other sections of the code." (Italics added.) (People v. Zelver (1955), 135 Cal.App.2d 226, 236-237, 287 P.2d 183.)

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 36

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Vincent Raymond WALSH and Joseph M.
Stewart, Defendants and Appellants.

Cr. 5793.

Supreme Court of California.
In Bank.

Sept. 14, 1956.

Rehearing Denied Oct. 9, 1956.

Prosecutions of two municipal plaster inspectors for agreeing to receive bribes upon agreements that condemned plastering work would be approved. The Superior Court, Los Angeles County, Ralph K. Pier-son, J., entered judgments of conviction and defendants appealed therefrom and from orders denying new trial. The Su-preme Court, Shenk, J., held that evidence sustained convictions.

Judgments and orders affirmed.

Schauer, Carter and Traynor, JJ., dissented.

Opinion, 286 P.2d 915, vacated.

I. Bribery Ⓒ10

Witnesses Ⓒ414(1)

In prosecutions of municipal plaster inspectors for agreeing to receive bribes upon agreement that condemned plastering

work would be approved, checks made out to cash and allegedly cashed by plastering subcontractors, and the proceeds of which were allegedly paid to inspectors, were competent evidence to prove witnesses had such sums in their possession at the time the alleged bribes were paid, and other-wise to corroborate their account of events which took place. West's Ann.Pen.Code, § 68.

2. Witnesses Ⓒ395

Where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements prior to the claimed fabrication and consistent with the testimony of the witness at the trial, not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purpose of the case.

3. Witnesses Ⓒ395

In order to render admissible evidence of statements or conduct prior to the claimed fabrication of a witness as an ex-ception to the hearsay rule, it is not neces-sary that the party desiring to impeach should expressly state that he seeks to prove a fabrication of a recent date, but it is sufficient if the record indicates a pur-pose to prove a recent fabrication.

4. Criminal Law Ⓒ1169(1)

Witnesses Ⓒ395

In prosecution of municipal plaster inspectors for agreeing to receive bribes upon agreement that condemned plastering work would be approved, trial court did not err in admitting evidence of prior consistent statements made by witnesses for the prosecution for the limited purpose of refuting inferences of recent fabrica-tion by such witnesses and to show a prior state of mind consistent with that shown by the witnesses when testifying, and even if there was error no miscarriage of justice resulted therefrom. West's Ann.Pen.Code, § 68.

5. Witnesses Ⓒ395

Where cross-examination of a witness for the defense in prosecutions of municipal plaster inspectors for agreeing to receive bribes upon agreement that condemned plastering work would be approved, did not develop bias and prejudice on such witness' part or inferences of recent fabrication on his part, rehabilitating evidence was not admissible. West's Ann.Pen.Code, § 68.

6. Witnesses Ⓒ309

The use of evidence of a defendant's prior refusal to testify before a grand jury because of fear of self-incrimination does not violate the constitutional privilege against self-incrimination, and the fact that a defendant acted on the advice of counsel does not destroy admissibility of such evidence.

7. Criminal Law Ⓒ814(8)

In prosecutions of municipal plaster inspectors for agreeing to receive bribes upon agreements that condemned plastering work would be approved, trial court's giving of proper instructions on entrapment was not erroneous in view of testimony of a prosecuting witness that he did not pay a bribe to one of the inspectors for the purpose of clearing a job, but as an aid to law enforcement officers, and upon the advice of the district attorney's office. West's Ann.Pen.Code, § 68.

8. Bribery Ⓒ11

Evidence sustained convictions of municipal plaster inspectors for agreeing to receive bribes upon agreements that condemned plastering work would be approved. West's Ann.Pen.Code, § 68.

Deputy Dist. Atty., Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the defendants Vincent Raymond Walsh and Joseph M. Stewart from judgments of conviction on two violations of section 68 of the Penal Code and from orders denying their motions for a new trial. Section 68 provides in its pertinent part as follows: "Every * * * employee * * * of the State of California, county or city therein * *, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his * * * action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison * * *."

The defendants were employed by the City of Los Angeles as building inspectors. Their assignments were to "spot check" plastering jobs and to pass upon the quality of workmanship and compliance otherwise with the local plastering requirements. If an inspector finds that work does not conform to those requirements he has authority to order a work stoppage on the particular job pending its correction. After the defects in a rejected job have been corrected, he is supposed to approve it in writing by an endorsement on the prior stop order. The contractor has a right of appeal from a stop order through administrative channels but pending the appeal the job would remain at a standstill, or if completed the contractor could not obtain a certificate that the building was ready for occupancy.

The offenses were charged in two indictments, both of which applied to each defendant. The events resulting in the first charge began on February 5, 1954, when the defendants jointly inspected an apartment under construction in San Pedro. They assumed to decide that the plastering was unsatisfactory and mailed a copy of

Robert M. Fisk, Richard P. B. Tyson, Pasadena, John J. Bradley, Max Solomon, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., William E. McGinley,

a job order to the general contractor which required that he: "Remove non-conforming interior plaster or submit test holes of interior plaster at spots indicated by plastering inspector. Do not apply third exterior coat of plaster until inspected by J. Stewart V. Walsh." On March 3rd it came to the defendants' attention that the order had not been complied with but that all of the plastering work had been completed. Walsh wrote out a duplicate order and arranged to meet Stubblefield, the plastering subcontractor, on the job, on March 5th. On that day the defendants and Stubblefield discussed the matter at the location of the job. Walsh stated to Stubblefield that he would require tests to be made at four different spots which would cost the subcontractor \$60 per test, but that he "heard that you were willing to fix the job up." Stubblefield asked if the price of one test would be sufficient. Walsh requested \$125, stating that they had to pay off someone else and promised that if Stubblefield worked with them he could have a job fixed almost anywhere in the city. He threatened to make Stubblefield tear off all the plaster if he told anyone about the deal. Stewart was present during this conversation and made no objection. Thereafter Stewart drove Walsh and Stubblefield to a bank in San Pedro. Stubblefield went in alone, made out and cashed a check drawn to cash in the sum of \$125, then returned to the car and, in the presence of Stewart, handed Walsh the proceeds of the check. Stubblefield made no changes in the plaster work. Walsh endorsed the job order: "Cured O.K. 3-8-54 Walsh."

In the second indictment it was charged that another plastering subcontractor in Culver City was required to pay a bribe. After inspecting that job on March 10, 1954, Stewart told the general contractor that the plastering was not satisfactory, gave him his business card and requested that the plastering subcontractor get in touch with him. The general contractor telephoned the message to the Ace Build-

ing Materials Company, and a Mr. Hilty of that company telephoned Mrs. Griffin, the wife of the plastering subcontractor. Upon receipt of the message Griffin consulted Hilty and his partner and was told by them to "do like the rest of them do", to "square it" by paying the inspector, and to keep his mouth shut. They suggested \$50 as a payment that would probably satisfy Stewart. Thereupon Griffin telephoned the district attorney's office and reported the incident. He was told to "stall" the inspectors as much as he could so that the department could go to work on the matter, and if unsuccessful in obtaining a delay to use his own judgment and to advise what happened. Griffin telephoned Stewart at his home and arranged to meet him or one of his associates on the job the next morning. On that day Walsh instead of Stewart appeared and told Griffin that the plastering must be rejected, that "these jobs are usually taken care of" and asked "could you stand \$50.00?" When asked why so much was demanded Walsh replied that there was someone else who had to be taken care of and stated, after receiving the money, "Well, this should handle you for a while to come." Griffin paid Walsh with the proceeds of a check for \$50 which he had cashed for that specific purpose while en route to the appointment.

Immediately after paying Walsh, Griffin reported to the district attorney's office. The following day Griffin was interrogated by officials of the city Building Department with regard to the incident. Several days later Griffin telephoned Walsh and asked why the job had not been approved. Walsh said, "You know why, you s— of a b—," and hung up. The job had not been approved prior to trial but there was evidence that it had withstood laboratory tests.

The defendants pleaded not guilty to both indictments. Over their objection the cases were consolidated for trial. Separate appeals were taken from the judgments and

from the orders denying the motions for a new trial.

[1] It is contended that the court erred in admitting in evidence the \$125 check cashed by Stubblefield on March 5, 1954, and the \$50 check cashed by Griffin on March 11, 1954, on the ground that the checks were incompetent, irrelevant, immaterial and self-serving. However, those checks were competent evidence to prove that the witnesses had such sums in their possession at the time of the alleged bribes and otherwise to corroborate their account of events which they testified took place. There was evidence that the proceeds of the checks in question found their way into the defendants' possession. The testimony connecting the checks with the defendants and the transactions involved was not remote or speculative, Cf. *People v. Bissert*, 71 App.Div. 118, 75 N.Y.S. 630, but was direct, positive and substantial. *People v. Vollmann*, 73 Cal.App.2d 769, 792, 167 P.2d 545; *People v. Graves*, 137 Cal.App. 1, 11, 29 P.2d 807, 30 P.2d 508; *Taylor v. State*, 44 Ga.App. 387, 161 S.E. 793, 801; *State v. Emmanuel*, 42 Wash.2d 799, 259 P.2d 845. There was no error in admitting the checks.

The defendants next urge that the court committed prejudicial error in admitting certain evidence claimed to be self-serving and hearsay. The contention arises out of attempts by the prosecution to rehabilitate their witnesses Stubblefield and Griffin. On cross-examination of these witnesses the defendants attempted to show that their testimony might have been fabricated and that they might have been biased and prejudiced towards the defendants. On redirect examination of the witness Stubblefield, the prosecution was allowed, over objection, to introduce certain prior consistent statements of the witness for rehabilitating his testimony. The court at that time instructed the jury that the evidence was being admitted not to prove the truth of the statements but for the limited purpose of refuting any suggestions or inferences that the witness had

"fabricated" his testimony at the trial or that his testimony had been actuated by bias or ulterior motives. The rehabilitating evidence showed that Stubblefield had placed an endorsement on the back of the \$125 check before he cashed it, reading "paid Vince Walsh \$125.00 for fixing job 38 & Pacific, San Pedro job." Also evidence was introduced to the effect that Stubblefield had, on a prior occasion, told his general contractor that he had paid the inspector \$125 to clear the job.

Likewise there was an attempt on cross-examination to impeach the testimony of the prosecution's witness Griffin and to show a recent fabrication on his part. As rehabilitating evidence, after such cross-examination, the prosecution introduced a check stub made out by Griffin at the time he wrote the \$50 check with the notation thereon "L. A. City Inst. Pay-off \$50.00", and he was allowed to explain that "Inst." meant "Inspector." Also, a store clerk who had cashed the check testified that Griffin had remarked at the time that it was for the purpose of a pay-off. Again, the jury was admonished by the court that this evidence was admitted for the limited purpose of "refuting the suggestions or inferences, if any, that this witness had beforehand or at the trial fabricated his testimony, or that his testimony was actuated by bias or ulterior motives, and it is introduced and received into evidence to prove the state of mind of this witness on a date prior to this trial for the purpose of determining whether his state of mind at that time was the same as disclosed at this trial, and to prove that his testimony at this trial was not a fabrication."

At the conclusion of the trial the court instructed the jury again as to the limited purposes for which rehabilitating evidence had been admitted, using substantially the same language as above set forth and as approved in *People v. Weatherford*, 78 Cal.App.2d 669, 697, 178 P.2d 816.

[2] It is the rule generally and in this state that where the opposition has assailed the testimony of a witness as being of

recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial, "not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purposes of the case." *People v. Kynette*, 15 Cal.2d 731, 753-754, 104 P.2d 794, 806; see also *Sweazey v. Valley Transport, Inc.*, 6 Wash.2d 324, 107 P.2d 567, 111 P.2d 1010, 140 A.L.R. 93.

The defendants contend that the court improperly applied the "prior consistent statement" rule; that an express limitation upon the use of this exception to the hearsay rule is that such prior remarks must have been made "prior to the time the motive of interest existed", *People v. Kynette*, *supra*, 15 Cal.2d 731, 754, 104 P.2d 794, 806; *Mason v. Vestal*, 88 Cal. 396, 398, 26 P. 213; *Barkly v. Copeland*, 74 Cal. 1, 5, 15 P. 307; that it is evident that these witnesses were as much biased and prejudiced at the time they made the prior statements as they were during the trial, and that the jury was confused and misled by the instructions of the court that the evidence was admissible to refute inferences that the witnesses had "at this trial" fabricated their testimony or that "at this trial" their testimony was actuated by bias or ulterior motives.

There is no question but that on cross-examination the defense endeavored to bring out that the witnesses Griffin and Stubblefield were motivated by personal interests, were biased and had fabricated their testimony at least in part. It may be assumed that the witnesses' bias and prejudice against the defendants originated at the time of or prior to the time they were forced to pay the bribes. But in addition to showing such bias and prejudice the cross-examination pursued by the defense was designed to create inferences of fabrication which originated after the time of the bribes and after the making of the

writings and statements claimed to have been improperly admitted for the purpose of rehabilitation. Thus the witness Stubblefield was questioned at length as to whether he presently disliked the defendant Stewart; whether he had testified differently before the grand jury; whether it was not now his purpose to "get even" for having been forced to pay the bribes; whether he and the witness Griffin had not discussed the testimony they would give at the trial after appearing before the grand jury and since the trial began; whether the \$125 check he cashed immediately before paying the bribes was signed in the manner it normally would have been if actually drawn and cashed at the time he claimed, and whether the whole transaction actually ever took place. In the case of the witness Griffin, he was interrogated on cross-examination as to his associations and discussions with Stubblefield and a police lieutenant for the purpose of creating an inference that his testimony was influenced by such discussions. In another instance a conflict had arisen as to the manner in which Stewart first met Griffin in connection with the matter. A slip of paper was offered in evidence containing the notation of a message purportedly given by Hilty to Mrs. Griffin over the telephone and asking that Griffin call Stewart. The paper contained, among other things, the notation "Wa. 4287." Stewart's residence telephone number was Walnut 4287. Griffin testified that he had called that number and talked to someone who had identified himself as Stewart, with regard to the job order. On cross-examination Griffin was asked whether he had inserted the number on the paper "since the trial began", and whether he ever actually gave Walsh the proceeds of the \$50 check or any currency at all.

[3, 4] With reference to the questioned rulings and instructions it is to be noted that it is not necessary that the party desiring to impeach should expressly state that he seeks to prove a fabrication of recent date. It is sufficient if the record

indicates a purpose to prove a recent fabrication. *Davis v. Tanner*, 88 Cal.App. 67, 78-79, 262 P. 1106; *Griffin v. Boston*, 188 Mass. 475, 74 N.E. 687; *Baber v. Broadway & S. Ave. R. Co.*, 9 Misc. 20, 29 N.Y.S. 40; *Sweazey v. Valley Transport, Inc.*, supra, 6 Wash.2d 324, 107 P.2d 567, 111 P.2d 1010, 140 A.L.R. 152 and cases collected at pages 153-154. In the present case inferences of fabrication since the alleged bribes could be fairly drawn by the jurors in addition to those which would tend merely to impeach the witnesses' general reputations or otherwise cast doubt upon their testimony. We find no error in admitting evidence of prior consistent statements for the limited purpose of refuting inferences of subsequent fabrication and to show a prior state of mind consistent with that shown by the witnesses when testifying. However if there was any error in ruling on the admissibility of the evidence a review of the record discloses no miscarriage of justice resulting therefrom.

[5] Error is asserted because of the refusal of the court to admit evidence to rehabilitate defense witness Hilty. The cross-examination of Hilty did not develop bias and prejudice or inferences of recent fabrication on his part and rehabilitating evidence was therefore not admissible.

[6] It is contended by the defendant Walsh that for the purpose of impeachment it was improper to elicit the fact that he refused on the advice of counsel to answer certain questions before the grand jury upon the ground that his answers would tend to incriminate him. At the trial he was accorded permission to fully explain his conduct before the grand jury. The use of evidence of a defendant's prior refusal to testify before a grand jury because of fear of self-incrimination does not, as this defendant claims, violate the constitutional privilege, *People v. Kynette*, supra, 15 Cal.2d 731, 750, 104 P.2d 794, and the fact that he acted on the advice of counsel does not destroy its admissibility. *People v. Jones*, 61 Cal.App.2d 608, 627, 143 P.2d

726; *People v. Sanchez*, 35 Cal.App.2d 231, 235, 95 P.2d 169; *People v. Graney*, 48 Cal.App. 773, 775, 192 P. 460.

[7] It is also contended that the court erred in giving at the request of the prosecution four instructions on the law of entrapment. Those instructions correctly state the law on that subject and appear to have been applicable in the present case as to the Griffin incident. Griffin testified that he consulted the district attorney before paying the bribe; that he proceeded under instructions from the district attorney; that he would not have paid the \$50 except upon the advice of the district attorney's office, and that he did not pay the bribe for the purpose of clearing the job but as an aid to law enforcement officers. The defendant Walsh asserts that the matter of bribery originated with Griffin. Proper instructions on entrapment under such circumstances cannot be said to create an inference that the act charged was in fact committed or to confuse the jurors as to the primary issue of the case. *People v. Jackson*, 42 Cal.2d 540, 268 P.2d 6. While the instructions were not expressly limited to the Griffin incident and there was no evidence of entrapment as to the Stubblefield incident, it does not appear that the jury would likely be confused by such lack of limitation.

Other claims of error are without merit.

[8] The evidence of bribery on the part of the defendants is abundantly sufficient to support the verdicts and judgments. They were given a fair trial and have advanced no sufficient reason for a reversal.

The judgments and orders are affirmed.

GIBSON, C. J., and SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

In my view it was error to receive in evidence, over the objection of defendants, the self-serving and unsworn writings of the complaining witnesses. Furthermore,

as I read the record, the instructions on entrapment were not applicable to any issue before the court and it was error to give them.

For further elucidation and strong documentation of the law supporting the views above stated, reference is made to the opinion prepared for the District Court of Appeal by Presiding Justice Shinn, concurred in by Justices Wood (Parker) and Vallée, and reported in 286 P.2d 915.

For the reasons above stated I would reverse the judgment.

CARTER and TRAYNOR, JJ., concur.

Rehearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.



Elizabeth R. COHEN, Plaintiff and
Respondent,

v.

The PENN MUTUAL LIFE INSURANCE
COMPANY, a corporation, Defendant
and Appellant.

No. 16702.

District Court of Appeal, First District,
Division 1, California.
Sept. 14, 1956.

Rehearing Denied Oct. 11, 1956.

See 302 P.2d 46.

Hearing Granted Nov. 8, 1956.

Action by beneficiary to recover on life policy. The Superior Court, County of Marin, Jordan L. Martinelli, J., entered judgment for beneficiary and denied insurer's motion for judgment notwithstanding the verdict and insurer appealed. The District Court of Appeal, Fred B. Wood, J., held that instruction which told jury that false answer in insurance application does not give rise to defense of fraud when true facts, if known to insurer, would not have made contract less desirable to insurer, but which failed to include element of the probable and reasonable influence of the true facts upon insurer, was prej-

udicial error where evidence disclosed insurer in instant case would have made a complete investigation as to applicant's physical condition if insurer had known true facts.

Judgment reversed and order denying motion for judgment notwithstanding verdict affirmed.

1. Insurance Ⓒ668(6)

In action on life policy, wherein insurer alleged insured made false and material misrepresentations and that consequently insurance contract was unenforceable, evidence as to whether representations were made with intent to deceive insurer was sufficient to present question for jury.

2. Insurance Ⓒ669(6)

In action on life policy, wherein insurer alleged policy was unenforceable because of false and material misrepresentations made by insured at time insurance contract was entered into, insurer, which pleaded and tried case upon theory of actual fraud, could not complain of instruction which submitted case to jury on theory that insurer had to prove an intent on part of applicant to deceive the insurer. West's Ann.Civ.Code, § 1572; West's Ann.Insurance Code, § 331.

3. Appeal and Error Ⓒ1066

Trial Ⓒ253(5)

In action on life policy, instruction which told jury that false answer in an insurance application would not give rise to defense of fraud when true facts, if known to insurer, would not have made contract less desirable, but which failed to include element of probable and reasonable influence of true facts upon insurer, was prejudicially erroneous where evidence disclosed that if insurer had known true facts as to applicant's physical condition in instant case, insurer would have made complete investigation of applicant's condition. West's Ann.Civ.Code, § 1572; West's Ann.Insurance Code, §§ 331, 334, 360.

Henry C. Clausen, Henry C. Clausen, Jr., Walker Lowry, San Francisco, McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, of counsel, for appellant.

Rockwell & Fulkerson, San Rafael, for respondent.

FRED B. WOOD, Justice.

Judgment was rendered upon a verdict against the defendant in favor of plaintiff, the beneficiary of an insurance policy issued upon the life of her husband, Dr. Sidney J. Cohen. Defendant has appealed from the judgment and from an order denying its motion for judgment notwithstanding the verdict.

Defendant by its answer admitted the issuance of the policy and the payment of premiums but declared a rescission of the contract and tendered the return of premiums paid, predicated upon asserted false statements of Dr. Cohen concerning his medical history, made in writing upon an application form which became a part of the policy.

In support of its motion for judgment notwithstanding the verdict, defendant claims the evidence is overwhelmingly in its favor, leaving no question of fact for determination by the jury, particularly the issues of falsity and materiality of the representations and of waiver by the insurer. Plaintiff, upon the other hand, contends there was a conflict of evidence upon the several issues and that the verdict is amply supported.

[1,2] We need only to consider one of those issues, the question whether Dr. Cohen made the alleged misrepresentations "with intent to deceive" the defendant "or to induce" defendant "to enter into the contract", Civ.Code, § 1572. Our examination of the record convinces us that the evidence does not demonstrate, as a matter of law, the existence of such an intent. No extended review of it is necessary because defendant does not claim proof of such intent as a matter of law. Instead, it contends that Dr. Cohen's intent in making the representations is not

an issue. In its opening brief, defendant says "All that the company need show is that the applicant concealed or misstated his medical history" and "Whether or not he had an actual intent to deceive is beside the point." P. 27. Upon the same ground, defendant criticizes an instruction given by the court which treated actual fraud as an issue and listed the elements thereof which defendant must prove, including proof "that the applicant intended the insurance company to rely on the misrepresentation or concealment." Concerning this defendant says "The implication that the Company had to prove an intent to deceive is wrong" and "the instruction is wrong too in suggesting that the Company had to prove that the applicant intended that the Company should rely on the misrepresentation or concealment." A.O.B., p. 32.

In support of this argument defendant invokes section 331 of the Insurance Code, which states that concealment, "whether intentional or unintentional," entitles the injured party to rescind insurance. But it pleaded and tried the case on the theory of "actual fraud."

It alleged that in his written application for insurance Dr. Cohen represented that his then present condition of health was good, that he had never had a special heart study or an electrocardiogram, and that there had never been any suspicion of nor had he ever had or been treated for pains in the chest or any disease of the heart or blood vessels.

It then alleged that each of the representations was false and untrue, each was known to Dr. Cohen to be false and untrue at the time of making it, *each was made by him for the purpose of inducing defendant to rely thereon and upon said reliance to issue to him said policy of insurance*, defendant did rely upon each thereof, defendant had no knowledge of the falsity of any thereof until after his decease, and that each of the representations was material to the risk in that defendant would not have issued the policy had it known

that they were false or untrue. These are averments essential to the pleading of a case of "actual fraud" as defined in section 1572 of the Civil Code. See 23 Cal.Jur.2d 27 and 164, Fraud and Deceit, §§ 11 and 66.

Having thus tendered the issue of actual fraud, including the question of Dr. Cohen's intent, defendant tried the case on that theory. For example, during the course of the trial when considering an objection defendant had made to a certain question, the judge indicated that a proper ruling "would depend upon the precise nature of the claim of the defendant in this case," saying "there are two kinds of misrepresentation, *one intentional and one not intentional*" and "now, if the insurance company here claims *actual fraud*—" at which point defendant's counsel said, "*that's what we do*, your Honor," and in response to a further comment by the judge, "*the claim is direct deception upon the contract* * * *—in any event, to answer your Honor's question, frankly, *the company* does, of course, depend upon the answers and *claims actual fraud*." (Emphasis added.)

Having pleaded and tried the case upon the theory of actual fraud, defendant is in no position to invoke a different theory upon appeal. The order denying the motion for judgment notwithstanding the verdict must be affirmed.

[3] *Defendant challenges as prejudicially erroneous three instructions on materiality* which told the jury that an incorrect answer on an insurance application (the concealment or the misrepresentation of a fact) is not material, does not give rise to the defense of fraud when the true fact, if known to the insurance company, "would not have made the contract less desirable to the insurer."

Defendant claims such an instruction is incomplete, failing as it does to include the element of the probable and reasonable influence of the true facts upon the insurer

"in making his inquiries"; that it should not be confined, as each of these instructions was confined, to the influence of such facts upon the insurer "in forming his estimate of the disadvantages of the proposed contract," quoting from section 334¹ of the Insurance Code.

This point seems well taken. The expression "would not have made the contract less desirable to the insurer" directs attention only to the insurer's "estimate of the disadvantages of the proposed contract" and, by its failure to mention, withholds from the jury consideration and determination of "the probable and reasonable influence of the facts" upon the insurer "in making his inquiries", in conducting his investigation of the applicant's medical history.

Plaintiff counters with the statement that the questioned instructions are based upon and use the very words of a statement recently made by our Supreme Court in *Ransom v. Penn Mutual Life Ins. Co.*, 43 Cal.2d 420, 427, 274 P.2d 633, 637: "An incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer. [Citations.]" But there, it would appear, *the sole question* was the probable effect of the true facts upon the desirability of the proposed contract to the insurer, not the probable influence thereof upon the "inquiries" the insurer would have made if it had known those facts. This is reflected in the statement which immediately follows the statement above quoted: "The electrocardiogram showed that Ransom's heart was 'essentially normal,' and defendant does not claim that this part of the medical history, if known, would have influenced it to consider the risk less desirable." 43 Cal.2d at page 427, 274 P.2d at page 637.

In our case, however, the "probable and reasonable influence" of the true facts upon the insurer in determining the desirability of the contract was *not the sole question*. Equally in issue was the probable influence

1. Section 334 applies to concealments. Section 360 of the same code makes section 334 applicable to representations.

of such facts upon the insurer "in making his inquiries." Clearly, the questioned instructions were erroneous.

Were they prejudicially erroneous? It would seem so.

Dr. Cohen failed to mention certain physical examinations given him by the Army in 1943 and 1946 and an electrocardiogram taken in 1943; nor did he state what any of the Army reports of such examinations indicated. Plaintiff concedes that there is a conflict in the evidence concerning the significance of the Army findings (for example, whether they indicated an organic disease or a functional disorder, arteriosclerosis or mere emotional tension), saying in part: "There is a direct conflict in the evidence on the question of whether there was a connection between the findings of the cause of death as reported in the autopsy and the findings of the Army physical examinations. Appellant had the burden of proving such connection * * * and whether it succeeded was a pure question of fact to be determined by the jury." R.B., pp. 33-34. That bears directly upon the question: What would have been "the probable and reasonable influence" of those examinations and the nature of those findings upon the defendant "in making his inquiries"? There is evidence that knowledge of the fact that an applicant had taken an Army physical and had been accepted for induction, commissioning or honorable discharge without indication of waiver or other limitation, would not influence the defendant, would not stimulate it to investigate further. Because of the difficulty and the time consumed in obtaining military records of physical examinations of an applicant, the company customarily did not seek to obtain them unless the applicant's answer provided a reason for so doing. If those answers indicated a service connected disability or an examination which showed defects covered by the questions asked of the

applicant, defendant's underwriting department would request the applicant to produce his health record from the Army before processing the application. Specifically, electrocardiograms, abnormal pulse records, and abnormal blood pressure readings are referred to home office doctors to review. Here, for example, asked if he ever had a health or physical examination, Dr. Cohen answered "U. S. Army induction 1944." He had in addition been examined by Army doctors several times in 1943 and again in 1946. Asked if he ever had a special heart study or an electrocardiogram, he said "No." Instead, he had had a heart study by X-ray and an electrocardiogram. The latter, according to one of the experts, was "definitely abnormal" pointing to the coronary arteriosclerosis found at the autopsy; according to another expert it was suggestive of heart disease. Asked if there had been suspicion of abnormal pulse, any disease of the heart or blood vessels or a high blood pressure, he said "No." Yet, there is evidence that he was examined several times in 1943 for high blood pressure and abnormal pulse, and that in 1944 he accepted an Army commission stating "Waiver is granted for unstable blood pressure, tachycardia, systolic apical murmur." The 1944 Army report stated "blood pressure this examination is of the same order as previously."

There is evidence that if Dr. Cohen had answered the application questions truthfully, a full investigation would have been made by the defendant.

We conclude, therefore, that the instructions in question were prejudicially erroneous.

The judgment is reversed and the order denying the motion for judgment notwithstanding the verdict is affirmed.

PETERS, P. J., and BRAY, J., concur.

Jack BAKER, Plaintiff and Appellant,
v.

Anton NOVAK, Individually and doing business as Sea Crest Service, Defendant and Respondent.

Civ. 5412.

District Court of Appeal, Fourth District, California.

Sept. 19, 1956.

Rehearing Denied Oct. 10, 1956.

Hearing Denied Nov. 14, 1956.

Action for injuries sustained by one riding in automobile driven by defendant when it went out of control and catapulted into a canyon. From a judgment of the Superior Court of San Diego County, C. M. Monroe, J., on a jury's verdict for defendant, plaintiff appealed. The District Court of Appeal, Burch, J. pro tem., held that whether plaintiff gave defendant compensation for ride and hence was a passenger, rather than guest of defendant, was question of fact for jury.

Judgment affirmed.

1. Appeal and Error ⇨842(1)

On appeal from judgment on general verdict for defendant in action for injuries sustained by plaintiff while riding in automobile driven by defendant, plaintiff is entitled to ruling on question whether he was a passenger in automobile as matter of law, though plaintiff's failure to prove by preponderance of evidence that defendant was guilty of negligence proximately contributing to injuries justified verdict for defendant. West's Ann.Vehicle Code, § 403.

2. Appeal and Error ⇨1062(4)

Trial court's submission to jury as fact question of issue, which is one of law on record, as to whether plaintiff, suing for injuries sustained while riding in automobile driven by defendant, gave defendant compensation for ride, and hence was passenger, rather than defendant's guest, results in error prejudicial to plaintiff, where jury returns general verdict for defendant, though record shows that ver-

dict would be supported because of plaintiff's failure to establish defendant's negligence. West's Ann.Vehicle Code, § 403.

3. Automobiles ⇨245(24)

In action for injuries to one riding in automobile driven by defendant, it was jury's function to draw one of two possible inferences, warranted by evidence, on question whether plaintiff conferred on defendant a benefit constituting compensation for ride, and hence was a passenger, entitled to protection of general law of negligence, or went along, at his own request, for fun of ride, and hence was defendant's guest, required to prove that injuries were caused by defendant's intoxication or wilful misconduct in order to recover damages. West's Ann.Vehicle Code, § 403.

4. Automobiles ⇨245(24)

In action for injuries to one riding in automobile driven by defendant, evidence, including defendant's testimony on examination under civil procedure code section, presented fact question for jury as to whether plaintiff was a passenger, giving defendant compensation for ride, or a guest of defendant. West's Ann. Code Civ.Proc. § 2055; West's Ann.Vehicle Code, § 403.

5. Automobiles ⇨181(2)

A "passenger" in automobile is a person giving driver compensation for ride, as distinguished from "guest", carried gratuitously, within Vehicle Code provision that no person accepting ride in vehicle as guest, without giving compensation therefor, has right of action against driver for personal injury sustained during ride, unless he establishes that injury resulted from driver's intoxication or wilful misconduct. West's Ann.Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest" and "Passenger".

6. Automobiles ⇨181(1)

An automobile driver is liable for ordinary negligence proximately causing injuries to or death of passenger in automobile.

7. Automobiles ⇨181(2)

Whether automobile operator received any advantage of value from carrying a rider, whether rider paid money to operator for ride, whether operator and rider shared expenses, and whether they were engaged in some undertaking or making trip together, must be considered in determining ultimate fact as to whether some benefit, realized or expected, flowed or would flow to operator, so as to constitute giving of compensation to him for ride, thereby rendering rider a passenger, rather than guest, in automobile. West's Ann.Vehicle Code, § 403.

8. Appeal and Error ⇨1064(4)**Trial** ⇨228(3)

In action for injuries to alleged passenger in automobile driven by defendant, uses of definitive word "the" instead of indefinite article "a" in instruction that questions whether parties shared expenses and were engaged in some undertaking or making trip together must all be considered by jury in determining whether "the thing which actuated the giving of that ride" was some benefit to defendant, and that test was whether "the motive in giving the ride" was some advantage or something of value flowing to defendant because of parties' agreements and undertakings, were not misleading and prejudicial to plaintiff. West's Ann.Vehicle Code, § 403.

9. Appeal and Error ⇨1067

In action for injuries to one riding in automobile driven by defendant when it went out of control and catapulted into a canyon, defendant's failure to preserve for future evidence of cause of failure of automobile's steering apparatus a part of broken bolt, which he and a mechanic in defendant's garage testified was probably defective because of crystallization, did not constitute wilful suppression of evidence, so that trial court's failure to instruct jury as to disputable statutory presumption that evidence wilfully suppressed would be adverse, if produced, was not error prejudicial to plaintiff, though res

ipsa loquitur doctrine applied. West's Ann.Code Civ.Proc. § 1963, subd. 5.

William Murray Hill and Murry Luftig, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, for respondent.

BURCH, Justice pro tem.

Plaintiff Jack Baker sues defendant Anton Novak to recover for damages he received when the "jeep" in which the parties were riding went out of control and catapulted into a canyon. The accident occurred at about 4:30 p. m. November 11, 1954, while Novak was driving the "jeep" in an easterly direction on U.S. Highway 76 at a point approximately 6 miles southeast of a junction known as Rincon Springs in San Diego County.

Trial by jury resulted in a general verdict for defendant. Plaintiff appeals from the judgment entered upon the verdict.

[1,2] The complaint alleges that plaintiff was a passenger at the time of the accident. He contends upon appeal that the court committed prejudicial error in failing to instruct the jury that plaintiff was a passenger as a matter of law, whereas, the court, considering the question was in conflict, left the matter to the jury as a question of fact. Plaintiff is entitled to a ruling on whether or not plaintiff was a passenger as a matter of law, even though the jury's general verdict could find support in plaintiff's failure to prove to the jury by a preponderance of the evidence that defendant was guilty of negligence which proximately contributed to his injuries, and thereby justifying the verdict for defendant. Although the record indicates that the jury might have based its verdict on the absence of negligence, it appears to be settled law, though with some debate, that prejudicial error results "in submitting to the jury as a question of fact" an issue on compensation for a ride "that on the record was one of law",

Huebottter v. Follett, 27 Cal.2d 765, 770, 167 P.2d 193, 196, even though the record shows the verdict would be supported because of failure to establish negligence.

[3] In considering the question of status as guest or passenger within the meaning of Vehicle Code Section 403 (the guest law) we center our attention upon the phrase therein requiring "compensation". The terms "guest", "passenger", and "compensation" are legal concepts in relation to the guest statute which carry the meanings given to them, respectively, by a long line of decisions from which it appears that the circumstances of each case fit more readily into one or the other of the two categories, guest or passenger, covered by the statute. Conceivably a rider may give a stipulated compensation, money or something else of value, to the driver, and come under the protection of the general law of negligence. But conceivably also the driver, motivated by sheer good will, may invite or permit to ride the well-known "hitchhiker" who loses his right thereby to compensatory damages for negligence, but must prove injuries caused by the driver's intoxication or wilful misconduct. These various decisions have been reviewed exhaustively in *Martinez v. Southern Pacific Co.*, 45 Cal.2d 244, 288 P.2d 868, and the line of demarcation there drawn indicates to us that the jury could in this case draw an inference that Mr. Baker was either one or the other. It is the function of the jury to draw that one of the two possible inferences supplied by the evidence offered upon the decisive question: Did Mr. Baker confer upon Mr. Novak a benefit within the meaning of compensation as used in the statute, or did Mr. Baker at his own request go along for the fun of the ride. The ultimate fact to be determined is whether he did or did not give compensation for the ride.

[4] The record discloses evidence for and against the legal concepts of "passenger" and "guest". The parties were friends. Novak testified: "Well I think I have known him (Mr. Baker) about a

year before this accident' * * *. The first time I ever met him was he stopped in at the station and wanted to know if he could leave a little radio he had there for some money, take his wife to the hospital. So I give him enough money to take her up to the doctor. And a few days later he picked his radio up * * *. Yes, he brought Dean (Mr. Dean Cabbie, Mr. Baker's son-in-law) down one day and asked me if I would give him a job, and I did." Novak and Cabbie went on a uranium hunt in the fall of 1954, but found no uranium. Novak and his wife had been on two uranium hunts before that, but none was found.

"Q. Now when you returned from your trip with Mr. Cabbie you arrived back a short period before you went on your trip with Mr. Baker; is that right? A. Yes, four days, I guess.

"Q. Was Mr. Baker working there at the station when you got back? A. Yes, he was.

"Q. And did Mr. Cabbie then take over? A. Yes.

"Q. Now was Mr. Baker living there on your premises when you first came back from the trip? A. Well, he had a small truck, he had a bed in back of it, and he lived there, I guess * * *.

"Q. Now when you originally planned to go on this second trip after coming back from Arizona with Mr. Cabbie did you originally plan to go with Mr. Baker or with your wife? A. I was planning on taking my wife. Then Jack wanted to go so I took Jack. * * *

"Q. Did you have any conversation with Mr. Baker before leaving about sharing of expenses or groceries or gas and oil? A. No.

"Q. Did Mr. Baker contribute anything toward the purchase of the groceries? A. He never gave me anything.

"Q. Did he pay you anything for the gas and oil? A. No.

"Q. Did he say to you that he would? A. There was nothing mentioned about he would or he wouldn't."

On examination under section 2055 of the Code of Civil Procedure Mr. Novak testified that the trip was headed for Palm Springs as a likely place to find uranium and that this was at Mr. Baker's suggestion; that they were equipped with a Geiger Counter, a couple of small shovels, bed rolls and a tent. Mr. Novak had previously testified in a deposition:

"Q. Was Jack Baker sharing the expenses of the trip, the ride? A. Yes.

"Q. And what was he to give you for that or what did he give you? A. Well, he put in half the gas and half the groceries and that was it * * *."

The witness continued under section 2055, supra:

"Mr. Cabbie and I got back on a trip before Jack and I left on this one. And him and I shared expenses. * * *. Dean had \$13 and I put the rest of the money into the trip. So I figured this would be the same way. That would be all. There was nothing mentioned about money or anything else."

A suggestion is also made that certain work was performed by Mr. Baker with others upon the jeep, putting in new rings and giving it a general overhaul, and that this, being in anticipation of the trip, was contributed as far as Mr. Baker was concerned, as compensation, to bring him into the category of a passenger and not a guest. We think we have quoted sufficiently from the record to show that the parties evidenced a situation with regard to "compensation" which would make the question one of fact and not one of law. The probative facts, in our view, do not establish as a matter of law that Mr. Baker was a passenger or that he was a guest. The hunt by Mr. Novak for uranium may have been purely by way of recreation from work, and he may have acceded to Mr. Baker's request to go along solely to accommodate a wish of a friend and to enjoy his company. Many people we

think might envisage such a trip as pure fun, and Mr. Baker could be among them for all we find in the record. We think the court properly left the question to the jury insofar as the Geiger Counter, pick and shovels affected the issue.

[5, 6] "The designations 'passenger' and 'guest' have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously." *Thompson v. Lacey*, 42 Cal.2d 443, 444, 267 P.2d 1, 2; *Whitmore v. French*, 37 Cal.2d 744, 746, 235 P.2d 3. Under this section one who is a guest in the automobile of another cannot recover against the driver for injuries or death unless he establishes that the injuries or death proximately resulted from the intoxication or wilful misconduct of the driver; but where one is a passenger, the driver is liable for ordinary negligence proximately causing the injuries or death. *Follansbee v. Benzenberg*, 122 Cal.App.2d 466, 470, 265 P.2d 183, 42 A.L.R.2d 832." *Martinez v. Southern Pacific Co.*, 45 Cal.2d 244, 249-250, 288 P.2d 868, 871.

As for the new rings and repair work on the jeep by the parties, again Mr. Baker's part is not necessarily to be taken as compensation for the ride. Gratitude for other and different accommodations than the trip, that he had received from Mr. Novak, may have been his motive. He kept his own truck on the premises and lodged therein. He had been befriended when his wife was ill. He had been casually employed at times around the station. The jury would have to judge which motive actuated Mr. Baker, friendship or a bargain for the ride. Assuming such an implied finding by the jury for the purposes of appellant's contention on appeal, we find no error in submitting to the jury the question as one of fact. *Martinez v. Southern Pacific Co.*, 45 Cal.2d 244, 288 P.2d 868.

[7,8] Appellant objects to the following instruction as containing prejudicial error in the use of the phrases "*the* motive in giving the ride and "*the* thing that actuated the giving of the ride". It is appellant's contention that the use of the article "the" instead of the article "a" constituted the error; that there need be only "a" benefit for the ride to make the rider a passenger. The instruction follows:

"Now you will note that what the law refers to is that there must flow to the operator of the automobile a consideration for the giving of the ride. That doesn't have to be a payment of money; but it can be anything, any advantage of value to the operator of the automobile. So that it is not to be determined solely by whether the parties share the expenses. It is not to be determined solely by whether or not they were engaged in some undertaking together or making a trip together. But all those things are to be taken into consideration by the jury in determining as a matter of fact whether in giving to the party the ride in the vehicle the thing which actuated the giving of that ride was either some benefit which could flow to the operator of the car or by reason of the arrangement the parties had made he anticipated would flow to him. Now that might be any sort of an advantage, any sort of a thing that would persuade the giving of the ride, as long as it was something that operated or was expected to operate as a valuable advantage to the party operating the car. So it will be apparent to you that the mere fact that the parties may have been interested in the same thing or that they may have undertaken to share expenses, isn't necessarily the test. It is the question whether or not the motive in giving the ride was because of some advantage or something of value that either did flow to the operator of the car or that he anticipated would flow to

him by reason of the agreements and undertakings of the parties."

What the court is speaking of here is the single concept of "compensation" for the ride as specified in section 403 of the Vehicle Code. As the instruction points out, this single concept is a fact to be judged by numerous probative facts among which are stated any advantage of value; whether or not a payment of money be made; whether or not expenses are shared; whether or not they were engaged in some undertaking together or making a trip together; all these matters were to be taken into consideration in determining that ultimate fact, to wit: "some benefit which would flow to the operator of the car", realized or expected. The instruction then explains the types of benefit or advantage that would measure up to the requirements of "compensation". We find nothing misleading in the uses of the definitive word "the" instead of the indefinite article "a". The matter was before the trial court on consideration of a motion for new trial and we adopt as a part of this opinion the remarks of the trial judge. The Honorable C. M. Monroe there said on the point:

"Plaintiff argues that the jury might have construed this language as meaning that in order to establish the relationship of passenger the plaintiff would be compelled to prove that the sole and only reason actuating the giving of the ride was the expectation of some gain or advantage on the part of the owner of the vehicle. No case has been cited in which this distinction has been carefully spelled out. It might be argued on the contrary, that if any expectation of any advantage or gain entered into the transaction in any degree whatever such fact would constitute the recipient of the ride a passenger. In such event it might be reasoned that practically any time that a person took another into his automobile the latter became a passenger. I think it is fair to state that it is

knowledge common to everybody that in all such transactions a number of reasons may be involved. Thus when a man proffers an accommodation to a friend he may entertain in the back of his mind some thought that the friend may in the future be of some value to him. So when we speak of 'motivating influence' we mean something which is actually a moving cause of the ride and not some minor consideration that may have possibly entered the mind of the owner of the automobile. I do not feel that this instruction could have been misunderstood or misinterpreted by the jury."

We find nothing in *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909, in conflict, as to this point, with *Whitmore v. French*, 37 Cal.2d 744, 235 P.2d 3, or *Thompson v. Lacey*, 42 Cal.2d 443, 267 P.2d 1, or *Martinez v. Southern Pacific Co.*, 45 Cal.2d 244, 288 P.2d 868. Where the context calls for the demonstrative and particular article, "the" that word is used. When, however, the court is directing its attention variously to one of several motives influencing conduct it uses the indefinite article "a".

[9] The court instructed the jury on the effect of the production of weaker evidence when it was in the power of the party to produce stronger evidence. The court gave no instruction under the rule stated in section 1963, subd. (5) of the Code of Civil Procedure, viz.: "That evidence wilfully suppressed would be adverse if produced". It is argued that the failure to give the latter instruction constituted prejudicial error, on the theory that the case was one for the application of the doctrine of *res ipsa loquitur* and the defendant had not furnished evidence explaining the accident and therefore plaintiff was entitled to an instruction that defendant's negligence was responsible for the accident. On the question of negligence the doctrine of *res ipsa loquitur* concededly applied. As to the evidence offered by defendant to explain the accident it does

not import the element of wilful suppression.

In *Dierman v. Providence Hospital*, 31 Cal.2d 290, 188 P.2d 12, plaintiff received his injuries from an explosion while in surgery and the doctor was using a hot iron to cauterize the wound. The *Dierman* case states the rule (quoting from the syllabus):

"Where the doctrine of *res ipsa loquitur* is applicable and, in addition to the prima facie showing of negligence, it is admitted or appears without dispute that defendant has it in his power to produce substantial evidence material to the issue of negligence but fails to do so, it must be presumed that such evidence, if produced, would have been adverse to defendant, and under such circumstances the evidence is insufficient to support a verdict for defendant and plaintiff is entitled to a directed verdict."

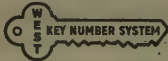
In the instant case the defendant made an affirmative showing that while descending a grade and negotiating a curve at a lawful and proper speed, "suddenly and without warning" his steering apparatus failed him and he was unable to bring the jeep to a stop before it plummeted over the bank. Not until some nine or ten days later, when defendant was released from the hospital, did he have an opportunity to again see or inspect the jeep. When he got it back to his garage in San Clemente an inspection revealed that a broken bolt, a part of which was found buried in the front axle, was probably defective through crystallization. The other part of the bolt was never found. The portion recovered was placed by defendant in a tool box at a time when no action was pending or anticipated. When the trial was in prospect defendant hunted for and failed to find the part of the bolt. Eleven months had elapsed, the jeep had been repaired and was sold. The mechanic who removed the imbedded part testified that in his opinion the bolt was crystallized and that the failure of the part was due thereto. Plain-

tiff himself testified that he had worked at the overhaul of the jeep shortly before the trip. We see in this no wilful suppression of evidence, and clearly the showing made takes the case out of the quoted rule of the Dierman case, supra. We agree with the trial court that the jury would be justified in finding the explanation in this evidence, and that the failure to have preserved the part for future evidence was in no way blameworthy.

Judgment affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



144 Cal.App.2d 455

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles Basil WHEAT, Defendant and
Appellant.

Cr. 5609.

District Court of Appeal, Second District,
Division 3, California.

Sept. 14, 1956.

Rehearing Denied Sept. 28, 1956.

Defendant was convicted by the Superior Court of Los Angeles County, Clement D. Nye, J., for burglary of the first degree, and appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported trial court's finding that burglary occurred in nighttime, so as to constitute first degree burglary.

Judgment affirmed.

Burglary ☞41(5)

In burglary prosecution, evidence supported trial court's finding that burglary occurred in nighttime, so as to constitute

first degree burglary. West's Ann.Pen Code, § 460.

Charles Basil Wheat, appellant, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with burglary. It was also alleged in the information that he had been convicted on seven prior occasions of a total of eight felonies, and that he had served terms of imprisonment therefore in state prisons. Defendant denied those allegations. Trial by jury was waived. He was adjudged guilty, and the offense was fixed as burglary of the first degree. The allegations as to prior convictions were found to be true. Defendant appeals from the judgment.

Appellant contends that the evidence was not sufficient to support the finding that the offense was burglary of the first degree. He asks that the judgment be modified by reducing the degree of burglary from first degree to second degree.

Section 460 of the Penal Code provides, in part: "1. Every burglary of an inhabited dwelling house or building committed in the night time * * * is burglary of the first degree. 2. All other kinds of burglary are of the second degree."

The question on appeal is whether the evidence was sufficient to support a finding that the burglary was committed in the nighttime.

Mrs. Burnand testified that on September 28, 1955, she was living in a one-family, two-story house at 2361 Hollyridge Drive in Los Angeles. About 8 p. m. of that day, she and her husband retired to bed; before she retired she examined the doors of the house, and everything was locked and in order; about midnight she heard noises in the house; she "heard sorts of things like they were dropping, stumbling around",

she did not do anything about the noises because she was very tired and thought the noises might be her imagination or the people across the road; when she went downstairs in the morning she saw that the suitcase, which was at the foot of the stairs, had been opened and everything had been thrown out of it, and her valuables which had been in the suitcase were missing; the missing valuables were a diamond brooch, two gold bracelets, gold earrings with Greek coins, circle diamond earrings, and \$55 or \$60; she also noticed that the doors of a room on the bottom floor were open; the gold earrings with Greek coins (Exhibit 1), shown to her while she was a witness, were her earrings which were missing on September 29.

A police officer, who arrested defendant in San Francisco on October 5, 1955, testified that the circle diamond earrings (Exhibit 2) were in defendant's shirt pocket.

Another police officer testified that he first saw Exhibit 1 (the gold earrings with Greek coins) in a house on East 24th Street in Los Angeles; defendant was with the officer at that time, and defendant said that the house was his residence; defendant told the officer that he opened the door of the Burnand house with a pry bar, went into the house, opened the suitcase at the foot of the stairs, took articles of jewelry from the suitcase, put them in his pocket, went out of the house, and stayed in the weeds until it became light enough for him to walk down the street without being noticed; defendant also said that Exhibits 1 and 2 came from the house, and that he thought it was daylight when he entered the house—he figured it was around 6 a. m. when he entered.

Defendant did not testify and did not call any witness in his behalf.

Appellant argues to the effect that there was no positive testimony that he entered the house in the nighttime; that the testimony of Mrs. Burnand was not definite as to where the noises were or as to the time when she heard them; and "it is

logical that perhaps the burglary was committed late the next morning."

The trial judge could reasonably have found from the evidence herein that the burglary occurred in the nighttime. The evidence supports the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



144 Cal.App.2d 445

H. R. REEVES, Plaintiff and Appellant,

v.

Charles S. HUTSON, American Supply Company, a corporation, Defendants and Respondents.

Civ. 16783.

District Court of Appeal, First District,
Division 1, California.

Sept. 14, 1956.

Rehearing Denied Oct. 11, 1956.

Hearing Denied Nov. 8, 1956.

Action was brought for services rendered and for money had and received. Plaintiff secured a default judgment. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered an order quashing execution, an order dismissing the action, and an order denying motion to restrain defendants from transferring or mortgaging certain property or to post bond, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that where period from commencement of action to date of entry of dismissal of action was five years and four months plus, but during period of five months and 14 days it was impracticable or futile to bring the action to trial because defendants had not complied with conditions of order setting aside default judgment in favor of plaintiff, action should not have been dismissed under section of the Code of Civil Procedure making mandatory the dismissal of an action unless such action is brought

to trial within five years after plaintiff has filed his action.

Order quashing execution affirmed, order dismissing action reversed, and appeal from order denying motion to restrain defendants or require them to post bond dismissed.

1. Appeal and Error ⇨113(1)

An unconditional order granting a motion to vacate a final judgment is an appealable order. West's Ann.Code Civ.Proc., §§ 473, 663.

2. Appeal and Error ⇨82(3)

If conditional order setting aside default judgment is self-executing, so far as the conditions are concerned, it is a final order and is appealable. West's Ann.Code Civ.Proc., §§ 473, 663.

3. Appeal and Error ⇨82(3)

If order setting aside default judgment on condition contemplates a second order unconditionally vacating the judgment, then the original order is interlocutory and non-appealable. West's Ann.Code Civ.Proc., §§ 473, 663.

4. Appeal and Error ⇨113(3)

Judgment ⇨569

Where order setting aside default judgment, though somewhat ambiguous, was susceptible to the reasonable interpretation that it was self-executing, the order was appealable, and, in absence of a timely appeal from such order, the issues determined by it were res judicata. West's Ann. Code Civ.Proc., §§ 473, 663.

5. Appeal and Error ⇨82(3)

Judgment ⇨569

Order refusing to set aside default judgment and to restore judgment was a special order after final judgment and was appealable, and, in absence of a timely appeal therefrom, issues determined by it were res judicata. West's Ann.Code Civ. Proc., §§ 473, 663.

6. Appeal and Error ⇨82(3)

Judgment ⇨569

If conditional order setting aside default judgment was interlocutory in nature

and not appealable, then subsequent order finding that there had been compliance with the conditional order and denying a motion to set aside the default judgment was an order after final judgment and appealable, and, in absence of timely appeal therefrom, issues determined by it were res judicata. West's Ann.Code Civ.Proc., §§ 473, 663.

7. Appeal and Error ⇨113(2)

Generally, an order vacating or refusing to vacate an appealable order is itself an appealable order if it presents facts which were not reviewable on appeal from the first order. West's Ann.Code Civ.Proc., §§ 473, 663.

8. Appeal and Error ⇨82(3)

If conditional order setting aside default judgment was a final self-executing order, it operated to set the default judgment aside, and subsequent order finding that there had been compliance with the conditional order and denying a motion to set the default judgment aside, could not be a special order after final judgment, because no judgment was then on the books, and the subsequent order would not be appealable. West's Ann.Code Civ.Proc., §§ 473, 663.

9. Tender ⇨26

Where defendants' attorney wrote plaintiff's attorney requesting a cost bill, and, when none was forthcoming, defendants' attorney wrote court and, on instructions from court, deposited with clerk more than enough to cover attorney's fees of plaintiff's attorney and costs, and plaintiff's attorney was so notified, there was a valid tender of attorney's fees and costs. West's Ann.Code Civ.Proc., § 2074.

10. Tender ⇨26

Where defendants' attorney wrote plaintiff's attorney requesting a cost bill, and, when none was forthcoming, defendants' attorney wrote court and, on instructions from court, deposited with clerk more than enough to cover attorney's fees of plaintiff's attorney and costs, and plaintiff's attorney was so notified, and plaintiff made no objections to the tender, the failure to

object amounted to a waiver of any infirmities in the procedure adopted. West's Ann. Code Civ.Proc., §§ 2074, 2076; West's Ann. Civ.Code, § 1501.

11. Judgment ⇨172

Where order of April 28 conditionally setting aside default judgment required defendants to make certain books available to plaintiff, and on June 19 defendants' attorney informed plaintiff's attorney that the books were then in the possession of defendant's attorney and could be seen at his office or at the office of the accountant, the delay from April 28 to June 19 could not be held to be unreasonable as a matter of law. West's Ann.Code Civ.Proc., §§ 2074, 2076; West's Ann.Civ.Code, § 1501.

12. Execution ⇨161

Where there was no default judgment in effect on date when court quashed execution because there had been compliance by defendants with conditions of conditional order setting aside the default judgment, the order quashing the execution was proper.

13. Dismissal and Nonsuit ⇨60(1)

Section of the Code of Civil Procedure, making mandatory the dismissal of an action unless the action is brought to trial within five years after plaintiff has filed the action cannot automatically be applied in every case, since there are court-created exceptions. West's Ann.Code Civ.Proc., § 583.

14. Dismissal and Nonsuit ⇨60(3)

The period during which it is "impossible," "impracticable" or "futile" to try the action must not be included in the five year period of statute making mandatory the dismissal of an action unless the action is brought to trial within five years after plaintiff has filed his action. West's Ann. Code Civ.Proc., § 583.

15. Dismissal and Nonsuit ⇨60(6)

Where period from commencement of action to date of entry of dismissal of action was five years and four months plus, but during period of five months and 14 days it was impracticable or futile to bring

the action to trial because defendants had not complied with conditions of order setting aside default judgment in favor of plaintiff, action should not have been dismissed under section of the Code of Civil Procedure making mandatory the dismissal of an action unless such action is brought to trial within five years after plaintiff has filed his action. West's Ann.Code Civ. Proc., § 583.

16. Appeal and Error ⇨781(4)

Affirmance of order quashing execution on default judgment, which was set aside, rendered moot the denial of motion by plaintiff to restrain defendants from disposing of property or to post a bond pending appeal, and appeal from order denying the motion to restrain defendants or to require them to post bond would be dismissed.

17. Appeal and Error ⇨491

Appeals from order quashing execution and from order of dismissal are not orders directing the payment of money, and determination of question whether a bond should be required clearly rested within sound discretion of trial court. West's Ann. Code Civ.Proc., §§ 942, 949.

18. Appeal and Error ⇨491

Trial court did not err in denying plaintiff's motion to restrain defendants from disposing of property or to post a bond pending appeal by plaintiff. West's Ann. Code Civ.Proc., §§ 942, 949.

Lorne M. Stanley, San Francisco, for appellant.

Howard C. Ellis, Bernard B. Glickfeld, San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff secured a default judgment against defendants. Subsequently the default was set aside. Thereafter, the trial court entered an order quashing execution, an order dismissing the action, and an order denying plaintiff's motion to restrain defendants from disposing of property or to post bond. From these three orders plaintiff appeals.

The facts are somewhat confusing. On October 18, 1949, plaintiff brought an action in San Francisco against defendants for \$13,563.14 for services rendered and for money had and received. Service was had on defendants in Santa Cruz County on October 19, 1949. About November 15, 1949, the attorney for defendants, Howard Ellis, secured from Lorne Stanley, attorney for plaintiff, an extension of time to plead to December 19, 1949. Defendants failed to plead within the time thus extended. On December 21, 1949, plaintiff caused defendants' default to be entered and judgment on default was entered on December 28, 1949. Ellis learned of the entry of the default on January 4, 1950, and moved to have it set aside on January 12, 1950. With this motion defendants filed their proposed answer denying liability and various affidavits. Ellis' affidavit filed in support of the motion avers that when he secured the extension in November of 1949 he and Stanley were on friendly terms, and he, Ellis, believed that Stanley would not take a default without some warning; that during this period, both before and after the action was filed, there were settlement discussions between counsel; that between October, 1949, and January 4, 1950, affiant was overwhelmed with an accumulated press of business and out of his office much of the time; that because of his secretary's neglect and inadvertence the date of the extended time to plead was not put on his calendar, nor was the file placed on his desk; that affiant discovered on January 4, 1950, that through oversight the time for answering had expired; that he immediately telephoned Stanley to request additional time to plead and was then informed of the entry of the default judgment; that affiant requested that the default be set aside by stipulation, but Stanley refused to so stipulate.

The motion to set aside the default was opposed. On April 28, 1950, Judge Theresa Meikle caused to be entered an "Order Setting Aside Default and Default Judgment Upon Condition." This order reads, in part, as follows:

"That the default and default judgment heretofore entered in the above-entitled matter be and the same is set aside upon the following express terms and conditions:

"1. That the Defendants pay to Plaintiff for and on account of costs incurred in said action the costs as taxed herein;

"2. That the Defendants pay to the attorney for Plaintiff the sum of \$200.00 as part consideration of this order—The default not to be set aside until the payment of costs and attorney fees is paid;

"3. That the books and records of the Defendant corporation be brought from its principal place of business in the County of Santa Cruz to the City and County of San Francisco and made available for the inspection by the attorney for Plaintiff, at the office of the certified accountant at all times;

"4. That the [Defendants] be * * * restrained from transferring any of [their] assets other than in the ordinary course of business pending the trial of the issues * * *

No appeal was taken from this order, but on November 26, 1951, some 19 months after it was entered, plaintiff moved to have it set aside and the judgment restored on the ground that the conditions contained in the order had not been performed. Stanley so averred. Ellis filed a counter-affidavit alleging that he and his clients had complied with the order; that on May 12, 1950, he wrote Stanley requesting a cost bill; that he received no reply; that on May 31, 1950, he wrote to Judge Meikle informing her that he was holding \$200 in his trust account for disposition of the matter, and requesting instructions as to its disposition; that Judge Meikle, under date of June 5, 1950, suggested that the money be deposited in court and Stanley notified; that on June 9, 1950, affiant deposited \$225 with the clerk of the court and Stanley was notified; that plaintiff made no demand for the money or for the books of defendant, and never submitted a cost bill; that the books and records of defendants have been available; that on June 19, 1950, affiant notified Stan-

ley that the books of defendants were in affiant's office and could be seen in affiant's office or in the office of the named accountants; that on November 29, 1951, affiant withdrew the money deposited with the clerk and sent Stanley a check for \$215.75 for the attorneys' fees and costs and again told him that the books were available at the accountant's office; that Stanley refused to accept the check.

On December 4, 1951, Judge Sweigert denied the motion to set aside the order setting aside the default and to restore the judgment. No appeal was taken from this order.

Nothing further occurred until December 1, 1954, on which date plaintiff, *ex parte*, secured an order from Judge Neubarth for a writ of execution, and levied on certain property of defendants located in Santa Cruz County. Defendants secured several *ex parte* stays of execution, and then, on January 3, 1955, moved to quash the execution and moved to dismiss the action. The affidavit of Ellis filed in support of the motions avers that all the conditions of the order of April 28, 1950, have been complied with, and that the action should be dismissed because more than five years had elapsed since its commencement. Affidavits of the accountants also averred that the books of defendants, describing them, were available for inspection at their office, but that no demand for such inspection had ever been made. Plaintiff filed cross-affidavits averring that the books in the possession of the accountants were not complete. On January 28, 1955, Judge Neubarth filed an order quashing the execution. This is one of the orders appealed from, and involved on this appeal.

On February 21, 1955, Judge Neubarth entered an "Order Dismissing Action of Plaintiff Pursuant to Section 583 of the Code of Civil Procedure," expressly finding that defendants had complied with all conditions of the order of April 28, 1950; that Judge Sweigert had so determined by his order of December 4, 1951; that no judgment existed since defendants had complied

with the April 28, 1950, order; that the action was commenced on October 18, 1949, and more than five years have elapsed since its commencement. Plaintiff has appealed from this order.

On March 14, 1955, plaintiff moved for an order restraining defendants from transferring or mortgaging certain property upon which plaintiff had previously levied, or to post bond, until the validity of the order of February 21, 1955, could be finally determined. This motion was denied March 16, 1955, by the late Judge Deasy. Plaintiff has appealed from this order.

[1-4] Appellant first attacks the validity of the order setting aside the default made on April 28, 1950, on the ground that the supporting affidavits do not show the required inadvertence, mistake, surprise or excusable neglect. This attack assumes that the validity of that order is reviewable on this appeal. This assumption appears to be contrary to the applicable law. Of course, an unconditional order made under either section 473 or section 663 of the Code of Civil Procedure granting a motion to vacate a prior judgment is an appealable order, being a special order after final judgment. *Colby v. Pierce*, 15 Cal.App.2d 723, 59 P.2d 1046; *Casner v. Superior Court*, 23 Cal. App.2d 730, 74 P.2d 298; *Harth v. Ten Eyck*, 12 Cal.2d 709, 87 P.2d 693. In the instant case, the order setting aside the default was made subject to certain conditions. In such event, if the conditional order is self-executing, so far as the conditions are concerned, it is still a final order and is appealable. *Paul v. Walburn*, 135 Cal.App. 364, 26 P.2d 1002. On the other hand, if the order setting aside the default on condition contemplates a second order unconditionally vacating the judgment, then the original order is interlocutory and non-appealable. *Hayes v. Pierce*, 18 Cal.App.2d 531, 64 P.2d 728; *Aalwyn's Law Inst. v. San Francisco*, 39 Cal.App. 365, 178 P. 966. While it must be conceded that the order of April 28, 1950, is somewhat ambiguous, it is susceptible of the reasonable interpretation that it is self-executing. The very first sen-

tence of the order provides that the default judgment "is set aside." Then the order provides that the "default not to be set aside until the payment of costs and attorney fees." These become express conditions precedent which, upon performance, made the order immediately effective. The conditions in the order about inspection of the books were not made conditions precedent but were made simple directives or orders. So construed, which construction is reasonable, the order of April 28, 1950, was a self-executing order that set aside the default the moment the conditions precedent—the payment of costs and attorney fees—were performed. It was, therefore, in our opinion, an appealable order.

[5] But even if the order of April 28, 1950, be considered as an interlocutory order, and therefore non-appealable, then there would be no doubt at all that the order of December 4, 1951, refusing to set aside the default and to restore the judgment was a special order after final judgment and appealable. Had such an appeal been taken the appellate court could then have reviewed the validity of the April 28, 1950, order, assuming that order was interlocutory in nature. Thus, under no theory, can the validity of that order now be passed upon.

[6] Appellant's second contention is that the supporting affidavits fail to show compliance with the order of April 28, 1950. There is grave doubt that this issue can be reviewed on these appeals. On December 4, 1951, Judge Sweigert expressly found that there had been compliance with the order of April 28, 1950, and denied a motion to set the default aside. If the order of April 28, 1950, was interlocutory in nature, then the order of December 4, 1951, was an order after final judgment and appealable. *Hayes v. Pierce*, 18 Cal.App.2d 531, 64 P.2d 728. Since it has long since become final, the issues determined by it are *res judicata*. *Lake v. Bonyng*, 161 Cal. 120, 118 P. 535.

[7] On the other hand, if the order of April 28, 1950, was a final order and therefore appealable, the problem is not quite so clear. Generally speaking, an order vacat-

ing or refusing to vacate an appealable order is itself an appealable order if it presents facts which were not reviewable on appeal from the first order. *Valentin v. Valentin*, 93 Cal.App.2d 588, 209 P.2d 654. Under this theory, the order of December 4, 1951, would be appealable even if the order of April 28, 1950, was a final self-executing order.

[8] On the other hand, it can be argued that if the April 28, 1950, order was a final self-executing order, it operated to set the judgment aside, so that the order of December 4, 1951, could not be a special order after final judgment, no judgment then being on the books. See *Colby v. Pierce*, 15 Cal. App.2d 723, 59 P.2d 1046, for a discussion of a somewhat similar situation. If this theory is sound, the order of December 4, 1951, would not be appealable and could be now reviewed.

On its merits, the affidavits show compliance with the conditions of the April 28, 1950, order. Those conditions were four in number—payment of attorney fees, payment of costs, inspection of the books and restraint on conveyance of defendants' property. The order expressly provided that the "default not to be set aside until the payment of costs and attorney fees." Thus, these two conditions are expressly made conditions precedent. Ellis' affidavit, already summarized, clearly shows a valid tender of performance of these two conditions. The other two conditions—permit inspection of the books and prohibiting conveyance of the property—would appear to be directives and not conditions precedent to setting the default aside. But if inspection of the books was a condition precedent, the affidavits, already summarized, show compliance.

[9,10] Plaintiff contends that the deposit of money with the clerk of the court was not a legal tender of the costs and attorney fees, citing *Rauer's Law & Collection Co. v. Sheridan Proctor Co.*, 40 Cal. App. 524, 181 P. 71. But the situation here is quite different from what it was in that case. Here, it is averred, Ellis wrote Stan-

ley requesting a cost bill. When none was forthcoming, Ellis wrote the court and on instructions from the court deposited with the clerk more than enough to cover the attorney's fees and costs, and Stanley was so notified. Under section 2074 of the Code of Civil Procedure this would appear to be a valid tender. Plaintiff made no objections to the tender. This failure amounted to a waiver of any infirmities in the procedure adopted. Sec. 2076, Code Civ.Proc.; Sec. 1501, Civ.Code; *Fogler v. Purkiser*, 127 Cal.App. 554, 16 P.2d 305; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 P. 82; *Kelley v. Russell*, 50 Cal.App.2d 520, 123 P.2d 606; *Wolff & Co. v. Canadian Pac. Ry. Co.*, 123 Cal. 535, 56 P. 453.

[11] So far as the inspection of the books is concerned, Ellis informed Stanley as early as June 19, 1950, that the books were then in his possession and could be seen at his office or at the office of the accountant. Plaintiff made no demand to see the books until 1955. Certainly, defendants' delay from April 28th to June 19, 1950, cannot be held to be unreasonable as a matter of law. Moreover, section 1501 of the Civil Code, and sections 2074 and 2076 of the Code of Civil Procedure contain a complete answer to plaintiff's arguments on this point.

[12] Thus, whether the orders of April 28, 1950, and December 4, 1951, were or were not appealable, they were proper orders. Therefore, the order now directly under discussion—the order of Judge Neubarth of January 28, 1955, quashing the execution—was clearly proper and should be affirmed, because on that date there was no judgment in effect.

[13] We now turn to the order of February 21, 1955, also by Judge Neubarth, which dismissed plaintiff's action under section 583 of the Code of Civil Procedure. That section makes mandatory the dismissal of an action "unless such action is brought to trial within five years after the plaintiff has filed his action". Here the action was filed on October 18, 1949, and the motion to dismiss was filed January 3, 1955, a period

of 5 years and 3 months. Obviously, more than five years had elapsed. But section 583 cannot automatically be applied to every case. There are court-created exceptions. One such exception is here applicable.

[14, 15] In the instant case there was a substantial period during which the default judgment was in existence—from its entry on December 28, 1949, to at least June 12, 1950, when Ellis notified Stanley that the money had been deposited in court. That period amounts to five months, 14 days. During that period it was "impracticable," or "futile" to bring the action to trial. That period, therefore, must be excluded in computing the five-year-period. It is well settled that the period during which it is "impossible," "impracticable" or "futile" to try the action must not be included in the five-year-period. *De Mota v. Superior Court*, 130 Cal.App.2d 58, 278 P.2d 537; *Rose v. Knapp*, 38 Cal.2d 114, 237 P.2d 981; *Christin v. Superior Court*, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; *In re Estate of Morrison*, 125 Cal.App. 504, 14 P.2d 102; *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 207 P.2d 17. The period from the commencement of the action to the date of entry of the dismissal was five years and four months plus. It is obvious that if five months and 14 days be deducted from that period, less than five years had elapsed at the time of dismissal. Thus, the order of February 21, 1955, dismissing the action must be reversed.

[16-18] Plaintiff also appeals from the order of March 16, 1955, denying his motion to restrain defendants from disposing of property or to post a bond pending appeal. Plaintiff, however, makes no separate argument on this appeal to this point. The reason is obvious. With the affirmance of the order quashing execution the issues presented by the denial of the motion to restrain defendants became moot. Moreover, inasmuch as the appeals from the order quashing execution and from the order of dismissal are not orders "directing the payment of money" within the meaning of section 942 of the Code of Civil Procedure, the

determination of whether a bond should be required clearly rested within the discretion of the trial court under section 949 of that code. Certainly, it is not an abuse of discretion, as a matter of law, to not require the successful party to a proceeding to protect the unsuccessful one during an appeal by the unsuccessful party.

For the foregoing reasons:

1. The order of January 28, 1955, quashing execution is affirmed;
2. The order of February 21, 1955, dismissing the action is reversed;
3. The appeal from the order of March 16, 1955, denying the motion to restrain defendants or to require them to post bond, being moot, is dismissed;
4. Each side on this appeal to bear his or its own costs.

It is so ordered.

BRAY and FRED B. WOOD, JJ., concur.



144 Cal.App.2d 509

Stanley LONG, Plaintiff and Appellant,
v.

George E. NEWLIN, Rhea E. Foust, and
J. C. Therlot, Defendants and Respondents.
Civ. No. 21552.

District Court of Appeal, Second District,
Division 1, California.

Sept. 19, 1956.

Rehearing Denied Oct. 15, 1956.

Hearing Denied Nov. 14, 1956.

Action was brought for money had and received. The Superior Court of Los Angeles County, Lloyd S. Nix, J., entered an order granting motions of defendants for a new trial, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that where an accounting would be meaningless and accomplish nothing, since partnership had been rescinded because of alleged fraud and partnership agreement

was void ab initio, granting of motions of defendants for new trial on grounds of insufficiency of evidence to show that it was not necessary to have an accounting, was error.

Order reversed.

1. New Trial §6

A motion for new trial rests peculiarly within the discretion of the trial court.

2. Appeal and Error §977(3, 5)

The granting or denial of a motion for new trial cannot be disturbed on appeal, in absence of a clear showing of abuse.

3. Appeal and Error §854(6)

Where order granting motions of defendant for new trial provided that motions were granted on the grounds of insufficiency of the evidence to show that it was not necessary to have an accounting, it could not be successfully contended on appeal that order may have been granted for insufficiency of the evidence to support the findings.

4. Money Received §18(1)

In action for money had and received, on ground that defendants by false and fraudulent representations obtained money from plaintiff's assignor to form partnership, plaintiff, in order to recover, had burden of proving assignment to plaintiff, payment of money to defendants by plaintiff's assignor, that payment was made under false representations, and rescission on discovery of alleged fraud.

5. Partnership §104

Action for money had and received, on ground that defendants by allegedly false and fraudulent representations obtained from plaintiff's assignor a certain sum of money to form a partnership, could be maintained over objection of defendants that one partner cannot bring an action against another except for dissolution of a partnership, since the very existence of the partnership was in issue, and effect of election of plaintiff's assignor to avoid the contract of partnership for alleged fraud was to place the parties, as between them-

selves, in the position as though no partnership ever existed. West's Ann.Civ.Code, §§ 1688, 1689 subd. 1; West's Ann.Corp.Code, § 15039, subd. (c).

6. Partnership ⇨259½

A contract of partnership can be rescinded in the same manner and for the same causes as other contracts. West's Ann.Civ.Code, §§ 1688, 1689, subd. 1.

7. Contracts ⇨274

The effect of a rescission of a contract is to void the contract ab initio. West's Ann.Civ.Code, §§ 1688, 1689, subd. 1.

8. New Trial ⇨70

Where an accounting would be meaningless and accomplish nothing in action for money had and received, since partnership had been rescinded because of alleged fraud and partnership agreement was void ab initio, granting of motions of defendants for new trial on grounds of insufficiency of evidence to show that it was not necessary to have an accounting, was error. West's Ann.Civ.Code, §§ 1688, 1689, subd. 1; West's Ann.Corp.Code, § 15039, subd. (c).

John C. Packard, Los Angeles, for appellant.

Paul L. Zimmerman, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an action upon a common count for money had and received. It was instituted to recover the sum of \$40,000 allegedly had and received by defendants for the use of J. F. Burke, plaintiff's assignor. By their answers defendants denied any indebtedness to plaintiff or his assignor.

The cause was tried upon the theory that defendants by false and fraudulent representations obtained from J. F. Burke the sum of \$36,276.55 to form a partnership or joint venture to promote a certain tool, made to wash perforations and to wash out sand from behind perforations in oil wells, thereby increasing their production.

That upon discovering the alleged falsity of the representations, plaintiffs' assignor rescinded the transaction. The cause proceeded to trial before the court sitting without a jury resulting in a judgment for plaintiff in the sum of \$36,276.55. Each defendant moved for a new trial, which motions were granted through entry by the court of the following order: "the motion of defendant Rhae E. Foust for a new trial herein, and the motion of defendants George E. Newlin and J. C. Theriot for a New Trial herein heretofore submitted July 22, 1955, are granted upon the grounds of insufficiency of the evidence to show that it was not necessary to have an accounting."

From such order plaintiff prosecutes this appeal.

[1-4] We deem it unnecessary to narrate in detail the factual background surrounding this litigation because the sole question presented to us on this appeal is whether it was necessary to have an accounting of the business before plaintiff could recover. If it was then the motions for a new trial were properly granted. Defendants urge that the motions for a new trial having been granted on the ground of insufficiency of the evidence, the order should not be disturbed under the well established rule that a motion for a new trial rests peculiarly within the discretion of the trial court and cannot be disturbed on appeal in the absence of a clear showing of abuse. With that rule we are in thorough accord, but it is not applicable here because the order is expressly limited to the ground of insufficiency of the evidence as to the legal necessity for an accounting and will be reversed where it appears from the record that under the law, an accounting between the parties was not required. Such limitation in the order precludes the contention on appeal that the order may have been granted for insufficiency of the evidence to support the findings. *McGinty v. Morgan*, 122 Cal. 103, 105, 54 P. 392; *Parker v. Wormack*, 37 Cal.2d 116, 123, 230 P. 2d 823. In the instant proceeding, in order to recover, the burden rested upon plain-

tiff to prove, (1) assignment to plaintiff; (2) payment of money to defendants by plaintiff's assignor; (3) that payment was made under false representations; and (4) rescission upon discovery of fraud. Upon the trial, the court determined that plaintiff had met the foregoing burden and that decision is not here open to question because the motions for a new trial were granted solely upon the ground that plaintiff offered insufficient evidence as to the necessity for an accounting. This presents a legal question as to whether, when a contract of partnership is rescinded it is extinguished and whether under such circumstances the rule that a partner cannot maintain an action at law against his co-partners on a partnership transaction applies.

[5-7]. We are satisfied that respondents' contention that one partner can not bring an action against another except for dissolution of partnership can not be sustained, where as here, the very existence of the partnership is in issue. In the case at bar, when appellant's assignor determined that he had been the victim of false and fraudulent representations he took immediate steps to rescind the contract. Civil Code, Section 1689, Subdivision 1, authorizes a party to rescind a contract when his consent was obtained by fraud, while Section 1688 of the same code provides that a contract is extinguished by its rescission. And a contract of co-partnership can be rescinded in the same manner and for the same causes as other contracts. 68 C.J.S., Partnership, § 13, page 422. The effect of a rescission is to void the contract *ab initio*. In other words, the effect of the election of plaintiff's assignor to avoid the contract of partnership for the fraud practiced upon him is, that, as between the parties there has never existed any co-partnership, although of course, having held himself out as an apparent member of the partnership prior to rescission thereof, appellant is not excused from his liability to the creditors of the co-partnership. Under Corporations Code, Section 15039, Subdivision (c), the

party entitled to rescind a partnership is also entitled to be indemnified by the person guilty of the fraud or misrepresentation against all debts and liabilities of the partnership.

[8] We are persuaded that the reason for requiring an accounting as a condition precedent to an action at law between partners is not present in the case now engaging our attention. The principal reason for requiring an accounting and settlement between co-partners as a condition precedent to an action at law by one against another is that a dispute of that nature ordinarily involves the taking of a partnership account to determine whether the plaintiff is not liable to refund more than he claims in the particular action and because in partnership transactions a partner does not as a rule become a creditor or debtor of the co-partner but of the firm. In the present case, an accounting would be meaningless and accomplish nothing: As pointed out by appellant, "The taking of an account in this case could not in any manner, shape or form change the liability of defendants to return the money to plaintiff which they obtained from him by fraud. If the account should show the partnership business was run at a loss the defendants would still owe plaintiff his money and if the partnership business was run at a profit the defendants would still owe plaintiff his money. When plaintiff elected to rescind the transaction it avoided the contract and as between the parties it was as if they had never been partners." None of the cases relied upon by respondents militate against what we have herein stated. True, the cited cases held, as contended by respondents, that partners may not sue "one another at law in respect to any of the business of the partnership or to recover damages from one or the other of the co-partners for a breach of the partnership agreement", but none of the cases hold that a partner remains a partner after rescission of the contract of partnership.

We are impressed that the action now engaging our attention comes within the

rule announced in 40 Am.Jur. 400, as follows:

"The test is whether the damages resulting from the breach of the covenant or stipulation in the partnership agreement belongs exclusively to the other partners and not to the firm and can be assessed without taking an account of the partnership business; when this test can be met, an action at law lies at the instance of the injured partner against the other for the damages sustained."

The order granting a new trial is reversed.

DORAN and FOURT, JJ., concur.



144 Cal.App.2d 404

Sarah Arnold KIRKPATRICK, William L. Stewart, Jr., Dorothy Stewart Elliott, Adelaide Stewart MacAlpine and Arthur C. Stewart, Plaintiffs, Cross-Defendants and Appellants,

v.

TAPO OIL COMPANY, a corporation, Barrett Conger, Administrator with the Will Annexed of the Estate of Ray E. Conger, Ray E. Conger, Jr., Barrett Conger, Lyda C. Vose, Dorothy Conger Ross, Genevieve Conger Everett, et al., Defendants and Cross-Complainants,

Barrett Conger, Administrator with the Will Annexed of the Estate of Ray E. Conger, Ray E. Conger, Jr., Barrett Conger, Lyda C. Vose, Dorothy Conger Ross, Genevieve Conger Everett, et al., Respondents.

Civ. 21484.

District Court of Appeal, Second District,
Division 3, California.

Sept. 12, 1956.

Action was brought to replace lost stock certificates under the Corporations Code, and the individual defendants filed a cross complaint seeking the same relief.

The Superior Court of Ventura County, Charles F. Blackstock, J., entered judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Vallée, J., held that where plaintiff's ancestor wrote corporation that he had sold stock in corporation to defendants' ancestor, and that shares standing in name of plaintiffs' ancestor properly belonged to defendants' ancestor, and that corporation should reissue stock certificates to defendants' ancestor, letter was effective to transfer title to stock, though there was no delivery of stock certificates.

Judgment affirmed.

1. Appeal and Error ⇨232(2)

Where defendants offered in evidence a ledger of deceased as an ancient document, and plaintiffs conceded that the ledger was more than 30 years old, that it was in the handwriting of the deceased, and that it was found among deceased's effects, and plaintiffs did not object to admission of the ledger on ground that proper foundation had not been laid, but objected that the offer was irrelevant, incompetent, immaterial, and hearsay, plaintiffs' objection to the evidence was not sufficient to preserve for review the point that a proper foundation was not laid for the reception of the ledger in evidence. West's Ann.Code Civ.Proc., § 1963.

2. Appeal and Error ⇨231(1)

Error cannot be predicated on the overruling of an objection when the particular grounds of the objection are not stated, unless they are obvious or otherwise known to the court.

3. Appeal and Error ⇨231(1)

To entitle an objection to notice, it must not only be on a material matter, affecting substantial rights of the parties, but its point must be particularly stated.

4. Appeal and Error ⇨231(1)

Where an objection is in general terms, and alleged defect could have been cured by party making the offer, if the reason it was objected to had been given, a reviewing

court will not consider a claim that trial court erred when precise ground of objection was not clearly or at all specified.

5. Trial ⚡84(3)

Where defendants offered in evidence a ledger of deceased as an ancient document, and plaintiffs conceded that the ledger was more than 30 years old, that it was in the handwriting of the deceased, and that it was found among deceased's effects, and plaintiffs did not object to admission of the ledger on ground that proper foundation had not been laid, but objected that the offer was irrelevant, incompetent, immaterial, and hearsay, trial court did not err in overruling objection to the reception of the ledger in evidence, though allegedly a proper foundation had not been laid. West's Ann.Code Civ.Proc., § 1963.

6. Evidence ⚡372(1)

An ancient document is admitted in evidence as proof of the facts recited therein, provided that the writer would have been competent to testify as to those facts. West's Ann.Code Civ.Proc., § 1963.

7. Equity ⚡72(1)

"Laches" is not mere delay, but delay that works a disadvantage to another.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

8. Equity ⚡72(1)

A person is guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something whereby the latter might be injured should he be allowed to enforce his rights.

9. Corporations ⚡109

Where there was no proof that defendants in any manner induced or suffered plaintiffs to do or abstain from asserting their claim to lost stock certificate, or that they had been prejudiced in any way by lapse of time on part of defendants in asserting their claim to lost stock certificate, defendants' cross action to have lost stock certificates replaced was not

barred by laches. West's Ann.Corp.Code, § 2482 et seq.

10. Equity ⚡71(1)

Lapse of time alone is not sufficient to bar a suit to quiet title

11. Limitation of Actions ⚡5(3)

Generally, statutes of limitations have no application to an action to establish a lost instrument.

12. Limitation of Actions ⚡95(1)

Where neither plaintiffs nor defendants had any knowledge of their respective claims to lost certificates of stock until notice was given by corporation shortly prior to filing of action by plaintiffs to replace lost stock certificates, defendants' cross action for the same relief was not barred by either three year or four year statutes of limitations. West's Ann.Code, Civ.Proc., §§ 337, 338; West's Ann.Corp.Code, §§ 2482 et seq., 2483.

13. Frauds, Statute of ⚡139(1)

Section of the Civil Code providing that enumerated contracts are invalid unless they or some note or memorandum thereof are in writing and are subscribed by the party to be charged, or by his agent, has no application to an executed contract. West's Ann.Civ.Code, § 1624.

14. Frauds, Statute of ⚡139(6)

Letter written by stockholder to corporation and stating that he had sold his shares of stock to third person, and that the shares standing in the name of the stockholder properly belonged to the third person, and that corporation should reissue stock certificates to third person, evidenced a fully executed, as distinguished from an executory, contract, and the statute of frauds was not applicable thereto. West's Ann.Civ.Code, §§ 1624, 1624a(3).

15. Corporations ⚡114

Where stockholder wrote corporation that he had sold stock in corporation to third person, and that shares standing in name of stockholder properly belonged to third person, and that corporation should reissue stock certificates to third person,

letter was effective to transfer title to stock, though at time statute imposed a stockholder's liability on registered owner of corporate stock, and though there was no delivery of stock certificates. West's Ann. Civ.Code, § 1059, subds. 1, 2.

Chandler, Wright, Tyler & Ward and Don F. Tyler, Los Angeles, for appellants.

Harold A. Ritchie, Pasadena, for respondents.

VALLEE, Justice.

Appeal by plaintiffs from an adverse judgment in an action to replace lost stock certificates for 5,000 shares of stock of defendant Tapo Oil Company, a California corporation, brought pursuant to section 2482 et seq. of the Corporations Code.¹ The cause went to trial on the amended complaint of plaintiffs, called the "Stewart heirs," the answer and cross-complaint of defendants other than Tapo Oil Company, called the "Conger heirs," and the answer of plaintiffs to the cross-complaint. Tapo appeared as a stakes holder. Each side sought to have new certificates of stock issued to them in place of the admittedly lost certificates.

By stipulation two defenses were added to the answer of the Conger heirs: the statute of limitations and laches; and three defenses were added to plaintiffs' answer to the cross-complaint: the statute of limitations, laches, and the statute of frauds.

No witnesses were called at the trial. The parties stipulated to these facts:

On May 15, 1900, W. L. Stewart purchased 5,000 shares of the stock of Tapo Oil Company, represented by certificates numbers 138, 139, 140, 141, and 142, for 1,000 shares each. The shares were registered in his name on the share register of the corporation and are still so recorded.

1. Corporations Code, § 2482: "Whenever a certificate for shares issued by a domestic corporation or by a foreign corporation maintaining an office or agency for the transfer of shares in this State has been lost or destroyed, the owner there-

On December 4, 1912 Stewart wrote the following letter to Tapo, the authenticity and delivery of which is admitted:

"Union Oil Company of California

"Union Oil Building

"Los Angeles, California

"W. L. Stewart

"First Vice President

"Manager Executive & Field Depts

"December 4th, 1912

"Tapo Oil Company

"Santa Paula, Cal.

"Gentlemen:

"This is to notify you that I hereby relinquish all my right, title and interest in and to 5,000 shares of the capital stock of the Tapo Oil Company, evidenced by certificates Nos. 138, 139, 140, 141 and 142, for 1,000 shares each, standing in my name on the stock books of the Tapo Oil Company.

"In explanation of the above, would say that a number of years ago I sold 5,000 shares of stock in your company to Mr. E. L. Conger, and he now informs me that he never received the certificates covering the same, and as I have no shares in this Company at present, and have had none since I made sale to Mr. Conger, it is my belief that the shares standing in my name properly belong to Mr. E. L. Conger, and it will be quite satisfactory to me, as far as my interest in the shares is concerned, to have you re-issue them to Mr. Conger.

"Yours very truly,

"(S) W. L. Stewart"

The letter forms a part of Tapo's share records.

W. L. Stewart died on June 21, 1930. His estate was probated in Los Angeles County but neither the inventory nor the decree of distribution referred to the cer-

of may bring an action in the superior court of the county in which the principal office of the corporation is located against the corporation and all known claimants, for the purpose of obtaining a new certificate."

tificates in question. E. L. Conger died in 1914. His estate was probated in Los Angeles County but neither the inventory nor the decree of distribution referred to the certificates. Plaintiffs are the descendants of and the successors in interest of W. L. Stewart. Defendants, other than Tapo, are the descendants of and the successors in interest of E. L. Conger. All parties had made diligent search for the certificates and they had not been found and were lost. No shares of stock are registered in the name of Conger on Tapo's books. The only certificates registered in the name of Stewart are the ones specified in the pleadings. The value of the shares of stock at any purchase, sale or assignment, which may have been made, was in excess of the then applicable statute of frauds. No documents which are material to the action are known to exist other than the letter of December 4, 1912 and the account book to be referred to.

Counsel for the Conger heirs then offered in evidence an account book kept by E. L. Conger in his lifetime.² The book is a ledger. It contains a number of pages referring to shares of stock in various corporations. On the upper half of page 175 is the account of Uncle Sam Oil Co. Three lines lower on the debit side of the ledger, in the column describing the shares, appear in ink the words "Tapo Oil Stock" and in pencil on the next line below it in the column used for showing amounts paid, "\$1000." Four lines lower is the notation: "East Whittier Oil Stock." The lower half of the page is the account of Columbia Oil Co. The entries for Uncle Sam Oil Co. and Columbia Oil Co. begin in the year 1900. The last entry made relative to Uncle Sam was on March 20, 1900.

2. Counsel for the Conger heirs characterized the ledger thus: "This is a record that commences in the year 1886, I think, and carries about every transaction that a man could have made at that time with respect to the operation of his home and his business. The defendants'

On the alphabetic index page lettered "N" and "O" of the ledger is found:

"Oil Stock.	Central Co.	167.—123.
" "	Uncle Sam.	175.
" "	Park. Crude Oil Co.	173.
" "	Columbia	175
" "	United Petroleum Co	176.
" "	Taho.	175.
" "	East Whittier	175
Omaha Water Bond.		Page 180."

The first notation made relative to Omaha Water Bond was on July 10, 1908. The ledger was carefully and well kept, even the number of eggs laid by chickens on respective days was noted.

Plaintiffs' counsel stipulated the ledger was found among the effects of E. L. Conger; it was kept in Conger's handwriting; and the particular entry "Tapo Oil Stock \$1000." was in his handwriting. He did not stipulate that it was under the date 1900 or that it was made on that or any other date.

Defendants offered the ledger in evidence as an ancient document. Over plaintiffs' objection it was admitted.

The court found: the ledger was and is an ancient document kept in the handwriting of Conger and "the entry therein 'Tapo Oil Co. \$1000' was and is an entry made in the handwriting of said deceased E. L. Conger, and that said entry was and is a record referring to his purchase of said aforementioned certificates for stock of the Tapo Oil Company for the total sum of One Thousand Dollars (\$1000.00)."

The court concluded the letter of December 4, 1912 was on the date of its delivery to Tapo "a sale, transfer and assignment of all the right, title and interest" that W. L. Stewart had or ever has had in and to the certificates to Conger; the action

predecessor in title was a minister of the Universalist Church. I think he was rather well known in this community. He shows here when he bought gas, when he bought grain for his chickens, and he shows what he paid for them."

is brought pursuant to section 2482 et seq. of the Corporations Code and Tapo was by virtue of the letter authorized and directed by Stewart to issue and cause to be delivered to Conger certificates for 5,000 shares of its stock as the property of Conger. No finding of fact or conclusion of law was made on the issue of the statute of limitations or laches. A finding against such issues is implicit in the court's conclusion with respect to the letter of December 4, 1912.

The court decreed the Conger heirs are the owners of the 5,000 shares of stock; ordered Tapo to cancel certificates 138 to 142 inclusive and to issue new certificates to the Conger heirs; and ordered them to deliver to the court a bond for \$5,000 to indemnify Tapo against loss or liability, pursuant to section 2485 of the Corporations Code.

Plaintiffs' points are: 1. The cross-action is barred by laches. 2. The cross-action is barred by the 3-year or, at most, the 4-year statute of limitations, Code Civ. Proc. §§ 337, 338. 3. The conclusion that the Stewart letter of December 4, 1912 was an enforceable contract of sale violates the statute of frauds. 4. The court erred in admitting the ledger as an ancient document.

We first consider whether the court erred in admitting the ledger in evidence as an ancient document. Code of Civil Procedure, section 1963, provides:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * *

"34. That a document or writing more than 30 years old is genuine,

when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained".

Plaintiffs concede it was shown the ledger was more than 30 years old and that it was in the handwriting of E. L. Conger. These concessions and their stipulation that it was found among Conger's effects carry with them the inference that it is genuine. They argue a proper foundation was not laid for its reception in evidence in that it was not shown it "has been since generally acted upon as genuine, by persons having an interest in the question," and its custody was not satisfactorily explained. However, plaintiffs did not object on the ground a proper foundation had not been laid. Their objection was, "I object to the introduction of the evidence upon the ground that the offer is irrelevant, incompetent and immaterial and is hearsay." Counsel's argument in support of the objection is set forth in the margin.³ Obviously the evidence was relevant, material, and competent; and the rule permitting the reception of ancient documents in evidence is an exception to the hearsay rule.

[1-5] Plaintiffs' objection to the evidence was not sufficient to preserve the point on review. We do not inquire whether there was such a defect in the foundation for admission of the ledger as would have made it the duty of the court to have sustained a proper objection. The court was not given an opportunity to pass on the objection urged here. Error cannot be predicated on the overruling of an objection when the particular grounds of the objection are not stated, unless they are obvious, or otherwise known to the

3. "The basis of my objection is that the document does not show when the entry was made; it does not show that the books were carefully kept or what they were intended to be a record of all of Mr. Conger's transactions. The statement of \$1,000.00 does not show whether he paid it, received it, valued it, or

what. The entry does not show that this was a purchase from Mr. Stewart. It merely shows 'Tapo Oil stock, \$1,000.00,' and may well have been no more than a jotting down of something he was to remember. There is too little to show to make it admissible, to tie it in to this litigation, to these shares of stock."

court. "To entitle an objection to notice, it must not only be on a material matter, affecting the substantial rights of the parties, but its point must be particularly stated. This is not only a statutory regulation, but it is the uniform rule, so far as we are aware, of all Courts of Record. The party, as the authorities say, must lay his finger on the point of his objection to the admission or exclusion of evidence." *Kiler v. Kimbal*, 10 Cal. 267, 268. And see *People v. Modell*, 143 Cal.App.2d 724, 300 P.2d 204; *People v. Tolmachoff*, 58 Cal.App.2d 815, 826, 138 P.2d 61. Where an objection is in general terms and the alleged defect could have been cured by the party making the offer if the reason it was objected to had been given, a reviewing court will not consider a claim that the trial court erred when the precise ground of objection was not clearly or at all specified. The court did not err in overruling the objection to the reception of the ledger in evidence.

[6] It is argued the court erred in using the entries in the ledger "for the asserted truth of the assumed matter asserted by them." Plaintiffs rely on dictum in *Gwin v. Calegaris*, 139 Cal. 384, at page 389, 73 P. 851, at page 853, that: "The rule as to ancient documents, as we understand it, does not import any verity to the recitals contained in these instruments. The documents themselves are presumed to be genuine, and the rule has no further effect." This dictum is not a correct statement of the law. Ancient documents would have no effect or potency as evidence unless

they served to import verity to the facts written therein. The true rule is that an ancient document is admitted in evidence as proof of the facts recited therein, provided the writer would have been competent to testify as to such facts. 32 C.J.S., Evidence, § 745, p. 662; 4 Annotation 6 A.L.R. 1437, 1444.

Garbarino v. Noce, 181 Cal. 125, at page 130, 183 P. 532, at page 534, 6 A.L.R. 1433, states:

"The deed of October 6, 1862, aforesaid, purported to convey the full title to the property described, including the ditch. Having been executed more than 50 years before the present controversy arose, it comes within the rules of evidence applicable to ancient deeds, and hence the recitals therein relating to the property conveyed are competent evidence of the facts recited, even against strangers to the title. [Citations.] It is also competent as a declaration of the grantor while in possession, as evidence that he then claimed full ownership of the ditch and water right." Also see *Ames v. Empire Star Mines Co., Ltd.*, 17 Cal.2d 213, 224, 110 P.2d 13.

The entries in the ledger tend to show, as the court found, that E. L. Conger purchased the Tapo stock and paid \$1,000 for it. They further tend to show he purchased the stock after May 1900.

[7-10] The cross-action is not barred by laches. "Laches is not mere delay, but delay that works a disadvantage to another.

4. "Ancient documents may be admitted in evidence as proof of the facts recited therein, provided the writers would have been competent to testify as to such facts. Such documents may, therefore, be received to prove or disprove title or possession, or the location of a boundary line, or the existence of a highway or right of way. They may also be admitted to prove matters of pedigree, heirship or widowhood; or to prove or disprove the identity of persons or land, or the existence of a power, or the authority of an executor or administrator to sell.

"A recital in an ancient deed or will of any antecedent deed or document, consistent with its own provisions, will after the lapse of a long period be presumptive proof of the former existence of such deed or document, especially in a case where nothing appears to rebut such presumption. Ancient documents coming out of the proper custody, and purporting on their face to show exercise of ownership, such as leases or licenses, have been admitted as being in themselves acts of ownership and proof of possession." 32 C.J.S., Evidence, § 745, p. 662.

A person is guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something, whereby the latter might be injured should he be allowed to enforce his rights." *Carlson v. Lindauer*, 119 Cal.App.2d 292, 309, 259 P.2d 925, 934. There was no proof that the Conger heirs in any manner induced or suffered plaintiffs to do or abstain from asserting their claim, or that they have been prejudiced in any way by the lapse of time. Assuming, as plaintiffs argue, that the cross-complaint states a cause of action to quiet title to the stock certificates, that cause is not barred by laches. "Lapse of time alone is not sufficient to bar a suit to quiet title." *Carlson v. Lindauer*, supra, 119 Cal.App.2d at page 310, 259 P.2d at page 934.

Plaintiffs assert that because the court concluded the letter of December 4, 1912 was, on the date of its delivery to Tapo "and is now, a sale, transfer and assignment of all right, title and interest" which Stewart "had or ever has had in and to" the certificates to Conger, the Conger rights arose by reason of the letter and the right of action is barred by the 4-year statute of limitations treating the cause of action as one on a written contract, or barred by the 3-year statute if the cause of action be considered as one to quiet title. The cause of action stated in the cross-complaint is one to replace lost stock certificates. It is not predicated on a written contract and is not barred by the 4-year statute.

[11, 12] The cross-action is not a suit to quiet title except in an incidental sense. Section 2483 of the Corporations Code provides the complaint in an action to replace

lost certificates shall set forth that the owner "does not know of any person, firm, or corporation that claims or may claim any interest in the certificate who is not specifically named as a defendant." The contention that the cross-action is barred by the 3-year statute is based on the fact that the cross-complaint, in addition to stating the action was brought to replace lost certificates, said it was brought to establish the title to the certificates. This was merely a statement of a purpose of the action and not an allegation of fact. The cross-complaint pleaded the facts required by Corporations Code section 2483 in this sort of action.⁵ The judgment follows the statute. It decrees that the Conger heirs are the owners of the certificates, that Tapo issue new certificates, and that the Conger heirs give a bond. Neither Corporations Code section 2482 nor its predecessor, Civil Code section 328, which authorizes an action to replace lost certificates, limits the time within which such an action may be commenced. See *Gallaher v. Iowa Oil Co.*, 139 Cal. App. 100, 33 P.2d 439, a proceeding commenced approximately 28 years after the loss and destruction of certificates, holding that the shareholder was not barred. The general rule is that statutes of limitations have no application to an action to establish a lost instrument. 53 C.J.S., Limitations of Actions, § 97, p. 1072. Neither plaintiffs nor defendants had any knowledge of their respective claims to the certificates of stock until notice was given by Tapo shortly prior to the filing of the complaint by plaintiffs. The parties are in identical positions. Neither has been harmed by the delay of the other.

5. Corporations Code, section 2483, reads: "The plaintiff shall set forth in a verified complaint all of the following:

"(a) The facts and circumstances relating to the loss or destruction of the certificate.

"(b) That he has not assigned, endorsed, transferred, hypothecated, or in any way disposed of the certificate except to a party defendant.

"(c) That he does not know of any person, firm, or corporation that claims or may claim any interest in the certificate who is not specifically named as a defendant.

"(d) A description of the certificate, giving so far as known the number of the certificate, the number of shares, and the name of any person in whose name the certificate may be registered."

Finally, plaintiffs claim the letter of December 4, 1912 is not an enforceable contract in that it violates the statute of frauds. It is said it does not state the price paid or to be paid. The claim is based on the erroneous premise that the statute of frauds is applicable.

[13, 14] During the time in question Civil Code, section 1624, read:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

* * * * *

"Four—An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, *unless the buyer accept or receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; * * **" (Italics added.) Code Am. 1873-74, c. 612, p. 241, § 190.

This section expressly provides an exception where "the buyer * * * pay[s] at the time some part of the purchase money". Section 1624 has no application to an executed contract. *Kreling v. Walsh*, 77 Cal.App.2d 821, 832, 176 P.2d 965. Everything said by Stewart in his letter of December 4, 1912 evidences a fully executed, as distinguished from an executory, contract. He specifically said "I sold" 5,000 shares of Tapo stock to Conger. He said he had no shares in Tapo and had had "none since I made sale to Mr. Conger"; that the shares standing in his name "properly belong to Mr. E. L. Conger." He stated in effect that Tapo should "re-issue" the certificates to Conger. The statement that Conger had informed him he had not received the certificates clearly indicates Conger had paid the purchase price. There is nothing in the letter indicating the necessity of the performance of any act by Conger to complete the sale.

See *Mills v. Jackson*, 19 Cal.App. 695, 698, 127 P. 655; Rest. of Cont., §§ 178, 205. And the inference from the entries in the ledger is that Conger had paid Stewart \$1,000 for the stock before the letter was written. The inference is also patent from the foregoing that Conger had accepted and assented to the passage of title to him. Civ.Code, § 1624a(3).

[15] It is argued the letter did not transfer title to Conger because it was not delivered to him. The letter is a confirmation of an earlier transfer of the shares from Stewart to Conger and, if necessary, a memorandum of what had transpired between them. Civil Code, section 1059, provides:

"Though a grant [which includes a transfer of shares of stock, (Civ.Code, §§ 1039, 1053)] be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

"1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

"2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed."

It appears from the letter it was understood by the parties that Tapo was to re-issue the shares in the name of Conger, and thus effect a delivery. And, further, the letter was delivered to Tapo for the benefit of Conger, since it may be inferred it was to issue the certificates and deliver them to Conger. These consequences follow, contrary to the argument of plaintiffs, notwithstanding the fact that at the time in question the statute imposed a stockholder's liability on the registered owner of corporate stock. It is not essential, as between the parties, to the transfer of shares of stock that the certificates be delivered. *Young v. New Pedrara Onyx*

Co., 48 Cal.App. 1, 17, 192 P. 55; Warfield v. Basso, 62 Cal.App. 47, 51, 216 P. 48. The cross-action is not barred by the statute of frauds.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



144 Cal.App.2d 477

David B. WILFORD and Clyde K. Wilford
(husband and wife), Plaintiffs and
Appellants,

v.

Wallace H. LITTLE and Julia W. Little,
Defendants and Respondents.

Civ. 21469.

District Court of Appeal, Second District,
Division 1, California.

Sept. 17, 1956.

Hearing Denied Nov. 14, 1956.

Action for death of plaintiff's minor son by drowning as result of falling or jumping from diving board into private swimming pool on defendant's residential property. From a judgment of the Superior Court of Los Angeles County, Kurtz Kauffman, J., dismissing the action, plaintiffs appealed. The District Court of Appeal, Fourn, J., held that a swimming pool and diving board are not attractive nuisances, so that defendants were not liable under attractive nuisance doctrine.

Judgment affirmed.

Doran, J., dissented.

1. Negligence ⇨39

A swimming pool and diving board do not constitute "attractive nuisance", so that owners of residential property are not liable under attractive nuisance doctrine for death of 4½ year old boy by drowning after falling or jumping from diving board into private swimming pool on such property.

See publication Words and Phrases, for other judicial constructions and definitions of "Attractive Nuisance".

2. Negligence ⇨32(4), 33(3)

A child's tender age, rendering it incapable of looking out for its own safety, raises no duty not otherwise existing to such child, and responsibility for avoiding injury to child trespassing on defective or dangerous premises lies with child's parents or legal custodian rather than proprietor of such premises.

3. Negligence ⇨33(3)

A landowner owes no other duty to child trespassing on land than to adult trespasser thereon, in absence of circumstances bringing case under attractive nuisance doctrine.

4. Negligence ⇨23(1), 39

The attractive nuisance doctrine is exceptionally harsh rule of liability, which is not to be extended.

5. Negligence ⇨23(1)

To constitute "attractive nuisance," a contrivance must be artificial and uncommon, as well as dangerous.

6. Negligence ⇨23(1)

The owner of a thing dangerous and attractive to children is not always and universally liable for injury to child tempted by such attraction.

7. Death ⇨24

Negligence ⇨95(1)

Parent and Child ⇨7(1)

It is parents' duty to guard and warn their children against common dangers existing in order of nature, and parents failing to do so cannot hold others responsible for resulting injuries to or deaths of children.

8. Negligence ⇨39

A body of water, natural or artificial, is not "attractive nuisance" subjecting owner thereof to liability for deaths by drowning of trespassing children attracted thereto, as it is of common and ordinary nature.

9. Negligence ⇨23(1), 39

The primary duty to exercise care for infant's safety is on parents thereof, and

their neglect will not convert into an attractive nuisance a dangerous situation which would not be so classed as to older children.

Rinehart, Merriam, Parker & Berg, Pasadena, for appellants.

Moss, Lyon & Dunn, Charles B. Smith and Henry F. Walker, Los Angeles, for respondents.

FOURT, Justice.

Plaintiffs commenced an action to recover damages for the death of a minor son who fell into the private swimming pool on defendants' residential property. To an amended complaint the defendants demurred and the same was sustained with leave to amend. No amendment was made and judgment of dismissal was entered. This appeal is from the judgment of dismissal.

A fair résumé of the matters set forth in the amended complaint are as follows: On or about August 31, 1954, the swimming pool in question contained water to a depth of about nine feet at one end, with a diving board extending over the water. Small children played on the property adjacent to the property of the defendants. The pool and diving board could be seen by the children from the adjacent property and this was known to the defendants. On the date heretofore mentioned Christian McLean Wilford, the four and one-half year old son of plaintiffs, and some other small children, were attracted onto the property of the defendants by the diving board and pool. Christian McLean Wilford and one other small boy began to play upon the diving board which was similar to a see-saw or teeter-board in that it had an "up-and-down" motion when jumped upon. The pool was so constructed that it was difficult for a child to hold onto the sides of the pool. The boy and his companions were too young to appreciate the danger involved in playing on the diving board and in the pool. In the course of play the lad fell or jumped from the diving board into the water

and drowned. Neither of the plaintiffs knew, nor had reason to know that there was a swimming pool in the neighborhood, or that the property of the defendants was not fenced or enclosed in any manner to keep children or others away from the pool. A fence or other enclosure could have been installed at a relatively small cost. It was then alleged that the defendants were negligent in not properly enclosing the pool and that this negligence resulted in the death of plaintiffs' son to their damage in the sum of \$50,000, together with expenses in the sum of \$992.06.

[1] It is appellants' contention that California has adopted the rule of law generally referred to as the "Attractive Nuisance Doctrine", or the "Rule of the Turntable Cases", as set forth in the Restatement of the Law of Torts, and cites as authority for such contention the case of *Copfer v. Golden*, 135 Cal.App.2d 623, 627-628, 288 P.2d 90, and the cases cited therein. It is our opinion, however, that a swimming pool and diving board is not an attractive nuisance as that term is generally used. The California Annotations to the Restatement of the Law of Torts contain the following language (at pages 141-142):

"§ 339. Artificial conditions highly dangerous to trespassing children

"* * * (b) Ponds or reservoirs: There is no liability for drowning of children in ponds or reservoirs under the attractive nuisance doctrine. (See a possible exception under the "siphon cases" *infra*.) *Peters v. Bowman*, 1896, 115 Cal. 345, 47 P. 113, 598, 56 Am.St.Rep. 106 is the leading decision. In this case the water collected on a vacant lot by reason of an embankment erected by the city in grading a street. *Polk v. Laurel Hill Cemetery Ass'n*, 1918, 37 Cal. App. 624, 174 P. 414, a child of eight drowned in an unguarded reservoir in a cemetery being used as a park. *Reardon v. Spring Valley Water Co.*, 1924, 68 Cal.App. 13, 228 P. 406, a five year old boy drowned after a fall from a rowboat which was allowed to remain unfastened in a negligently guarded reservoir. The court refused to hold that

the presence of the boat brought the case within the doctrine.

"(c) 'Siphon' cases: There are several decisions but in only one was the doctrine held applicable. (1) *Sanchez v. East Contra Costa Irr. Co.*, 1928, 205 Cal. 515, 271 P. 1060. In the other two cases there is an obvious effort to pattern after the rules announced in this opinion. Plaintiff's son, aged five, was drowned in a canal when he fell into it after trying to wet his handkerchief. The body was found in a 'siphon' which carried the water under a cross stream. The court held that defendant had created a concealed danger in the nature of a trap (siphon) to those who lived close by, and one that could easily be guarded. (2) *Melendez v. City of Los Angeles*, 1937, 8 Cal.2d 741, 68 P.2d 971. The demurrer to the complaint was sustained and on appeal this action of the court was affirmed. The court cited and approved Restatement § 339 as an exception to the rule of nonliability but held the doctrine not applicable. The complaint alleged that plaintiff's two sons were drowned in a pool of water in a storm drain: One son, aged 11, was on a raft and fell into the water and into a deep hole concealed and unknown to him. The other son, aged 13, went to his rescue and was similarly drowned. The decision held that the deep hole was not an artificial contrivance of the possessor of the land and the precedent followed is *Beeson v. City of Los Angeles*, *infra*."

[2-4] In the recent case of *Lake v. Ferrer*, 139 Cal.App.2d 114, 293 P.2d 104, hearing denied in the Supreme Court, March 28, 1956, plaintiffs' son of two and one-half years was attracted to the defendant's swimming pool and trespassed upon the defendant's property, fell into the swimming pool and drowned. Plaintiff parents did not know of the pool's existence and had not been told of it. In the *Lake* case, the plaintiffs relied for authority upon section 339 of the Restatement of Torts and practically all of the cases cited in the instant case, plus several others. It was held that the attractive nuisance doctrine did not

apply under allegations considerably stronger than those presented in the instant case. The court, among other things, said, 139 Cal.App.2d at page 117, 293 P.2d at page 105:

"* * * "The following from 38 American Jurisprudence 779 is applicable: 'The accepted view is that the tender age of a child, rendering it incapable of looking out for its own safety, does not raise a duty where none otherwise exists. * * * It is said that the responsibility for avoiding injury to a trespassing child from defective or dangerous premises lies with the parent or legal custodian of the child rather than with the proprietor of the premises.' In 19 California Jurisprudence 624 a similar statement occurs: 'In the absence of circumstances which bring a case under the attractive nuisance doctrine, it is said that an owner of land owes no other duty to a child who is trespassing * * * than he owes to an adult trespasser.'"" * * * It is pointed out that, 'Our courts hold the attractive nuisance doctrine is an exceptionally harsh rule of liability and is not to be extended. As expressed in *Whalen v. Streshley*, 205 Cal. 78, 81 (269 p. 928, 929, 60 A.L.R. 445): 'Unless the case falls within the doctrine of the turntable cases—a doctrine which this court and others have refused to extend—the plaintiff may not recover, and we are of the opinion that there is no analogy between those cases and the instant one. In the case of *Peters v. Bowman*, 115 Cal. 345, 47 P. 113, 598, this court refused to extend the rule of the turntable cases to a pond of water, and characterized that rule as an exceptionally harsh rule of liability.'""

[5] There are several elements to the doctrine of attractive nuisance in this state. The contrivance must be artificial and uncommon, as well as dangerous, *Hernandez v. Santiago O. G. Ass'n*, 10 Cal.App. 229, 233, 293 P. 875, and as held in *Doyle v. Pacific Elec. Ry. Co.*, 6 Cal.2d 550, 552-553, 59 P.2d 93, 94:

"* * * Thus in *Loftus v. Dehaif*, 133 Cal. 214, 218, 65 P. 379, 380, it was said by

this court: 'But it by no means follows, as has been said, that anything or everything which a jury may find or a court may determine to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. Moving street cars and moving vehicles upon the street are irresistibly attractive to many children, and thousands daily imperil their lives by climbing on and off of them while in motion. Venturesome boys and even girls make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight.'

"* * * There is nothing uncommon about a ladder. * * * The ladder was dangerous, but it was not uncommon, * * *"

[6,7] In *Peters v. Bowman*, 115 Cal. 345, 355, 47 P. 113, 598, 599, the court said:

"A turntable is not only a danger specially created by the act of the owner but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in nowise different from those natural ponds and streams, which exist everywhere, * * *. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. * * * The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. * * * As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. * * *"

[8] Courts in California have held repeatedly that a body of water, natural or artificial, is not such a thing as may be held

to constitute an attractive nuisance. It may be attractive to children but it is also of a common and ordinary nature of that which is to be found anywhere. *Polk v. Laurel Hill Cemetery Ass'n*, 37 Cal.App. 624, 634, 174 P. 414; *Reardon v. Spring Valley Water Co.*, 68 Cal.App. 13, 228 P. 406; *Peters v. Bowman*, supra, 115 Cal. 345, 269 P. 928; *King v. Simons Brick Co.*, 52 Cal.App.2d 586, 126 P.2d 627; *Demmer v. City of Eureka*, 78 Cal.App.2d 708, 178 P.2d 472; *Betts v. City & County of San Francisco*, 108 Cal.App.2d 701, 239 P.2d 456; *Ward v. Oakley Co.*, 125 Cal.App.2d 840, 271 P.2d 536. In the *Ward* case, affirming a judgment based on the sustaining of a demurrer to the complaint without leave to amend, it was stated, 125 Cal.App.2d at page 845, 271 P.2d at page 540:

"It is settled that a body of water, natural or artificial, does not constitute an attractive nuisance which will subject the owner to liability for trespassing children who are attracted thereto and are drowned. [Citing cases.]"

Appellants here have advanced an argument very similar to that presented in the case of *Meyer v. General Electric Company*, 46 Wash.2d 251, 280 P.2d 257. In the *Washington* case plaintiffs' two year and eight months old child trespassed onto defendant's premises and was drowned when he fell into an artificial ditch on said premises. In reversing a judgment for the plaintiff, the court said, 280 P.2d at pages 258-259:

"The deceased infant's age *eliminates* any question of contributory negligence, and we are not concerned with the ordinary duty of care of an owner of property toward a known trespasser. The defendant is not liable unless the doctrine of attractive nuisance applies.

* * * * *

"This state adheres to the attractive nuisance doctrine. However, our question is: Under what circumstances will a watercourse constitute an attractive nuisance?"

"It is the weight of authority that a *natural* watercourse is not an attractive nuisance."

sance, and that an artificial one is not if it has natural characteristics. * * *

"* * * It was not unnaturally dangerous, had no element of deception or of an inextricable trap, and, in fact, presented no danger by reason of being artificial that was different in any way from that of a natural watercourse. We hold, as a matter of law, that it was not an attractive nuisance.

* * * * *

[9] "The presence of danger to an unattended infant is not necessarily a test of anything but the need of parental care. An infant is afraid of nothing and in danger of everything when left to his own devices. The primary duty of care is upon the parents of an infant. [Citing case.] Their neglect will not convert a situation admittedly dangerous to an infant into an attractive nuisance which would not be so classed as to older children."

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.



144 Cal.App.2d 545

Marle ARTHUR, Plaintiff and Appellant,
v.

CITY OF LOS ANGELES, a municipal
corporation, et al., Defendants and
Respondents.

Civ. 21993.

District Court of Appeal, Second District,
Division 1, California.

Sept. 21, 1956.

Hearing Denied Nov. 14, 1956.

Action against a city. From a judgment of the Superior Court, Los Angeles County, for defendant and minute orders of such court denying plaintiff's motions for a new trial and to vacate judgment,

plaintiff appealed. On defendant's motion to dismiss the appeals, the District Court of Appeal, Nourse, J. pro tem., held that notice of appeal from judgment, filed over 60 days after entry of judgment, was too late, that notice of intention to move for new trial, filed 10 days before filing of superior court's fact findings and conclusions of law, was a nullity and could not extend time for appeal from judgment, that notice to vacate judgment, filed over 60 days after entry thereof, did not extend time for notice of appeal therefrom, and that minute orders were not appealable.

Motions granted.

1. Appeal and Error ⇨351(1)

A notice of appeal from judgment, filed over 60 days after entry of judgment, was too late, in absence of extension of time for filing of such notice under rule on appeal. West's Ann.Rules on Appeal, rule 3(a).

2. Appeal and Error ⇨345(1)

New Trial ⇨117(2)

A notice of intention to move for new trial, filed by plaintiff ten days before filing of Superior Court's fact findings and conclusions of law, was a nullity and could not extend time for appeal from judgment for defendant, though defendant treated notice as proper and court purported to act on it. West's Ann.Rules on Appeal, rule 3(a).

3. Appeal and Error ⇨345(1)

A notice, filed by plaintiff over 60 days after entry of judgment for defendant, to vacate it, was ineffectual if treated as motion for new trial to extend time for notice of appeal from judgment. West's Ann.Rules on Appeal, rule 3(a).

4. Appeal and Error ⇨110, 113(1)

Superior Court's minute orders, denying plaintiff's motion for new trial and motion to vacate judgment for defendant were not appealable. West's Ann.Code Civ.Proc., § 963.

5. Appeal and Error ⇨653(1)

Plaintiff's application to District Court of Appeal for order directing Superior

Court clerk to permit plaintiff to file amended notice to prepare transcript after dismissal of plaintiff's appeal from judgment for defendant need not be considered by District Court of Appeal. West's Ann. Rules on Appeal, rule 4.

Marie Arthur, in pro. per.

Roger Arnebergh, City Atty., Edwin F. Shinn, Deputy City Atty., Los Angeles, for respondents.

NOURSE, Justice pro tem.

Plaintiff has appealed from a judgment rendered in favor of the defendant City of Los Angeles, from a minute order denying her motion for a new trial, and from a minute order denying her motion to vacate the judgment appealed from. Defendants and respondents have moved to dismiss the appeal from the judgment upon the ground that the notice of appeal was not filed within time, and to dismiss the appeals from the two orders mentioned upon the grounds that they are not appealable orders.

Each of the motions to dismiss must be granted.

The findings of fact and conclusions of law and the judgment appealed from were filed January 6, 1956, and the judgment was entered on January 10.

Plaintiff's notice of intention to move for a new trial was served and filed on December 27, 1955. Her so-called notice of intention to vacate the judgment was filed on March 12, 1956, or 61 days after the entry of the judgment.

[1] Her notice of appeal was not filed until June 12, 1956.

The time within which plaintiff was entitled to file a notice of appeal from the judgment entered against her expired on March 10, 1956, unless that time was extended under the provisions of rule 3(a) of the Rules on Appeal.

[2] The notice of intention to move for a new trial was filed on December 27, 1955, or ten days before the findings of fact and the conclusions of law were made and filed. This notice was therefore "a nullity and ineffectual for any purpose" and could not extend the time within which appellant might appeal from the judgment. It was not given vitality by reason of the fact that the defendant treated it as a proper notice or by reason of the fact that the court purported to act upon it, *Tabor v. Superior Court*, 28 Cal.2d 505, 507, 170 P.2d 667.

[3] Plaintiff's notice to vacate the judgment, which was filed on March 12, 1956, if treated as a motion for new trial was ineffectual to extend the time within which she might give notice of appeal from the judgment inasmuch as it was not filed within 60 days after the entry of the judgment, rule 3(a), Rules on Appeal.

[4] Neither of the minute orders appealed from is an appealable order. *Code Civ.Proc.*, sec. 963; *Hughes v. DeMund*, 195 Cal. 242, 233 P. 94; *De la Montanya v. De la Montanya*, 112 Cal. 101, 118-119, 44 P. 345, 32 L.R.A. 82; *In re Estate of Baker*, 170 Cal. 578, 582, 150 P. 989; *Home Owners' Loan Corp. v. Engelbertson*, 54 Cal.App.2d 46, 48, 128 P.2d 424; *Sharpe v. Sharpe*, 55 Cal.App.2d 262, 265, 130 P.2d 462; 3 Cal.Jur.2d 491.

[5] Appellant has applied to this court for an order directing the clerk of the superior court to permit her to file an amended notice to the clerk to prepare a transcript under rule 4 of the Rules on Appeal. Inasmuch as her appeal from the judgment must be dismissed, her application need not be further considered by us.

The motions of respondents to dismiss the appeals from the judgment, from the order denying appellant's motion for a new trial, and from the order denying her motion to vacate the judgment, are granted.

WHITE, P. J., and FOURT, J., concur.

144 Cal.App.2d 533

Henry LACHMILLER, Plaintiff and
Respondent,

v.

LACHMILLER ENGINEERING COMPANY,
a California corporation, Defendant
and Appellant.

Civ. 21696.

District Court of Appeal, Second District,
Division 2, California.
Sept. 20, 1956.

Proceeding upon motion to discharge attachment. The Superior Court of Los Angeles County, Jerold E. Weil, J., denied motion on condition that certain substituted bond be posted, and that levy would be released on certain property. Defendant appealed from order. The District Court of Appeal, Fox, J., held that where attachment bond was insufficient because authority of agent, who signed bond for surety, was limited to amount less than amount of bond, and plaintiff, on hearing on defendant's motion to discharge attachment, agreed to release defendant's business, and that only defendant's bank account would remain subject to attachment, and to replace bond with new one in amount equal to 10% of amount of claim, court properly allowed plaintiff to post such substituted bond.

Order affirmed.

1. Principal and Agent ⇨155(2)

Where authority of attorney in fact who executed \$21,000 attachment bond in behalf of surety was limited to \$10,000, and limitation of agent's authority was matter of record, principal was bound to extent of \$10,000. West's Ann.Civ.Code, § 2333.

2. Attachment ⇨136

Where surety was bound to extent of \$10,000 on \$21,000 attachment bond executed by his agent, whose authority to execute bond was limited to \$10,000, attachment bond was not void, and could be amended upon other party's motion to discharge attachment. West's Ann.Civ.Code, § 2333; West's Ann.Code Civ.Proc., § 558.

3. Attachment ⇨137

Where attachment bond was insufficient because authority of agent, who signed bond for surety, was limited to amount less than amount of bond, and plaintiff, on hearing on defendant's motion to discharge attachment, agreed to release defendant's business, and that only defendant's bank account would remain subject to attachment, and to replace bond with new one in amount equal to 10 per cent of amount of plaintiff's claim, court properly allowed plaintiff to post such substituted bond. West's Ann.Code Civ.Proc., §§ 558, 1057; West's Ann.Civ.Code, § 2333.

William A. Sherwin, Richards D. Barger,
Los Angeles, for appellant.

Jack A. Crickard, Glendale, for respondent.

FOX, Justice.

Defendant appeals from that part of an order which denied its motion to discharge an attachment.

Plaintiff brought this action to recover for services rendered and on two promissory notes in the total amount of \$30,652.79. He caused a writ of attachment to be issued and levied on defendant's place of business (and a keeper put in charge) and on its bank account of approximately \$14,000. He posted a bond in the amount of \$21,000 executed by a corporate surety. The authority, however, of the attorney in fact who signed the bond on behalf of the surety was limited to \$10,000. The limitation of the agent's authority was a matter of record. Upon discovery of this information defendant moved to discharge the writ of attachment on the ground, inter alia, that it was "improperly and irregularly" issued in that the person who executed the document was without authority to sign a bond in that amount. At the hearing on defendant's motion, plaintiff proposed to release all property under attachment except the bank account and to replace the bond with a new one in the amount of \$3,065.28, being 10 percent of the amount of plaintiff's

claim. The court thereupon denied the motion to discharge the attachment on condition a bond in the sum of \$3,065.28 be posted forthwith and the levy immediately released on everything except the bank account. The condition was complied with by plaintiff. It is from the order denying its motion to discharge the attachment that defendant appeals.

[1,2] Defendant's position is that "the purported bond filed herein was void because the person pretending to act for the bonding company had no authority to do so" and that "the undertaking being void it cannot be amended because it never existed." In arguing that the initial bond was void defendant overlooks the provisions of section 2333 of the Civil Code, which provides that "When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized." In this matter the agent was expressly authorized to sign bonds up to \$10,000. He was not, however, authorized to execute bonds beyond that amount. It is thus obvious that his authorized act can be "plainly separated" from his unauthorized act; and that since he was authorized to execute a bond up to \$10,000 the principal was bound to that extent under the quoted code section. See *Walker v. Peake*, 153 S.C. 257, 150 S.E. 756, and cases there collected; also, *Wilson v. Beardsley*, 20 Neb. 449, 30 N.W. 529; and *Guaranty Trust Co. of New York v. Koehler*, 8 Cir., 195 F. 669. It therefore follows that the bond was not void, and was subject to amendment under the provisions of section 558, Code of Civil Procedure.¹

Actually, however, what transpired in this case was not an amendment of the bond but rather the substitution of another and different bond. After hearing the matter, the trial judge concluded that since the

business was to be released and only the bank account remain subject to the writ a bond in an amount equal to 10 percent of plaintiff's claim would be adequate protection to defendant.

[3] The posting of a substituted bond was entirely proper. Section 1057, Code of Civil Procedure, provides that whenever an undertaking has been given in any action and it is thereafter made to appear to the court that any surety on such undertaking is insufficient, the court may order the giving of a new undertaking. The principle of posting a substitute bond was sustained in *Poswa v. Brittain*, 4 Cal.App.2d 554, 41 P.2d 345. The principle was also recognized in *Bone v. Trafton*, 31 Cal.App. 30, 159 P. 819, which was an attachment case. At page 32 of 31 Cal.App., at page 820 of 159 P., the court stated "* * * there is ample authority holding that, where a statute permits the correction of an original undertaking, or the *substitution of a new one*, it has the effect of validating the proceeding from its inception." (Emphasis added.)

Defendant relies on *Alexander v. Superior Court*, 91 Cal.App. 312, 266 P. 993, and *Fairbanks, Morse & Co. v. Getchell*, 13 Cal.App. 458, 110 P. 331. Neither of these cases is applicable in the instant matter. In the *Alexander* case the plaintiffs in the attachment proceeding undertook to become their own sureties on the attachment bond. Such a purported undertaking was a nullity, and there was nothing to amend. The court pointed out, 91 Cal.App. at page 316, 266 P. at page 994, that "no effort was made to execute an undertaking with sureties. Had an undertaking irregular in form been filed, we would have been presented with an entirely different problem, and one which the amendment to section 558, Code of Civil Procedure, was intended to reach." In the *Getchell* case the affidavit

1. Section 558, Code of Civil Procedure, reads: "If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; provided that such attachment shall not be dis-

charged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter."

for the attachment was void. Being so, the court held it was not subject to amendment under section 558. As we have pointed out above, the bond in the instant case was not void. The situation, therefore, could be corrected by either an amendment or the substitution of a new bond.

The order is affirmed.

MOORE, P. J., and ASHBURN, J.,
concur.



144 Cal.App.2d 483

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Carl SELBY and Patrick William Ennis,
Defendants,

Patrick William Ennis, Appellant.
Cr. 5516.

District Court of Appeal, Second District,
Division 1, California.
Sept. 17, 1956.

Defendant was convicted of burglary and grand theft. From judgment and sentence of the Superior Court, Los Angeles County, Thomas L. Ambrose, J., defendant appealed. The District Court of Appeal, Fourth, J., held that the evidence was sufficient to establish the corpus delicti and that convictions were supported by substantial evidence.

Appeal from sentence dismissed and judgment affirmed.

1. Criminal Law ☞563

A prima facie showing that alleged act was the result of a criminal agency is all that is required to establish the corpus delicti, which need not be established by evidence as clear and convincing as that necessary to establish guilt.

2. Criminal Law ☞552(1)

Criminal intent may be demonstrated by the circumstances and facts shown in evidence.

3. Burglary ☞41(2)

Larceny ☞56

Evidence that warehouse window had been broken and that tires and wheels of a value in excess of statutory requirement for grand theft, had been taken from warehouse without the knowledge or consent of owner and sold to a dealer was sufficient to establish the corpus delicti in prosecution for burglary and grand theft. West's Ann.Pen.Code, §§ 459, 487, subd. 1.

4. Criminal Law ☞409

Where the corpus delicti had been established by prima facie proof, extrajudicial admissions allegedly made to police officer, freely and voluntarily, by defendant, realizing to whom he was speaking, were admissible in prosecution for burglary and grand theft. West's Ann.Pen.Code, §§ 459, 487, subd. 1.

5. Burglary ☞41(1)

Larceny ☞55

That stolen tires had been sold by defendant to dealer at less than their value was evidence of defendant's guilt in prosecution for burglary and grand theft. West's Ann.Pen.Code, §§ 459, 487, subd. 1.

6. Criminal Law ☞1023(10)

An appeal does not lie from a sentence.

7. Burglary ☞41(1)

Larceny ☞65

Convictions for burglary and grand theft were supported by substantial evidence. West's Ann.Pen.Code, §§ 459, 487, subd. 1.

Jack Surinsky, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Patrick T. McCormick, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal by the defendant Ennis "on all statutes taken from the judgment of the Superior Court in and for The County of Los Angeles Department 43, the Honorable Judge Ambrose, Presiding taken from the sentence imposed this day of July 19, 1955."

"Appellant deposes and says that he is a pauper, without funds and wishes to be excluded from the cost of the above said transcripts and any legal data pertaining to this case."

Present counsel for the defendant was appointed by this court.

An information was filed May 24, 1955, in the Superior Court of the State of California charging appellant, Patrick William Ennis, and his codefendant, Carl Selby, with two counts of burglary in violation of section 459 of the Penal Code, and in count 3 with grand theft in violation of section 487, subd. 1, Penal Code, a felony. As to appellant, the information also charged four prior felony convictions.

Appellant entered a plea of not guilty and denied the prior convictions alleged in the information. On June 22, 1955, trial was had, and at such time it was stipulated between the parties that the People's case in chief might be entered upon testimony and evidence as submitted at the preliminary hearing, all stipulations entered into by the parties at the time of the preliminary hearing to be deemed entered into for the purpose of the trial, and each party reserving the right to offer additional testimony. Appellant and his co-defendant, with counsel present, were found guilty as to counts 2 and 3. Appellant then admitted the four prior convictions as alleged. Count 1 was dismissed. A probation officer's report was ordered and filed and the appellant was sentenced to the state prison for the term prescribed by law, the sentences to run concurrently.

A substantial résumé of the facts is as follows. On May 2, 1955, a window was discovered broken at the warehouse of

Howard F. Ward, Incorporated. At the same time, it was noticed that a stack of tires located near the broken window was greatly diminished. On May 4, 1955, Howard K. Ward, an owner of Howard F. Ward, Incorporated, went to the address of Don McCready, where he identified a quantity of tires and wheels as being the property of Howard F. Ward, Incorporated. These tires were identified by the name of the particular Eastern manufacturer and by means of government chalk marks on the wheels.

On several occasions the codefendant, Carl Selby, accompanied by the appellant, Patrick Ennis, had sold a quantity of tires and wheels to Don McCready, who owned and operated McCready's Service Center. On April 27, 1955, McCready gave Selby a check for \$85 in payment of a quantity of tires and wheels. Again on April 28, 1955, McCready gave Selby a check for \$52 in payment for a quantity of tires and wheels. On a third instance, April 29, 1955, another payment for tires and wheels in the amount of \$95 was made to Selby. At the time of the transactions enumerated, both Selby and appellant were present, both having taken the tires to the McCready place of business.

The appellant admitted to Roy M. Saunders, a Los Angeles police officer, that he had broken a window of the warehouse, that he had climbed in the window and handed the tires out to Selby, and that they had taken these tires to the McCready Service Center. The appellant admitted entering the warehouse and taking eight or ten tires on as many as seven or eight occasions.

The appellant testified that he had merely aided Selby in transporting the tires and wheels from the residence of Selby to McCready's Service Center. He further testified that it was his impression that Selby had come into possession of the tires through Selby's brother. The appellant also denied knowledge of his making any admission regarding his entering the

burglarized premises, or knowledge that the property was taken from the warehouse of Howard F. Ward, Incorporated.

It is appellant's contention that there was a failure to establish or prove the corpus delicti of either burglary or grand theft, and that the admissions or confession of the appellant were made while he was not conscious of what he was saying, being then and there afflicted with the illness of delirium tremens.

[1] The corpus delicti need not be established by evidence as clear and convincing as that necessary to establish guilt. A prima facie showing that the alleged act was the result of a criminal agency is all that is required. *People v. Van Scoyoc*, 25 Cal.App.2d 416, 77 P.2d 485; *People v. Wiesel*, 39 Cal.App.2d 657, 664, 104 P.2d 70. As stated in *People v. Seymour*, 54 Cal.App.2d 266, at page 275, 128 P.2d 726, at page 731: "* * * It is also well settled that slight or prima facie proof of the corpus delicti is all that is necessary. * * *

[2,3] In the case before us evidence was submitted to show that the window was discovered broken at the warehouse on or about May 2, 1955, that tires and wheels belonging to the company were found at the premises of McCready's Service Center, and that property was taken from the warehouse without the knowledge or consent of the owners. Intent may be demonstrated by the circumstances and facts shown in evidence. *People v. Ross*, 105 Cal.App.2d 235, 233 P.2d 68; *People v. Turley*, 119 Cal.App.2d 632, 259 P.2d 724; *People v. Smith*, 84 Cal.App.2d 509, 190 P.2d 941. It was further established that sixty-two tires were recovered by the victim, approximately half of the tires being mounted on wheels; also, that payment was made by McCready for fifty tires and that twenty-one tires also delivered were not paid for. There was fur-

ther testimony that the tires were of the value of \$15 each, and the value of each wheel was \$4 or \$5. It is immediately apparent that the property was taken without the knowledge or consent of the owners, and that such property was of a value in excess of the statutory requirement for grand theft.

[4] The officer testified that he had a conversation with the appellant about 11:30 o'clock in the morning of May 5, 1955; that the statements made by the appellant were freely and voluntarily given; that he was coherent and realized who he was talking to. The corpus delicti having been established by prima facie proof, the extrajudicial admissions were admissible as the People's evidence. Thereupon it was testified that the appellant had said that he had broken the window to the warehouse; that he had climbed in the window and handed the tires out to Selby, and that they had then taken the tires to Don McCready's Service Center, and that this course had been followed several times.

[5] The tires were sold to McCready for \$5 per tire, with the exception of one, which was sold for \$7. The appellant himself indicated that he was aware that the tires were sold quite a bit below the retail price. The fact that the tires were sold below value is evidence to show the guilt of the defendant. *People v. Von Moltke*, 118 Cal.App. 568, 571, 5 P.2d 917.

[6] An appeal does not lie from a sentence.

[7] We are of the conclusion that the corpus delicti was amply established by the People, and further, that there was substantial evidence to support the finding of guilt by the trial court.

The purported appeal from the sentence is dismissed, and the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

144 Cal.App.2d 541

Helen M. ORLOFF, Plaintiff and Appellant,
v.

Peter M. ORLOFF, Defendant and
Respondent.
Civ. 21926.

District Court of Appeal, Second District,
Division 1, California.

Sept. 21, 1956.

Proceeding upon motion of husband to dismiss appeal by wife from order staying entry of final judgment after interlocutory decree granted wife. The District Court of Appeal, Nourse, J. pro tem., held, in part, that where husband, against whom wife had obtained interlocutory divorce decree, obtained order staying entry of final judgment, order was appealable, as special order made after final judgment affecting wife's rights under that judgment, and as itself a final judgment, because it terminated action as between parties, in that it precluded review on appeal of divorce decree.

Motion denied upon condition of payment of fees within 10 days, and otherwise appeal dismissed.

1. Appeal and Error ⇨78(1)

Interlocutory divorce decree obtained by wife was a final judgment in so far as it adjudicated right of wife to divorce from husband. West's Ann.Code Civ.Proc., § 963, subd. 1.

2. Appeal and Error ⇨82(1)

Where husband, against whom wife had obtained interlocutory divorce decree, obtained order staying entry of final judgment, order was a special order made after final judgment, affecting wife's rights under that judgment, and was appealable. West's Ann.Code Civ.Proc., § 963, subd. 2.

3. Appeal and Error ⇨78(1), 82(1)

Where husband, against whom wife had obtained interlocutory divorce decree, obtained order staying entry of final judgment, order was appealable, as special order made after final judgment affecting

wife's rights under that judgment, and as itself a final judgment, because it terminated action as between parties, in that it precluded review on appeal of divorce decree. West's Ann.Code Civ.Proc., § 963, subds. 1, 2.

4. Divorce ⇨181

Where wife's notice of appeal from husband's order staying entry of final judgment on wife's interlocutory divorce decree was filed on sixtieth day after entry of order, as evidenced by certificate of clerk, notice was timely. West's Ann.Rules on Appeal, rule 2(b).

5. Appeal and Error ⇨371

The superior court did not have power to extend appellant's time to pay fees of clerk for more than 90 days. West's Ann.Rules on Appeal, rules 4, 5 and subd. (c).

6. Appeal and Error ⇨371

The District Court of Appeal has discretion to extend time within which appellant must pay fees to clerk, and to deny motion to dismiss appeal because of failure to pay fees of clerk within statutory time. West's Ann.Rules on Appeal, rules 4, 5 and subd. (c).

7. Appeal and Error ⇨371

Where appellant had acted upon order of Superior Court extending her time to pay fees to clerk for more than 90 days, though superior court lacked power to grant extension, in view of discretion of District Court of Appeal to extend that time and to deny motion to dismiss appeal upon that ground, court would exercise discretion to allow appeal to be heard upon its merits. West's Ann.Rules on Appeal, rules 4, 5 and subd. (c).

Ray Howard, Los Angeles, for appellant.
Barry Sullivan, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Plaintiff and appellant has appealed from an order of the superior court granting the defendant's motion to stay further pro-

ceedings and prohibiting the entry of a final judgment of divorce after the expiration of one year from the entry of the interlocutory decree adjudicating that appellant was entitled to divorce from respondent.

Respondent has moved to dismiss this appeal on four grounds: (1) that the order appealed from is not appealable; (2) that the notice of appeal was not timely; (3) that the superior court was powerless to extend the appellant's time to pay the fees of the clerk beyond ninety days; and (4) that the fees of the clerk were not paid within the time required by rule 5(c) of the Rules on Appeal.

We have reached the conclusion that the motion to dismiss the appeals should be denied.

The relevant facts are:

On November 16, 1954, an interlocutory decree of divorce was entered whereby it was decreed that appellant was entitled to a divorce from respondent and which further awarded the custody of the minor child to the plaintiff and required the defendant to support that child. It also awarded certain community property to appellant.

On November 9, 1955, respondent served and filed a notice of motion for an order to stay further proceedings in the action and to prohibit the entry of a final decree of divorce.

On November 17, 1955, the court granted this motion and its order was entered in the minutes on November 21, 1955. The order did not require the preparation or filing of any further order.

On January 20, 1956—that is, on the sixtieth day after the entry of the order in the minutes of the court—appellant filed her notice of appeal from that order.

On January 30, 1956, appellant served and filed her request for transcript pursuant to rules 4 and 5 of the Rules on Appeal. On February 20, 1956, the clerk gave to appellant a notice designating the estimated cost of the preparation of the clerk's transcript. On February 29, an order was made

permitting appellant to file a settled statement of the oral proceedings, this statement to be served and filed on or before March 12, 1956, the time for settlement to be fixed by the trial judge, and the time to fix and deposit clerk's fees for transcript was extended to ten days following the date upon which the transcript was settled.

On April 4 the proposed settled statement was filed, and on May 18 the engrossed settled statement of oral proceedings was filed. On June 20, 1956, an order was made for additions to the transcript on appeal (the clerk's certificate filed with this court does not state whether these additions were to the clerk's transcript or were additions to the engrossed settled statement).

On July 2, 1956, the court made an order extending appellant's time to pay the fees of the clerk to August 1.

Is the order appealed from an appealable order?

[1,2] This question must be answered in the affirmative. It must be so answered for two reasons. The interlocutory decree of divorce was a final judgment insofar as it adjudicated the right of appellant to a divorce from respondent, *Suttman v. Superior Court*, 174 Cal. 243, 244, 162 P. 1032; *Claudius v. Melvin*, 146 Cal. 257, 79 P. 897; *In re O'Connell*, 80 Cal.App. 126, 130, 251 P. 661, and the order here appealed from was a special order made after that final judgment, affecting appellant's rights under that judgment. It is therefore made one of the orders as to which section 963, subdivision 2, Code of Civil Procedure, grants the right of appeal.

[3] Further than this, the order in question is, in effect, itself a final judgment, for it terminated the action as between the parties. Under that order no final decree of divorce could be entered and therefore it could not be reviewed on an appeal from a judgment. It was therefore appealable as a final judgment under paragraph 1 of section 963, Code of Civil Procedure. *Zoller v. McDonald*, 23 Cal. 136; *De la Montanya v. De la Montanya*, 112 Cal. 101, 119, 44 P. 345, 32 L.R.A. 82; *Dollenmayer v. Pry-*

or, 150 Cal. 1, 3, 87 P. 616; Hibernia Sav. & Loan Soc. v. Ellis Estate Co., 216 Cal. 280, 282, 13 P.2d 929; Cugat v. Cugat, 102 Cal.App.2d 760, 762, 228 P.2d 31; Valentin v. Valentin, 93 Cal.App.2d 588, 592, 209 P.2d 654.

Was the notice of appeal timely?

[4] This question must also be answered in the affirmative. The certificate of the clerk which constitutes the record before us states that the order was entered on November 21, 1955. We understand this to mean that that was the date of the entry in the permanent minutes of the court. Plaintiff's time to file her notice of appeal did not commence to run until such entry, rule 2(b) of the Rules on Appeal, and inasmuch as her notice of appeal was filed on the sixtieth day after that entry, it was timely.

The other two points made by appellant may be considered together.

[5] It was beyond the power of the superior court to extend the appellant's time to pay the fees of the clerk for more than ninety days, and therefore the court could not here extend appellant's time to pay these fees beyond May 30, 1956.

[6, 7] The appellant, however, acted upon the orders of the court extending her time beyond that date; and as it is within our discretion to further extend that time and to deny the motion to dismiss the appeal because of the failure to pay the fees of the clerk within the statutory time, we exercise that discretion to the end that the appeal may be heard upon its merits.

The motion to dismiss the appeal is denied provided that within ten days after the filing of this opinion the appellant pays to the clerk of the superior court the fees designated by him for the preparation of the clerk's transcript on appeal and files with the clerk of this court the receipt of the clerk of the superior court for such payment. If such be not filed within said time, then the appeal is dismissed without further opinion.

WHITE, P. J., and FOUNT, J., concur

144 Cal.App.2d 500

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Jose Angel MENDEZ, Defendant and
Appellant.

Cr. 5630.

District Court of Appeal, Second District,
Division 1, California.

Sept. 18, 1956.

Defendant, who had been convicted of possession of a preparation of heroin, filed a motion in the nature of a petition for writ of error coram nobis to vacate or set aside the judgment. The Superior Court of Los Angeles County, David Coleman, J., entered an order denying the motion, and the defendant appealed. The District Court of Appeal, Fount, J., held that motion was properly denied.

Order affirmed.

1. Criminal Law §997(16)

Where defendant, on motion in the nature of a petition for writ of error coram nobis to vacate or set aside judgment, did not present by affidavit or other proof any matter in support of charges contained in motion, and defendant stated no ground for relief requested, court was justified in denying the motion without a hearing. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law §997(1)

A motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment is a remedy of narrow scope, and the function of such a motion is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of defendant, was not brought forward before the rendition of judgment.

3. Criminal Law §997(2)

On motion in the nature of a petition for writ of error coram nobis to vacate or

set aside a judgment, relief does not lie for errors cognizable by appeal from the judgment or an order denying a motion for a new trial.

4. Criminal Law §997(6)

A motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment does not lie to correct errors of law made at the trial.

5. Criminal Law §997(11)

Applicant for a motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment must show that facts upon which he relies were not known to him and could not, in exercise of due diligence, have been discovered by him at any time substantially earlier than time of his motion for the writ.

6. Criminal Law §997(4)

Alleged fact that evidence introduced against defendant at the trial of prosecution for possession of a preparation of heroin was illegally obtained was not ground for relief in the nature of a writ of error coram nobis. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law §997(5)

Alleged denial of effective aid of counsel to defendant in prosecution for possession of a preparation of heroin could not be raised in a proceeding in the nature of a petition for writ of error coram nobis. West's Ann.Health & Safety Code, § 11500.

8. Criminal Law §997(2)

A motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment does not lie to redress any irregularity occurring at the trial, if the irregularity could have been corrected by a motion for new trial or by appeal.

9. Criminal Law §997(4)

Charge that there was insufficiency of evidence and failure to prove the corpus delicti in prosecution for possession of a preparation of heroin did not state matter within scope of motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment. West's Ann.Health & Safety Code, § 11500.

10. Criminal Law §997(11)

On motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment, the mere naked allegation that a constitutional right of defendant in prosecution for possession of heroin had been invaded would not suffice. West's Ann.Health & Safety Code, § 11500.

11. Criminal Law §997(11)

Application in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment should make a full disclosure of the specific facts relied on and not merely state conclusions as to the nature and effect of such facts.

12. Criminal Law §997(15)

On motion in the nature of a petition for writ of error coram nobis to vacate or set aside a judgment, it is not necessary for the trial judge to accept as true any statement contained in defendant's affidavits in support of the motion.

13. Criminal Law §997(16)

Question whether motion in the nature of a petition for writ of error coram nobis to vacate or set aside judgment was to be followed by a hearing appropriate to the issues raised was entirely within the discretion of the trial court.

Jose Angel Mendez, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from an order denying defendant's motion to annul, vacate and set aside a judgment.

In an information filed by the District Attorney of Los Angeles county, the defendant was charged with violation of section 11500 of the Health and Safety Code and it was alleged that on or about October 13, 1954, defendant had in his possession a preparation of heroin. Four prior convictions were also alleged in the information. Defendant was duly arraigned and entered a plea of not guilty and denied the prior

convictions as alleged. Thereafter, the defendant, the district attorney and defense counsel waived trial by jury, and by stipulation the People's case was submitted on the preliminary transcript. Exhibits were introduced and the defendant testified in his own behalf. When the matter was submitted, the court adjudged the defendant guilty as charged. It was stipulated that the prior convictions could be determined from the probation report.

Subsequently, the first and second priors having been dismissed, the third and fourth priors (violations of the Deadly Weapons Control Act, Pen.Code, § 12000 et seq. and the State Narcotic Act, Health and Safety Code, § 11000 et seq.) were found to be true. Probation was denied and defendant was sentenced to the state prison for the term prescribed by law. Judgment was entered January 14, 1955. No appeal was taken from the judgment.

On or about August 2, 1955, a motion to annul, vacate and set aside the judgment was filed.

The defendant stated that the grounds for the motion were: (1) that the trial court violated defendant's constitutional rights when it sanctioned and failed to "provide relief for the police action of forcefully, illegally, and without warrant, breaking-in the door, entering and searching petitioner's domicile"; (2) that the court denied defendant "due process and equal protection of law" when it "convicted the petitioner without proving the corpus delicti beyond a reasonable doubt"; and (3) that defendant was denied due process and equal protection by not being represented by or having effective and adequate legal counsel.

On August 3, 1955, the motion to annul, vacate and set aside the judgment was denied. There were other proceedings taken and disposed of in *Mendez v. Superior Court*, 137 Cal.App.2d 465, 290 P.2d 270, with which we are not concerned at this time.

Defendant contends now that a full hearing should have been accorded him on his application. Respondent contends that the

appellant did not state any ground entitling him to the requested relief; that he was accorded a hearing and that the court properly denied his application.

[1] On the appeal presented to this court the defendant claims that the court denied him due process of law when it denied his motion to annul, vacate and set aside the judgment, contending that he should have had a hearing on his motion. The defendant did not present by affidavit or other proof any matter in support of the charges contained in his motion. Defendant further stated no ground for the relief requested, and the court was, in our opinion, justified in denying the motion without a hearing. *People v. Croft*, 134 Cal.App.2d 800, 802, 286 P.2d 479.

[2] Our examination of the record in this case reveals that the defendant has misconceived the scope of the requested relief. A motion to vacate or set aside a judgment in the nature of a petition for writ of error *coram nobis* is a remedy of narrow scope. The function of such an application is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before the rendition of judgment. *People v. Gennaitte*, 127 Cal. App.2d 544, 548, 274 P.2d 169.

[3] It is well settled that such relief does not lie for errors cognizable by appeal from the judgment or order denying a motion for a new trial. *People v. Adamson*, 34 Cal.2d 320, 326, 327, 328, 210 P.2d 13.

[4, 5] As was said in *People v. Ayala*, 138 Cal.App.2d 243, 245-246, 291 P.2d 517, 518: "It would be a salutary thing if the applicants for this writ could be made to understand its narrow scope. It does not lie to correct errors of law made at the trial. * * * The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been

discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.””

[6] One of the alleged or claimed grounds of the defendant is that the evidence introduced against him at the trial was illegally obtained. This is not a ground for relief in the nature of a writ of error *coram nobis*.

[7] Likewise, it is well established that a claim of denial of effective aid of counsel may not be raised in a proceeding in the nature of a petition for writ of error *coram nobis*. *People v. James*, 99 Cal.App.2d 476, 479, 222 P.2d 117; *People v. Krout*, 90 Cal.App.2d 205, 208, 202 P.2d 635.

[8, 9] It is well settled that the remedy sought in the court below does not lie to redress any irregularity occurring at the trial that could be corrected by a motion for a new trial or by appeal. Thus, the charge that there was insufficiency of the evidence and a failure to prove the corpus delicti of the crime does not state matter within the scope of the requested relief. *People v. Bible*, 135 Cal.App.2d 65, 69, 286 P.2d 524.

[10, 11] The mere naked allegation that a constitutional right has been invaded will not suffice. “The application should make a full disclosure of the specific facts relied upon and not merely state conclusions as to the nature and effect of such facts.” *People v. Stapleton*, 139 Cal.App.2d 512, 293 P.2d 793, 794.

[12] There was nothing in the petition filed in the trial court in this instance warranting the trial court to grant the requested relief, but even had there been affidavits in support of the motion it was not necessary for the trial judge to accept as true any statement contained in any such affidavits. *People v. Kirk*, 98 Cal.App.2d 687, 692, 220 P.2d 976.

[13] In this case the defendant did not state any ground for the setting aside of the judgment or produce any proof of any fact constituting legal ground for setting aside the judgment or for the writ of error

coram nobis. Whether the defendant’s petition was to be followed by a hearing appropriate to the issues raised was entirely within the discretion of the court below. *People v. Block*, 134 Cal.App. 217, 218, 25 P.2d 242.

It is our opinion that the motion was properly denied and the appeal from the order of denial is without any merit whatsoever.

The order of the superior court in denying the motion of the defendant is affirmed.

WHITE, P. J., and DORAN, J., concur.



144 Cal.App.2d 504

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles E. LARSEN, Defendant and
Appellant.
Cr. 5637.

District Court of Appeal, Second District,
Division 2, California.

Sept. 18, 1956.

Rehearing Denied Sept. 26, 1956.

Hearing Denied Oct. 17, 1956.

Proceeding on motion to vacate judgment of conviction. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered order denying motion and defendant appealed. The District Court of Appeal, Ashburn, J., held that motion was equivalent of application for writ of error *coram nobis*, and where petition did not complain of any incident of original conviction, but merely of fact that between time he had been originally convicted of burglary and time his probation was revoked and sentence ordered to run, legislature had passed law revoking any credits earned for good behavior in prison, though he did not claim to have earned any such credits, defendant did not show himself entitled to any relief.

Affirmed.

1. Criminal Law Ⓒ999(1)

A motion to vacate judgment of conviction is the equivalent of an application for a writ of error coram nobis.

2. Criminal Law Ⓒ997(5)

Coram nobis is not the proper vehicle for vindicating constitutional right; that is the function of a motion for new trial, appeal or habeas corpus.

3. Criminal Law Ⓒ1001

An order of court revoking probation granted upon conviction of crime and ordering sentence to run is an order merely revoking suspension of execution of judgment and not a new judgment. Pen.Code, 1203.2.

4. Criminal Law Ⓒ997(4)

If defendant claims that his sentence was excessive, his remedy is to have the sentence fixed or refixed when he has served the lawful term, whatever that may be, and if dissatisfied to review the matter on habeas corpus at such time.

5. Criminal Law Ⓒ997(11)

In proceeding on motion to vacate judgment of conviction, treated as the equivalent of an application for writ of error coram nobis, where petition did not complain of any incident of the original conviction but merely of fact that, between the time defendant had been originally convicted of burglary and time his probation

was ordered revoked and sentence to run, Legislature had passed statute revoking any credits earned for good behavior in prison, but petition did not claim that defendant had earned any such credits, defendant failed to show that he was entitled to writ of error coram nobis. Pen.Code, §§ 461, subd. 1, 1203.2, 2926; St.1947, p. 2944, § 1.

Charles E. Larsen, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

[1] This is an appeal from an order denying defendant's motion to vacate the judgment of conviction, a proceeding recognized as the equivalent of an application for a writ of error coram nobis. *People v. Jennings*, 121 Cal.App.2d 531, 532, 263 P.2d 37; *People v. Adamson*, 34 Cal.2d 320, 330, 210 P.2d 13; 12 Cal.Jur.2d § 4, p. 554.

[2] Appellant's major contention is that a 1947 amendment to Penal Code, § 2926¹ is unconstitutional, in that it deprives him of certain credits previously earned. The authorities establish that coram nobis "is not the proper vehicle for vindicating constitutional rights; that is a function of motion for new trial, appeal or habeas corpus." *People v. Ayala*, 138 Cal.App.2d 243, 246,

the terms of prisoners are shortened by the allowance of credits, provision is made in this act for an earlier parole date and for an earlier discharge date in the case of this latter class of prisoners." Said Chapter also amended § 2926, Penal Code, to read as follows: "The provisions of this article are to apply to all prisoners serving sentence on December 31, 1947, in the state prison, to the end that at all times the same provisions relating to credits shall apply to all such inmates thereof. No prisoner received on or after January 1, 1948, at any state prison or institution under the jurisdiction of the Director of Corrections shall receive or be allowed any credits provided for in this article or under Section 2789 of this code." Stats.1947, pp. 2944-2945.

1. Prior to 1947, § 2926 read: "The provisions of this article are to apply to all prisoners now serving sentence in the State prison, to the end that at all times the same provisions relating to credits shall apply to all the inmates thereof." Stats.1941, p. 1107. By Chapter 1381 of the 1947 Statutes the legislature provided, in § 1: "It is the intention of the Legislature, recognizing the inconsistency of applying a statutory system of credits to a prison term fixed under the indeterminate sentence law, to abolish by this act the statutory system of credits now in use in the prisons of this State. * * * Where the person is received at a state prison or institution under the jurisdiction of the Director of Corrections on or after January 1, 1948, it is the intention of the Legislature that no statutory credits be allowed him. As

291 P.2d 517, 519. To the same effect are *People v. Adamson*, 34 Cal.2d 320, 327, 210 P.2d 13; *People v. Jennings*, 121 Cal.App.2d 531, 533, 263 P.2d 37.

If *coram nobis* were an appropriate remedy the instant petition would be factually insufficient. "It would be a salutary thing if the applicants for this writ could be made to understand its narrow scope. It does not lie to correct errors of law made at the trial. Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (Citing cases.) The applicant for the writ "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief." (*People v. Shorts*, 1948, 32 Cal.2d 502, 513, 197 P.2d 330, 336.)' *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13, 15. * * * The applicant must allege facts which establish a right to the writ within its recognized narrow confines. Mere conclusions or generalities will not suffice." *People v. Ayala*, supra, 138 Cal.App.2d 243, 245, 246, 247, 291 P.2d 518. It affirmatively appears that appellant does not complain of any incident of his original conviction. He claims a deprivation of earned credits for good behavior; but it is not shown that in fact he entered prison on or after January 1, 1948, or that he had actually earned any credits before that date. The petition consists of generalities which do not suffice to make a showing entitling one to the writ.

On October 17, 1938, appellant in the Los Angeles superior court entered a plea of guilty to the charge of burglary, which crime was fixed as first degree, and on November 2, 1938, defendant was sentenced to the state prison for the term prescribed by law. Execution was suspended and probation granted for a period of five years. No appeal was taken or attempted. Probation

was revoked and restored twice prior to December 6, 1948. Petitioner having been imprisoned in San Quentin pursuant to conviction of burglary in the San Francisco superior court, the Los Angeles court on November 30, 1953, made an order containing this: "Probation having been heretofore revoked, the sentence imposed on November 2, 1938, committing this defendant to the State Prison for the term prescribed by law is ordered in full force and effect. This sentence is ordered to run *concurrently* with sentence Defendant is now serving. Defendant is remanded into the custody of the Director of Corrections at the California State Prison at San Quentin."

[3] Appellant admits and asserts that he is lawfully imprisoned and not entitled to habeas corpus. His interesting objective is disclosed at page 18, opening brief: "Appellant concedes that the irregularity of which he complains was not in the trial in 1938—but in the application of the penalty after the trial—after subsequent legislation had been enacted to the detriment of appellant. A retrial could not change the situation of the appellant, hence, it would be useless. While the discharge of the appellant releases from the information one guilty of a felony, this misfortune is one for which the State Legislature alone is responsible. Appellant urges that it is better that he escape punishment entirely for the 1938 offense than for the courts of this State, under the guise of subserving the ends of justice assume that they may rise higher than the law and disregard the plain mandate of both the Federal and State Constitutions." The contention is that, as the 1947 amendment to Penal Code, § 2926 abolishes the right to good behavior credits earned prior to the amendment, the order of November 3, 1938, imposes a new sentence to be served without possibility of credits. Actually the order is but one revoking suspension of *execution* of judgment, not a new judgment. In *re Dearo*, 96 Cal.App.2d 141, 214 P.2d 585. Section 1203.2, Penal Code, concludes with these words: "[B]ut if the judgment has been pronounced and the execution

thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence, less any credits herein provided for."

[4] The punishment for first degree burglary is fixed at not less than five years with no maximum specified. Pen.Code § 461, subd. 1. Appellant's remedy is to have his sentence fixed or refixed when he has served the lawful term, whatever that may be, and if dissatisfied to review the matter on habeas corpus at that time. In re Seeley, 29 Cal.2d 294, at page 302, 176 P.2d 24, at page 29, says: "The rule is settled in this state in accord with the weight of authority that 'where a court has jurisdiction of the person and of the crime, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to question and attack. In other words, the sentence is legal in so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separate and may be dealt with without disturbing the valid portion of the sentence.'" 29 Cal.2d at page 303, 176 P.2d at page 30: "No difficulty is likely to arise in ascertaining the lawful portion of the sentence which should have been imposed upon the petitioner. Section 461 of the Penal Code fixes the punishment for first degree burglary as imprisonment in the state prison for not less than five years. Since no maximum is there prescribed the petitioner has failed to show that he is entitled to his release at this time. The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in this opinion." This is but one of a consistent line of cases announcing and applying the same rule. In re Morck, 180 Cal. 384, 181 P. 657; In re Rosencrantz, 205 Cal. 534, 541, 271 P. 902; In re Seeley, supra, 29 Cal.2d 294, 302, 176

P.2d 24; In re Bramble, 31 Cal.2d 43, 53, 187 P.2d 411; In re Drake, 38 Cal.2d 195, 197-198, 238 P.2d 566; In re Spaulding, 8 Cal.App.2d 497, 498, 48 P.2d 133.

[5] Appellant, as above shown, is not entitled to a writ of coram nobis and the time for habeas corpus has not arrived.

The order is affirmed.

MOORE, P. J., and FOX, J., concur.



144 Cal.App.2d 555

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert James STEWART, Defendant and
Appellant.

Cr. 1086.

District Court of Appeal, Fourth District,
California.

Sept. 21, 1956.

Rehearing Denied Oct. 2, 1956.

Hearing Denied Oct. 17, 1956.

Defendant was convicted of furnishing narcotics to a minor. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment on the verdict and an order denying a motion for new trial, and the defendant appealed. The District Court of Appeal, Mussell, J., held that where police officer with the consent and at the request of defendant's roommate entered premises where defendant and roommate resided, to get some of the belongings of defendant's roommate, and while there the police officer observed a marihuana cigarette butt and an eyedropper, needle, and spoon, all of which contained heroin, and defendant then entered and told officer to go ahead and look around, and officer took defendant to jail, and then returned and picked up the eyedropper, needle and spoon, they were not obtained by unlawful search and seizure,

and were properly admitted in prosecution.

Judgment and order affirmed.

1. Arrest ☞71

It is immaterial to the lawfulness of a search and seizure that seizure of paraphernalia used in the commission of a crime may have preceded rather than followed arrest.

2. Arrest ☞71

A search without a warrant is valid if it is incident to a lawful arrest, is reasonable, and is made in good faith.

3. Arrest ☞71

Criminal Law ☞395

Where police officer with the consent and at the request of defendant's roommate entered premises where defendant and roommate resided, to get some of the belongings of defendant's roommate, and while there the police officer observed a marihuana cigarette butt and an eyedropper, needle, and spoon, all of which contained heroin, and defendant then entered and told officer to go ahead and look around, and officer took defendant to jail, and then returned and picked up the eyedropper, needle and spoon, they were not obtained by unlawful search and seizure, and were properly admitted in prosecution of defendant for furnishing narcotics to a minor. West's Ann.Health and Safety Code, § 11714.

Edgar G. Langford and J. Perry Langford, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Robert S. Rose, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged in an information with having furnished narcotics to a minor in violation of section 11714 of the Health and Safety Code, a felony, in that on or about the 22nd day of January, 1956, in said county of San Diego, he did "wilfully, unlawfully and feloniously furnish or

administer and give to Nancy Cook, who was then and there a minor of the age of 17 years, a narcotic." Trial was had by the court without a jury and defendant was found guilty of the offense charged in the information. His motion for a new trial and his application for probation were denied and he was sentenced to the state prison for the time prescribed by law. He appeals from the judgment and from the order denying his motion for a new trial. His sole contention is that the trial court erred in admitting into evidence certain exhibits on the ground that they were obtained by unlawful search and seizure.

A summary of the evidence, viewed in the light most favorable to the People, *People v. Spreckels*, 125 Cal.App.2d 507, 509, 270 P.2d 513, is as follows: On January 22, 1956, at about 6:00 p. m., Nancy Cook, aged 17, met the defendant at a hamburger stand in San Diego. She then went with the defendant to his residence at 2887 Boston Avenue, arriving there at about 7:00 p. m. En route, Nancy and the defendant discussed narcotics and Nancy informed the defendant she would like some heroin. After listening to some records in defendant's residence, they went into the bathroom where the defendant had a glass of water, a paper containing a brownish-white powder, a lighter, an eyedropper, a needle and a silver spoon. He cut the brownish-white powder with a knife and placed the substance on a silver spoon, then used cotton as a means of adding water to the substance in the spoon, heated the spoon with the lighter, drew liquid from it into the eyedropper and attached the needle to the dropper. He then took a belt from the doorknob on the bathroom door and placed it around his arm, inserting the needle into his arm. He then put the belt around Nancy Cook's right arm and inserted the needle in her arm three times, after which he placed the belt around her left arm and inserted the needle in it four times, injecting fluid into her arms. Fifteen minutes after these injections Nancy felt slightly nauseous and in forty-five minutes she felt drowsy. She and the

defendant again listened to some records and waited for another girl (Chris McCracken) to arrive. Chris then returned and the two girls went out to get something to eat, after which Nancy returned to her home.

On January 22, 1956, Loel L. Boggs, who had been taken into custody by Sgt. Gibbs of the San Diego police department and was in the custody of H. H. James, a United States Probation Officer, requested Gibbs to obtain his (Boggs') clothing at 2887 Boston Avenue in San Diego. At the San Diego jail Boggs also asked officer James to obtain for him a pair of blue suede shoes and some clothing from the address on Boston Avenue. Officer James conveyed this request to Sgt. Gibbs and on January 23, 1956, at about 4:00 p. m., he went to 2887 Boston Avenue to pick up the clothing as requested. Upon arriving there, Sgt. Gibbs identified himself to the landlady, who showed him officer James' card and stated that she had been expecting him. She then unlocked the door to the house and admitted the sergeant. The inside of the house was very dark, the overhead light contained "three small bulbs of the Christmas tree variety, red, blue and green, that shed no light at all." The sergeant turned on the kitchen light and observed a cigarette butt, (People's exhibit 4) lying on a shelf above a built-in desk. The cigarette contained a greenish material that appeared to be marijuana. The sergeant then went to the cupboard, obtained a light bulb and at that time "observed an eyedropper with a needle attached setting needle-downward in a 'gill' or whiskey shot glass." The sergeant then returned to the living room and placed a light bulb in a reading lamp. He obtained the clothing which he came for and then conducted a further search of the premises. He found a number of brown paper rolled "sticks" and two sandwich bags of vegetable matter. (People's exhibits 2, 3 and 5). It was stipulated at the trial that exhibits 2, 3, 4 and 5, contained marijuana. Wayne A. Burgess, an expert chemist, testified that the eyedropper, needle and spoon (People's exhibit

1) all contained heroin. As Sgt. Gibbs was preparing to leave the premises, the defendant, Nancy Cook and Chris McCracken entered and the sergeant "bid them welcome and asked Stewart if he minded if we looked around and he said 'No, go ahead.'" The defendant and the two girls were taken to the city jail and later that evening the sergeant and two other police officers returned to the defendant's home and were again admitted by the landlady. They retrieved the eyedropper, needle and spoon from a table in the living room where Sgt. Gibbs had left them when he took the defendant and the girls to jail.

At the city jail police officer Wilson of the narcotic detail examined Nancy Cook's arms. He observed three needle puncture marks in the elbow fold of her left arm and two in the elbow fold of her right arm. He testified that in his opinion the eyedropper, needle and spoon was "a complete outfit that regular hyps would use and all that is on them it appears to have been used. However, in some instances cotton is usually in the spoon."

Dr. Harry Depew was qualified as an expert physician and testified that if a person received an injection under the circumstances testified to by Nancy Cook and exhibited the symptoms related by her, it would be his opinion that such a person had received an injection of a narcotic.

Defendant contends that exhibits 1, 2, 3 and 5 were obtained by unreasonable and unlawful search and seizure. However, he concedes that the police officers acted lawfully up to and including the time when they found People's exhibit 4, the "roach" or marijuana cigarette butt. He further concedes that after finding the "roach", the officers had probable cause to arrest Stewart and further concedes that the officers had consent to enter the premises for a limited purpose of obtaining Boggs' clothing. He argues that these facts could not justify the two searches thereafter made and that the admission into evidence of fruits of these searches and seizures was improper under

the law enunciated in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, and subsequent cases. We are not in accord with this argument.

[1, 2] Officer Gibbs entered the premises at 2887 Boston Avenue with the consent and at the request of Loel E. Boggs, who resided with the defendant. The officer turned on the lights and first observed the marijuana cigarette butt and immediately thereafter observed the eyedropper, needle and spoon, all of which contained heroin. The defendant then entered and told the officer to "go ahead and look around." The evidence shows that the search was made with the defendant's consent and therefore was not unreasonable. *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852. The officer had reasonable cause to make the arrest. *People v. Brite*, 9 Cal.2d 666, 687, 72 P.2d 122. Furthermore, it is conceded by appellant that the arrest was lawful. It is immaterial that the seizure of the paraphernalia used in the commission of the crime may have preceded rather than followed the arrest. *People v. Martin*, 45 Cal.2d 755, 762, 290 P.2d 855. As is said in *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40, 46:

"It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible. * * *" (Citations.)

[3] The eyedropper, needle and spoon containing heroin were related to the crime charged. Sgt. Gibbs could have lawfully taken these articles with him when he took the defendant to the city jail and the fact that he went back to the defendant's residence, where he was again admitted by the landlady, and retrieved them did not in our opinion constitute an unreasonable and unlawful search and seizure.

The judgment and order are affirmed.

GRIFFIN, Acting P. J., and BURCH, J.
pro tem., concur.

144 Cal.App.2d 536

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Donald Joseph BEAULIEU, Johnny Frank-
lin Fritz and Lyle Warner Giroux,
Defendants.

Lyle Warner Giroux, Appellant.

Cr. 5646.

District Court of Appeal, Second District,
Division 2, California.

Sept. 20, 1956.

Prosecution for robbery. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment and defendant appealed. The District Court of Appeal, Fox, J., held that the evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law §1159(2)

Before conviction can be reversed on ground of the insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

2. Criminal Law §260(11)

Reviewing court must assume in support of judgment, the existence of every fact which trial court could have reasonably deduced from the evidence, and then determine whether the facts justify the inference of guilt.

3. Criminal Law §1159(6)

If the circumstances reasonably justify the determination of trier of facts, the opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant a reversal.

4. Criminal Law §59(5)

One who aids and abets another in the commission of a crime, though not present, is a principal in any crime so committed and shall be punished as such. West's Ann.Pen.Code, §§ 31, 971.

5. Robbery \Rightarrow 15

A person who stays in an automobile and enables those who are robbing to make a successful getaway, aids and abets the commission of the crime and is as much a principal as if he were present and assisted in the actual taking of the property. West's Ann.Pen.Code, §§ 31, 971.

6. Robbery \Rightarrow 24(1)

Evidence justified inference that defendant aided and abetted others in commission of robbery by assisting them in making a "getaway" and was sufficient to support conviction of robbery. West's Ann.Pen.Code, §§ 31, 211, 971.

7. Criminal Law \Rightarrow 1023(10)

No appeal lies from a sentence.

Louis W. Shaffer, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendants Giroux, Beaulieu¹ and Fritz were charged with the crime of robbery, Pen.Code, § 211, in that on October 23, 1955, they took certain money by force and fear from Fumio Nakaya. The court found Giroux guilty, denied probation and sentenced him to the state prison. He appeals from the judgment and sentence.

Fritz and Beaulieu went into a liquor store at 3124 East Fourth Street, Los Angeles, where Fumio Nakaya worked, between 12:30 and 1:00 o'clock in the morning of October 23, 1955. When Nakaya first noticed these men they were standing in the center of the store with drawn .45 automatics. Beaulieu demanded the money. Nakaya, being in fear, gave him \$73 from the cash register. Beaulieu took the money and went out quickly. Fritz remained briefly inside the door, keeping watch, and then he, too, left. Nakaya went outside and saw a Pontiac automobile pulling away.

Felix G. Mena, who was across the street from the liquor store, observed a car with a sun visor move up to the store from the corner where it had been parked, a distance of 300 feet. Mena was not able to identify the driver beyond the fact that it was a man. When the car pulled up a man came out of the store and entered it. Then the horn sounded and another man left the store and entered the car. The three men in the car were last seen going east on Fourth Street.

Officer Vera and his partner Shelly responded to the police broadcast of the burglary. At the liquor store they received a description of the car. At approximately 1:15 a. m. they arrested the defendants in the 5000 block on East Third Street. Beaulieu was driving. All three were in the front seat. Just before the police stopped the car, Fritz was observed to bend forward in his seat. Upon searching the car three .45 automatics (all cocked) were found under the front seat where Fritz had been sitting. They were the same type of weapon the robbers used. One of these guns had a clip with eight rounds of ammunition in it. Five rounds of .45 caliber ammunition were found in appellant's right front pocket. Fritz had seven rounds in his pocket. Fritz had \$21 on his person; the other two had \$20 each. Two handkerchiefs were found in the glove compartment of the car; and a pair of brown gloves on the front seat.

At the police station, approximately a half hour after the arrest, appellant stated: "We were just riding around and haven't done anything. That's all you are going to get out of me."

At the trial appellant testified he had not at any time driven the car used in the robbery. He told of going to Long Beach with Fritz, and that they met Beaulieu in a bar; that he left the bar at 11:00 p. m. and went to sleep in the back seat of Beaulieu's car; that he did not wake up until around 12:30 to 1:00 a. m.; that they stopped at a bar and about 15 minutes

1. Beaulieu and Fritz are not involved in this appeal.

after he had awakened the police arrested them. His explanation of the cartridges being in his pocket was that he felt some hard objects that bothered him in the back seat of the car when he was trying to go to sleep; that he saw what they were and put them in his pocket so he "could sleep more comfortably."

Appellant contends that the evidence is insufficient to sustain the conviction. Specifically, he argues that the People failed to prove (1) that he was not asleep, and (2) that he knew of the unlawful purpose of Beaulieu and Fritz or that he knowingly assisted them in accomplishing their purpose, or in escaping detection. His argument is lacking in merit.

[1-3] Before a conviction can be reversed on the ground of the insufficiency of the evidence "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780. We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts "justify the inference of guilt." *People v. Deysher*, 2 Cal.2d 141, 149, 40 P.2d 259, 263. If the circumstances reasonably justify the determination of the trier of fact, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal. *People v. Newland*, supra; *People v. Frankfort*, 114 Cal.App.2d 680, 689, 251 P.2d 401.

[4] One who aids and abets another in the commission of a crime, though not present, is a principal in any crime so committed and shall be punished as such. Pen. Code, §§ 31 and 971; *People v. Hopkins*, 101 Cal.App.2d 704, 707, 226 P.2d 74.

[5] A person who stays in an automobile and enables those who are robbing to make a successful "getaway" aids and abets the commission of the crime and is

as much a principal as if he were present and assisted in the actual taking of the property. *People v. Benton*, 32 Cal.App.2d 407, 409-410, 89 P.2d 1089; *People v. Soffer*, 34 Cal.App.2d 301, 304, 93 P.2d 183.

Someone drove the car from the corner, a distance of approximately 300 feet, to the liquor store where Beaulieu entered the car. "Shortly thereafter," according to witness Mena, "the horn blew" and then Fritz came out and entered the front seat of the car from the passenger side. The car was stopped by the police about half an hour later and appellant was in the front seat with them. The car was identified by Nakaya as the Pontiac that he saw leaving the curb following the robbery. Although Mena was not able to identify the operator of the car, it is a reasonable inference that appellant was the male driver Mena saw in the car when it pulled up in front of the liquor store, for admittedly he was in Beaulieu's car. The trial judge, of course, was not required to accept as true appellant's testimony that he was asleep because of his obvious self-interest. His statement that "We were just riding around" belies his story that he was asleep.

When appellant was searched upon his arrest he had .45 caliber cartridges in his right front pocket. The shells were the same caliber as those used in the weapons found under the front seat of the car and these guns were identified as the same type as those used in the holdup. Fritz was seen to lean forward in his seat before the car was stopped and the guns were found under his seat. From these circumstances it is reasonable to infer that appellant knew of the unlawful activities of his companions. Appellant's explanation of the presence of the .45 caliber cartridges in his pocket challenges the credulity of any reasonable person.

[6] Without discussing the evidence further, it is apparent that it adequately justifies the inference that appellant aided and abetted Beaulieu and Fritz in the commission of the robbery by assisting them

in making a "getaway." See *People v. O'Keefe*, 138 Cal.App.2d 329, 291 P.2d 982.

[7] Since no appeal lies from a sentence, the purported appeal therefrom is dismissed. *People v. Douglas*, 141 Cal.App.2d 33, 296 P.2d 1.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



144 Cal.App.2d 487

Clara Myrtle D. BARKER, Plaintiff and Appellant,
v.

Mary CARVER, Jewel Giroux, Ilo Margaret Parr, also known as Ilo Mohr Parr, as Executrix of the Last Will and Testament of Raymond E. Parr, John Doe, Jane Doe, Doe Company, a corporation, and Doe & Co., a copartnership, Defendants.

Jewel Giroux, Ilo Margaret Parr, also known as Ilo Mohr Parr, as Executrix of the Last Will and Testament of Raymond E. Parr, deceased, Respondents.

Civ. 21491.

District Court of Appeal, Second District,
Division 1, California.
Sept. 18, 1956.

Action against plaintiff's sister and against plaintiff's former guardian and another for recovery of property allegedly belonging to plaintiff and never accounted for in a guardianship. The Superior Court, Los Angeles County, J. Howard Ziemann, J., sustained defendants' objection to introduction of any evidence, entered judgment for defendants and plaintiff appealed. The District Court of Appeal, White, P. J., held that where any of the frauds alleged in plaintiff's complaint could have been relieved by the court when plaintiff objected to the final account filed upon termination of her guardianship, and in fact were submitted to the court in such proceedings and decided adversely to plaintiff after presenta-

tion by her of all of her case, she could not relitigate the claimed frauds upon which she unsuccessfully relied in the guardianship proceedings, notwithstanding fact that two of the defendants in the action were not parties to the guardianship proceeding.

Judgment affirmed.

1. Judgment ⇐540

In determining the validity of a plea of res judicata three questions are pertinent, namely, was the issue decided in the prior adjudication identical with the one presented in the action in question, was there a final judgment on the merits, and was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication.

2. Appeal and Error ⇐714(2)

The District Court of Appeal is authorized to refer to the record of the case in a former appeal before it in determining a subsequent appeal involving the same plaintiff and same issues as the prior appeal.

3. Guardian and Ward ⇐163

Where plaintiff was a party to previous litigation as to the settlement of her guardianship account, and was bound by the decision therein, defendants in a subsequent action involving alleged fraud in such guardianship were not precluded by lack of privity or mutuality of estoppel from invoking the plea of res judicata against plaintiff even though they were not parties to the prior litigation.

4. Judgment ⇐441

Intrinsic fraud will not suffice to justify equitable intervention for relief from a judgment; instead, there must be a showing of extrinsic fraud.

5. Guardian and Ward ⇐163

Where any of the frauds alleged in plaintiff's complaint for recovery of property allegedly never accounted for in her guardianship could have been relieved by the court when plaintiff objected to the final account filed upon termination of her guardianship, and in fact were submitted to

the court in such proceedings and decided adversely to plaintiff after presentation by her of all of her case, she could not relitigate the claimed frauds upon which she unsuccessfully relied in the guardianship proceedings, notwithstanding fact that two of the defendants in the action were not parties to the guardianship proceeding.

Clara Myrtle D. Barker, in pro. per.

Louis Ballenger, Donovan Ballenger, Glendale, for respondent, Jewel Giroux.

John Ruskin Lane, Pasadena, Elber H. Tilson, Los Angeles, for respondent, Ilo Margaret Parr.

WHITE, Presiding Justice.

Plaintiff appeals from an adverse judgment in an action instituted by her against Mary Carver, plaintiff's former guardian, Raymond E. Parr, attorney for said guardian, and Jewel Giroux, sister of plaintiff, to "recover property belonging to appellant (plaintiff herein) that they have never accounted for to appellant (plaintiff) or to the court in the guardianship matter". Subsequent to the death of defendant Parr on November 29, 1954, Ilo Mohr Parr, as Executrix of his estate, was substituted as a party defendant.

The factual background surrounding this litigation may be thus epitomized: On July 24, 1944, plaintiff was committed to the General Hospital of Los Angeles County, and shortly thereafter was committed to the State Hospital at Camarillo, California. On July 14, 1944, defendant Mary Carver, a niece of plaintiff, filed a petition for appointment of herself as guardian of plaintiff Clara Myrtle D. Barker, and was thereafter regularly appointed and qualified as such guardian. The estate of said plaintiff was handled by said guardian and through regular procedure was eventually administered, and the accounts of said guardian were settled, attorney's fees allowed, and the proceedings finally terminated in the court below. An appeal was taken by plain-

tiff herein "from the judgment on Final Account" and from the order "denying motion for a new trial". This court affirmed the judgment, *In re Guardianship of Barker*, 100 Cal.App.2d 69, 223 P.2d 64. Petition for hearing was denied by the Supreme Court on December 18, 1950.

The action involved in this appeal was filed on November 21, 1949, while the matter of guardianship of Barker just referred to was on appeal. Thereafter, an amended complaint was filed and eventually a supplemental complaint wherein the Estate of Parr was substituted for Raymond E. Parr, deceased. Raymond E. Parr during his lifetime, appeared as attorney for the guardian, Mary Carver, in the guardianship proceedings. In the present case a motion to dismiss for lack of prosecution was filed for the defendant Jewell Giroux and later a similar motion was filed on behalf of defendant Ilo Mohr Parr, Executrix of the estate of defendant Raymond E. Parr, deceased. Both motions were denied.

This cause was finally called for trial on June 24, 1955. Defendant and former guardian Mary Carver was never legally served with process and made no appearance. Plaintiff appeared in pro. per. and defendant Jewel Giroux and defendant Ilo Mohr Parr appeared with their attorneys. The record reflects that the following proceedings were thereupon had: "J. R. Arnold is sworn on behalf of the plaintiff and states his name. The defendants object to the introduction of any evidence on the ground that the supplemental complaint does not state a cause of action, that there has been no prosecution within five years, that the matter before the court is *res adjudicata*, and that the aduction of evidence would be violative of the 'Dead Mans Statute [Code Civ.Proc. § 1880]' as to the defendant Ilo Margaret Parr, Executrix". The cause was thereupon continued to June 27, 1955, at which time the court announced its decision as follows: "The Defendants' objection to the introduction of any evidence is sustained. All other defendants' motions are granted". Judgment was en-

tered accordingly and plaintiff prosecutes this appeal therefrom.

[1] Since we are satisfied that the court was correct in sustaining the plea of res adjudicata we shall first give consideration to that issue. "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (Citing cases.) *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892, 895.

The gist of appellant's complaint and amended supplemental complaint, is as stated therein, "that by virtue of the said appointment of the said defendant, Mary Carver, as Guardian, there came into the possession of *defendants* all of the assets, including equipment, supplies and good will, of the beauty parlor business owned by plaintiff at the time of the appointment as Guardian of said Mary Carver, and all of the personal effects, monies and properties belonging to plaintiff. * * *". (Emphasis added.) Then follows a list of the properties in question. The allegation is that all of the property and assets were delivered to the defendants in the instant action without any further specification, and of course one of the defendants was the guardian. The guardian was therefore responsible for the property constituting the estate and any adjudication as to her accounting was binding on appellant. There is no allegation in the pleadings involved herein, of extrinsic fraud. There is no new matter contained in the complaint or amended and supplemental complaint filed herein which could not have been adjudicated in the guardianship proceedings.

That the issues tendered on this appeal were decided adversely to appellant is evidenced by the language of this court in the former appeal, *In re Guardianship of Barker*, supra, wherein it is stated that

such appeal arose, "'* * * out of the appointment of a non-resident niece of appellant as her guardian, culminating in an arbitrary approval of her accounts, *notwithstanding the failure to account for various properties * * * and the manner in which she acted in respect to the properties * * **' The appeal is, in effect, a general and specific attack upon all steps taken in the guardianship proceedings from the original appointment to and including the settlement of the guardian's final account. * * *" (Emphasis added.)

[2] Referring to the record before this court on the former appeal as we are authorized to do, *In re Estate of Bruce*, 27 Cal.App.2d 44, 51, 80 P.2d 82; *Gackstetter v. Market St. Railway Co.*, 10 Cal.App. 2d 713, 716, 52 P.2d 998; *Hammell v. Britton*, 19 Cal.2d 72, 75, 119 P.2d 333; *Pailhe v. Pailhe*, 113 Cal.App.2d 53, 66, 247 P.2d 838, we find one of the objections urged therein was that, "Certain items of property were received by the guardian but were neither shown upon the inventory nor accounted for nor returned to the ward. These items include: (a) One trunk and its contents, now in the possession of Jewel Giroux." In the former proceeding appellant herein specifically litigated the questions of properties not mentioned or appraised by asserting that there was property in the possession of the guardian at the time of appointment, which should have been but was not inventoried or appraised.

[3] Appellant insists that respondents Parr and Giroux in the instant proceeding not having been parties, or in privity with a party, in the earlier litigation cannot now assert the plea of res adjudicata against her. This contention cannot be sustained. As was said by our Supreme Court in *Bernhard v. Bank of America*, supra, 19 Cal.2d at page 812, 122 P.2d at page 894: "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." Appellant having been

a party to the previous litigation and bound by the decision therein, respondents in the present case are not precluded by lack of privity or of mutuality of estoppel from invoking the plea of *res adjudicata* against her. It would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries. The cases of *In re Estate of Smead*, 219 Cal. 572, 28 P.2d 348; *Silva v. Hawkins*, 152 Cal. 138, 92 P. 72; and *People ex rel. Drew v. Rodgers*, 118 Cal. 393, 46 P. 740, 50 P. 668, relied upon by appellant were overruled in the case of *Bernhard v. Bank of America*, supra, 19 Cal.2d at page 813, 122 P.2d 892, to the extent that they are inconsistent with the views expressed therein.

[4, 5] Appellant attempts to invoke the principle of equitable relief enunciated in *Caldwell v. Taylor*, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194. But this case does not aid appellant. It is authority for the intervention of equity only when there is alleged and proven that by some fraud practiced directly upon the party seeking relief against a judgment or decree that party has been prevented from presenting all of his case to the court. In other words, there must be a showing of extrinsic fraud. Intrinsic fraud will not suffice to justify equitable intervention. In *United States v. Throckmorton*, 98 U.S. 61, 65, 25 L.Ed. 93, the court stated that the cases where the equitable relief sought by appellant herein would be granted are those in which "by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud and deception prac-

ticed on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. . (Citing authorities.)" In the case now engaging our attention there is no allegation in the pleadings, of extrinsic fraud. Nothing is complained of that could not have been adjudicated in the guardianship proceedings. Since any of the frauds alleged in the case at bar could have been relieved by the court in the guardianship proceedings, and in fact were submitted to the court in such proceedings and decided adversely to appellant after presentation by her of all of her case, she cannot now relitigate the claimed frauds upon which she unsuccessfully relied in the guardianship proceedings. It follows from what we have said that the lower court was not in error when it sustained respondents' plea of *res adjudicata*.

The foregoing conclusion at which we have arrived, renders it unnecessary to discuss or decide the other issues presented on this appeal.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

144 Cal.App.2d Supp. 860

PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Ingall W. BULL, Jr., Defendant and
Appellant.
Cr. A. 3495.

Appellate Department, Superior Court,
 Los Angeles County, California.
 Sept. 12, 1956.

Prosecution on charge of failing to yield right of way upon making a left turn at an intersection. The Municipal Court, Los Angeles Judicial District, V. P. Lucas, J., entered judgment of conviction and defendant appealed. The Superior Court, Appellate Department, Bishop, P. J., held that complaint failed to state a public offense and that evidence failed to show defendant was guilty of any offense.

Reversed with directions.

1. Automobiles ⇨335

Under statute providing that driver of vehicle within intersection intending to turn to left shall yield right of way to any vehicle approaching from opposite direction which is within intersection or so close thereto as to constitute an immediate hazard, the words "approaching from opposite direction" apply not only to vehicle which is within intersection but also to automobile which is so close as to constitute an immediate hazard. West's Ann.Vehicle Code, § 551.

2. Automobiles ⇨335

Statute regulating left turn at intersection deals with vehicles approaching from opposite direction and so supplements statute which treats of vehicles entering from different highways and statute which regulates automobiles entering intersection from a through highway. West's Ann. Vehicle Code, §§ 550, 551 and subd. (a), 552.

3. Automobiles ⇨351

Complaint charging that driver of vehicle within intersection intending to turn

to the left wilfully and unlawfully failed, refused and neglected to yield right of way to vehicle approaching from opposite direction which was within intersection and to vehicle which was so close as to constitute an immediate hazard failed to state offense of failing to yield right of way upon making left turn at intersection. West's Ann.Vehicle Code, § 551.

4. Automobiles ⇨335

Where southbound driver turned left in intersection while all other automobiles involved were headed north and were standing opposite driver and back of crosswalk, driver did not violate statute providing that driver of vehicle within intersection intending to turn left shall yield right of way to any vehicle "approaching" from opposite direction which is within intersection or so close thereto as to constitute an immediate hazard. West's Ann. Vehicle Code, § 551.

See publication Words and Phrases, for other judicial constructions and definitions of "Approaching".

Ingall W. Bull, in pro. per.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

BISHOP, Presiding Judge.

The defendant was convicted on a charge of failing to yield the right of way upon making a left turn at an intersection. The complaint failed to state a public offense and the evidence did not show that a public offense had been committed. The consequence, of course, is a reversal of the judgment against the defendant.

The facts are not in dispute. The defendant, southbound in the most easterly of the three southbound lanes on Fairfax Avenue (Los Angeles City) was halted by a red traffic light while "straddling the cross walk" on the north side of the intersection of Fairfax with Beverly Boulevard. During the period that the red light controlled the traffic, three cars, head-

ed north, filled the three lanes on the side of Beverly, opposite the defendant and back of the cross-walk. When the red light changed to green the defendant put his car in motion and was in the intersection before any of the cars opposite him began to move. Indeed, it was not made to appear that any of them moved before the defendant had completed his turn and was on his way out of the intersection.

[1,2] The statutory law upon which the prosecution depends is subsection (a) of section 551, Vehicle Code, providing: "The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle *approaching* from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard." [The emphasis is ours.] It may be argued that the words "approaching from the opposite direction" should be understood as applying only to a car "which is within the intersection", so that the correlation of ideas is: "any vehicle [1] approaching from the opposite direction which is within the intersection or [2] so close thereto as to constitute an immediate hazard." Were this an acceptable interpretation we would affirm the judgment, for we entertain no doubt that the trial court would have been warranted in concluding that the three cars awaiting the "go" signal constituted an immediate hazard. The more natural and the correct reading of the provision, we submit, is this: "any vehicle approaching from the opposite direction which [1] is within the intersection or [2] so close thereto as to constitute an immediate hazard." Thus read, section 551 deals with vehicles approaching from the opposite direction, and so supplements section 550, which treats of vehicles entering from different highways and section 552, concerned with cars entering an intersection from a through highway.

[3] We conclude, therefore, that the complaint fails to state a public offense,

applicable to the situation of interest to us, when it charged that the defendant "was the driver of a vehicle within an intersection of highways intending to turn to the left, who wilfully and unlawfully failed, refused, and neglected to yield the right of way to a vehicle approaching from the opposite direction which was within the intersection and to a vehicle which was so close thereto as to constitute an immediate hazard." Whoever drafted the complaint departed from the language of the statute and by inserting "and to a vehicle" but omitting "approaching from the opposite direction" charged that which was not made an offense by section 551 (or any other statute).

[4] It must be concluded, further, that the evidence failed to show that the defendant was guilty of any offense. There was, of course, no car other than the defendant's within the intersection and none that might be said to be approaching, as the defendant made his left turn. This is so, because all others, involved, were stationary and so not approaching. It would be a contradiction in terms to say that a *standing* car was *approaching*. But the word is used in the statute, and may not be discarded. " * * * it is presumed that every word, phrase and provision employed in a statute was intended to have some meaning and to perform some useful office, [authorities cited]. And any construction should be avoided which implies that the legislature was ignorant of the meaning of the language so employed, or that it used words in vain * * *." *Prager v. Isreal*, 1940, 15 Cal.2d 89, 93, 98 P.2d 729, 731.

The judgment is reversed with directions to dismiss the complaint, for the purpose of filing an amended complaint if the People are so advised.

PATROSSO and KAUFFMAN, JJ., concur.

144 Cal.App.2d Supp. 854

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Lawrence Charles THOMPSON, Defendant
and Appellant.

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Roberta THOMPSON, Defendant and
Appellant.

C. A. 3480, 3481.

Appellate Department, Superior Court,
Los Angeles County, California.

Sept. 4, 1956.

Defendants were convicted upon charges of violation of statute proscribing the unlawful use or addiction to the unlawful use of narcotics. The Municipal Court of the Los Angeles Judicial District, Byron J. Walters, J., imposed sentence on each defendant, and defendants appealed. The Appellate Department of the Superior Court, Bishop, P. J., held that where jurors were instructed that they could find defendants guilty, even though defendants were not in fact addicted to unlawful use of narcotics, if defendants had used narcotics, and that no proof of place of use was needed if defendants had been picked up by police in city, instruction was erroneous on matter of proof of venue.

Judgments and orders denying motions for new trial reversed.

Appeals from non-appealable orders dismissed.

Motion for reporter's transcript, and other matters, denied.

1. Poisons ⚡4

Under statute providing that no person shall unlawfully use or be addicted to the unlawful use of narcotics, and that any person convicted of violating statute is guilty of misdemeanor, and in view of statutory definition of "addict", as person who unlawfully uses, or is addicted to the

unlawful use of, narcotics, legislature has effectively made it a misdemeanor for a person either to make unlawful use of narcotics, or to be addicted to the unlawful use; one is an act, the other is a condition or status; they are not identical. West's Ann.Health & Safety Code, §§ 11000-11797, 11009, 11721.

See publication Words and Phrases, for other judicial constructions and definitions of "Addict".

2. Poisons ⚡4

Statute defining "addict", as person who unlawfully uses, or is addicted to the unlawful use of, narcotics, has given artificial meaning to "addict", for it has put that label not alone on one who is addicted, but also on one who is an unlawful user, even though he has not become addicted, that is to say, even though, in fact, he is not an addict. West's Ann.Health & Safety Code, §§ 11009, 11721.

3. Criminal Law ⚡772(4)

Where municipal court jurors were instructed that they could find defendants guilty of violation of statute proscribing the unlawful use or addiction to unlawful use of narcotics, even though defendants were not, in fact, addicted to unlawful use of narcotics, if defendants had used narcotics, and that no proof of place of use was needed if defendants had been picked up by police in city, instruction was erroneous on matter of proof of venue. West's Ann.Health & Safety Code, §§ 11000-11797, 11009, 11721.

4. Criminal Law ⚡798

Where proof of either of two facts constitutes the offense charged, jury should be instructed that all twelve must agree that one fact or other is established; it will not do for some of jurors to agree on existence of one fact, and others conclude that other fact alone was established. West's Ann.Health & Safety Code, § 11721.

5. Criminal Law ⚡736(1)

Question whether or not arresting officers had reasonable cause to make arrest

should be answered by trial court, and not left in whole or in part to jury.

6. Criminal Law §671

Testimony of officer that informant had told him that defendants were narcotic users, though properly received on issue of legality of arrest, should not have been allowed to reach ears of jurors. West's Ann. Health & Safety Code, § 11721.

7. Criminal Law §1023(8)

Order denying motion in arrest of judgment is not appealable.

8. Criminal Law §1023(1)

Order denying motion re bail is not appealable.

Samuel C. McMorris and Walter L. Gordon, Jr., Los Angeles, for appellants.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., and Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

BISHOP, Presiding Judge.

We find ourselves compelled to reverse the judgments because of an erroneous instruction, twice given, concerning the proof of venue. As will appear, the error was not technical, but adversely affected a proper defense.

The identical charges in these cases were based upon these provisions of section 11721 of the Health and Safety Code: "No person shall unlawfully use or be addicted to the unlawful use of narcotics. * * * Any person convicted of violating any provision of this section is guilty of a misdemeanor * * *." We should also have before us this irrelevant definition from section 11009 of the same code: "Addict," as used in this division, [sections 11000-11797] means a person who unlawfully uses, or is addicted to the unlawful use of, narcotics." Making a mixed use of these two code sections the complaint, in each of the cases under review, charged that the defendant, "on or about

November 15," "at and in Los Angeles City," "was then and there a person who did wilfully and unlawfully use and be addicted to the unlawful use of narcotics."

[1] Certain conclusions appear to us to be inescapable. The legislature has effectively made it a misdemeanor for a person either (a) to make unlawful use of narcotics or (b) to be addicted to the unlawful use. One is an act, the other is a condition or status. They are not identical. It is as though a statute made it a public offense either to take a drink or be drunk in a public place. A person may make unlawful use of narcotics (for a short time) without becoming or being addicted to the use. He may, while addicted to the use, be in a city where he cannot obtain any narcotic and so does not make use of it there. As stated in *Palmer v. Spaulding*, 1949, 299 N.Y. 368, 370, 87 N.E.2d 301, 302: "'Addicted' is not a word of art. It is not a technical word at all. According to the lexicographers, it means strongly disposed to some taste or practice or habituated, especially to drugs. But resort to dictionaries in situations like that now before us has for some reason been judicially deprecated at times and so we go on to the case law where occasions for defining the word 'addicted' have often occurred in the course of controversies respecting applications for insurance. Thus in *Aetna Life Ins. Co. v. Davey*, 123 U.S. 739, 742, 8 S.Ct. 331, 332, 31 L.Ed. 315, the court said: 'The inquiry as to whether the insured had ever been addicted to the excessive or intemperate use of alcoholic stimulants, and, whether, at the time of the application, he used alcoholic stimulants "often or daily," was, in effect, an inquiry as to his habit in that regard; not whether he used such stimulants or opium at all, but whether he used any of them habitually. If he was addicted to the excessive use of them, he was habitually intemperate; and to use them often or daily is, according to the ordinary acceptance of those words, to use them habitually.' Law writers ascribe to 'addicted' the same significance. Mr. Appleman says: 'After all, a

man is either temperate or intemperate, and in common parlance, a man is not intemperate unless he frequently drinks to excess. Even more elastic is the word "addicted." This, also in layman's language, means a slave to'".

[2] We think that it is clear that the legislature has given an artificial meaning to "addict", for it has put that label not alone on one who is addicted, but also on one who is an unlawful user even though he has not become addicted, that is to say, even though, in fact, he is not an addict. We do not question the right of the legislature to make use of the word in this partially artificial way, but we wish to emphasize that nowhere is it declared that it is a misdemeanor to be an addict, nor was that term used in either complaint to charge a public offense against the defendants. Significantly, this was not always so. A reading of the sections that touch our problem, sections 11009, 11720 and 11721, from the Statutes of 1939, p. 755 et seq., through Stats.1941, p. 17 et seq. and Stats.1945, p. 1839 et seq., reveals that at first punishment was prescribed for "narcotic addicts," who, by definition, were addicts in fact. Some purpose must have been in the minds of the legislators to have substituted the present provisions for those originally adopted. As already noted, the present statute makes it a misdemeanor either to unlawfully use or to be addicted to the unlawful use, and that they fell in both classes, was the charge made against the defendants.

The trial court overlooked the facts we have just stated when it undertook to instruct the jury about the meaning of "addict", a word with which they were not concerned. This statement of the trial court was correct enough, as applied to sections 11000-11797 of the Health and Safety Code: "Now, an addict means a person who unlawfully uses or is addicted to the unlawful use of narcotics. Now, the use of these words by the Legislature, defining the narcotic addict, in so far as it applies to this case means as follows: An addict is one who unlawfully uses

narcotics whether or not he is an addict, in fact."

It may be, that had the instructions gone no further, no prejudicial error would be presented, but they did not stop here. A bit later the jurors were advised: "Now, there has been a theory of the defendant throughout this trial concerning what the defendants term 'venue.' It is obvious from the definition of the term 'addict,' as I have just given it to you, that if you find the defendants, or either of them, as you consider each case separately, were apprehended in the City of Los Angeles and that if you further find that any such defendant unlawfully used narcotics, then you are advised that the proper venue has been established in his case." Some time later, after the jury had begun its deliberations, it interrupted them to seek the trial court's further instruction. The foreman spoke: "The jury would like clarification of your instructions on venue. In other words, is it necessary that the act of taking narcotics be proved to have occurred in the County of Los Angeles?" To which the trial court replied: "Under the former instructions of the Court, if you find that the defendants, or either of them, were addicts within the meaning of the instructions of the Court and the interpretations placed upon this status by the Court, the answer is no."

[3] Plainly, the jurors were advised by the instructions given them, that they could find the defendants guilty even if they were not, in fact, addicted to the unlawful use of narcotics, provided they had used them, and that no proof of the place of use was needed if—as was the undoubted fact—they had been picked up by the police in Los Angeles City. But the last part of this advice was bad law. The decision of the San Diego Appellate Department, in *People v. Garcia*, 1953, 122 Cal.App.2d Supp. 962, 266 P.2d 233, that a judgment, following a conviction on a charge of unlawfully using narcotics, had to be reversed because the place of use was not established by a preponderance of the evi-

dence, is fully supported by the cases cited in the opinion.

The evidence was such that the jury might very well have concluded that neither defendant was, at any time involved in this case, in fact addicted to the use of narcotics, but that the case turned on that part of the charge that they had unlawfully used it. Their inquiry of the court concerning venue is consistent, to say the least, with this theory. A "not guilty" verdict because the only use shown by a preponderance of the evidence was outside of Los Angeles, was made impossible by the trial court's combined instructions on the meaning of "addict" and the effect of the arrest within the boundaries of the city.

[4] Two other errors were committed and should be avoided on a new trial. Where, as in this case, the proof of either of two facts constitutes the offense charged, the jury should be instructed that all twelve must agree that one fact or the other is established; it will not do for part of them to agree on the existence of one fact, the rest of them concluding that the other fact alone was established. *People v. Scofield*, 1928, 203 Cal. 703, 710, 265 P. 914; *People*

v. McMillan, 1941, 45 Cal.App.2d Supp. 821, 830, 114 P.2d 440, 445; *People v. Dutra*, 1946, 75 Cal.App.2d 311, 321-322, 171 P.2d 41, 47.

[5, 6] If, as appears likely, the question shall again be presented whether or not the arresting officers had reasonable cause to make the arrest, its determination should be made by the trial court and not left in whole or part to the jury. *People v. Gorg*, 1955, 45 Cal.2d 776, 780-781, 291 P.2d 469, 471-472. The testimony of the officer that an informant told him that the defendants were narcotic users, although properly received on the issue of the legality of the arrest, should not have been allowed to reach the ears of the jurors.

[7, 8] In each case the judgments and the order denying the defendant's motion for a new trial are reversed; the appeals from the non-appealable orders denying the motion in arrest of judgment and re bail are dismissed; the motion of the defendant for a reporter's transcript, and other matters, is denied.

PATROSSO and KAUFFMAN, JJ.,
concur.

144 Cal.App.2d 531

Application of William J. McNALLY for a Writ of Habeas Corpus.**Cr. 3279.**District Court of Appeal, First District,
Division 2, California.

Sept. 20, 1956.

Hearing Denied Oct. 17, 1956.

Habeas corpus proceeding for enforcement of claimed rights. The District Court of Appeal, Draper, J. pro tem., held that where points raised by petition had been determined adversely to petitioner in other proceedings or were wholly without merit, writ would be denied but that prisoner was entitled to order restoring civil rights to extent of permitting him to engage counsel for defense of civil action.

Order to show cause discharged and petition denied in all respects save to restore civil rights to limited extent of permitting prisoner to engage counsel for defense of civil action.

1. Convicts ☞6

One imprisoned is still liable to be sued, and this liability necessarily carries with it the right to defend, but the prisoner is not entitled to be personally present at any part of the proceedings. West's Ann.Pen.Code, § 2600.

2. Convicts ☞6

Prisoner in state prison was entitled to restoration of civil rights to extent of permitting him to engage counsel for defense of pending civil action. West's Ann.Pen.Code, § 2600.

3. Habeas Corpus ☞25(1)

Habeas corpus was appropriate remedy for enforcing right of state prisoner to restoration of civil right to extent of permitting him to engage counsel for defense of pending civil action. West's Ann.Pen.Code, § 2600.

William J. McNally, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M.

301 P.2d—25

Momboisse, Deputy Atty. Gen., for respondent.

DRAPER, Justice pro tem.

Petitioner is an inmate of San Quentin Prison. By this writ of habeas corpus he seeks enforcement of a number of claimed rights. Petitioner alleges that he has been named as defendant in a civil action brought in Los Angeles County, that he applied to the Adult Authority for restoration of his civil rights to the extent of permitting him to engage named counsel for defense of that action, and that such application was denied. None of these allegations is controverted.

"A sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced * * *. But the [Adult Authority] may restore to said person during his imprisonment such civil rights as the board may deem proper," with exceptions not material here. Pen.Code, § 2600.

[1] One imprisoned is still liable to be sued, and "this liability necessarily carries with it the right to defend." *People v. Lawrence*, 140 Cal.App.2d 133, 295 P.2d 4, 6. This right is qualified by the rule that the prisoner is not entitled to be personally present at any part of the proceedings. *People v. Lawrence*, supra; *In re Bagwell*, 26 Cal.App.2d 418, 420, 79 P.2d 395.

[2, 3] It follows clearly that the prisoner is entitled to representation by counsel in such a civil proceeding. Certainly his right to defend would be wholly illusory if, lacking the right to be present in person, he could also be denied the right to employ counsel. Thus the application for limited restoration of rights should have been granted.

"The writ of habeas corpus has been allowed to one lawfully in custody as a means of enforcing rights to which, in his confinement, he is entitled." *In re Chessman*, 44 Cal.2d 1, 9, 279 P.2d 24, 29 and cases cited.

It is therefore ordered that the civil rights of petitioner be and he deemed restored to the limited extent of permitting him to employ counsel to present his defense in the civil action described in his petition.

The other points raised by the petition have been determined adversely to petitioner in other proceedings. *People v. McNally*, 134 Cal.App.2d 410, 285 P.2d 716; *In re McNally*, 46 Cal.2d 307, 293 P.2d 777, or are wholly without merit. In all respects save that outlined above, the order to show cause is discharged and the petition denied.

NOURSE, P. J., and KAUFMAN, J., concur.



144 Cal.App.2d 591

**William F. STEIGERWALD, doing business
as Asbestos Products Co., Plaintiff and
Respondent,**

v.

**John GODWIN, Defendant and Appellant.
Civ. 5189.**

District Court of Appeal, Fourth District,
California.

Sept. 24, 1956.

Action against a general contractor for construction of certain school buildings to recover amount stipulated in subcontract for plaintiff's completion of roofing work on buildings. Defendant filed a counterclaim for damages because of a fire, not covered by defendant's insurance policies, during construction work. From a judgment of the Superior Court of San Diego County, Joe L. Shell, J., denying recovery on the counterclaim, defendant appealed. The District Court of Appeal, Burch, J. pro tem., held that demands in counterclaim, based on plaintiff's employees' negligence in causing fire,

were not available to defendant after his assignment to his insurer of all his claims for such damages by subrogation receipt for sum paid him by insurer and were abated by insurer's federal court actions against subcontractor on assigned claims and judgments on jury's verdicts for insurer therein.

Judgment affirmed.

1. Contracts ⇨316(1)

A roofing subcontractor's willingness to forego collection of debt due him under subcontract until later date, as accommodation to general contractor for construction of school buildings, pursuant to understanding that general contractor would not pay subcontractor until termination of federal court actions by general contractor's insurer, as such contractor's assignee and subrogee, against subcontractor for damages by fire, caused by subcontractor's employees' negligence, during construction work, did not constitute waiver of general contractor's obligation to subcontractor.

2. Release ⇨35

Neither insured nor insurer may split cause of action for damage to insured's property and bring action therefor against tort-feasor after his release on payment of damages recovered in previous action against him by insured, and insurer failing to protect its right of subrogation cannot be heard to complain.

3. Insurance ⇨606(1)

Release ⇨4

An insurer, by subrogation, acquires all of insured's rights of action against third-party tort-feasor, and release obtained by him with knowledge of such subrogation rights will not avail him.

4. Abatement and Revival ⇨8(1)

Action ⇨53(1)

A party may not split up a single cause of action and make it basis of separate suits, but if he does, first action may be pleaded in abatement of subsequent suit on same claim, as defendant should be protected against vexatious litigation and it is

against public policy to permit litigants to consume court's time by relitigating matters already judicially determined or asserting claims which properly should have been settled in prior action.

5. Insurance ⇨606(1)

Under rule against splitting cause of action, a general contractor for construction of school buildings cannot recover from roofing subcontractor damages caused by fire during construction work under counterclaim in subcontractor's action against general contractor on subcontract after general contractor's assignment to his insurer of all his rights against subcontractor by subrogation receipt, even if it conveyed only rights covered by insurance; general contractor, as insured, and his assignee as subrogated insurer, being "privies" and same parties under statute. West's Ann.Code Civ.Proc., § 1910.

6. Abatement and Revival ⇨12

Insurance ⇨606(1)

In sub-contractor's action against general contractor for construction of school buildings to recover amount stipulated in sub-contract for completion of roofing work, demands in defendant's counterclaim for damages by fire, caused by negligence of plaintiff's employees during construction work, were not available to defendant after his assignment of all his claims for such damages to his insurer by subrogation receipt in consideration of insurer's payment of insured's claims under policy, and were abated by insurer's prior federal court actions against subcontractor on assigned claims; such actions being for same negligence and damages as counterclaim.

7. Contracts ⇨355

In roofing subcontractor's action against general contractor for construction of school buildings, where Superior Court found that plaintiff fully performed subcontract, and defendant's counterclaim for damages by fire caused by plaintiff's employees during construction work failed of proof because of attempt to split single cause of action for violation of a right which was litigated and fully settled and

compromised in federal court action against subcontractor by general contractor's insurer as his assignee and subrogee, plaintiff was entitled to judgment for stipulated price of work performed by him.

Oakes & Horton, San Diego, for appellant.

Edwin C. Jeffries and Luce, Forward, Kunzel & Scripps, San Diego, for respondent.

BURCH, Justice pro tem.

Plaintiff sues on a written contract to recover \$5,243, the amount stipulated in the contract for the completion of the roofing work in new construction on school buildings in Lakeside, California. The defendant is the general contractor on said construction. Defendant's answer admits the obligation on the contract and sets up a counterclaim for items of damage in the total sum of \$1,671.59, which items were incurred in demolition work and otherwise following a destructive fire during the course of the construction work and were not covered by defendant's insurance policies.

Defendant appeals from a judgment in favor of plaintiff which denied recovery on the counterclaim. The court found that evidence produced at the trial proved the fire resulted from the negligence of plaintiff's employees but that the issue had been adjudicated in favor of plaintiff in certain actions brought in the United States District Court of Southern California, Southern Division, by defendant's insurers as assignees of defendant and subrogated to defendant's rights by reason of the payment of defendant's claims against plaintiff for negligently causing the fire. It was found by the court that the fire occurred on July 1, 1952, in the course of plaintiff's work and that defendant was damaged in the amounts claimed. It was also found that plaintiff completed his roofing subcontract and rendered to defendant his bill for performance on January 26, 1953. The court further found

that the fire resulted from the negligence of plaintiff's employees but that plaintiff's negligence had been litigated previously and was res judicata. Finding V reads:

"The Court further finds that any and all claims of defendant arising out of said fire and damage were, prior to the commencement of this action, assigned to General Accident Fire and Life Assurance Corporation, Ltd., on its behalf and on behalf of the other fire insurance companies which had insurance on the said building construction project and that prior hereto all said claims were settled and compromised by the said insurance companies."

It was also found that the insurance companies brought actions on the assigned claims against plaintiff in the Federal Court for the Southern District of California, Southern Division.

Defendant does not dispute the findings stated, except as hereafter noted, nor other findings that the jury rendered a verdict for plaintiff in the federal court action on the assigned claims and that a judgment was entered thereon. He does contest further findings of the trial court that the judgment was res judicata in the present action on the issue of negligence and that the plaintiffs there are in privity with the defendant here, and a further finding of the trial court that an account stated was proved for \$5,243.

In the actions by the insurance companies against plaintiff for the fire losses, judgment went for plaintiff following a verdict in his favor. A motion for a new trial was noticed but before a hearing was had, the judge indicated to counsel his intention to grant the motion. At this point, the parties to those actions compromised and settled their claims. Thereupon counsel for the insurance companies agreed that the actions be dismissed and furnished releases to opposing counsel therefor. Defendant, on being informed of this action, made known his refusal to release the plaintiff because of the matters now in suit.

As a result of this refusal, the dismissals were not filed and the record in the federal court showed at the time of trial that the motion for a new trial was denied and that the judgment for plaintiff was duly entered. Mr. Godwin, defendant here, was not a party named but actively participated in the cases in federal court. Counsel for plaintiff here also represented him in the insurers' actions. He testified that he conferred with counsel for the companies, who also represents the defendant in the present action; that because of Mr. Godwin's asserted claim and refusal to release, he proposed to take full advantage of the verdict and judgment should future litigation arise because of defendant's claim.

Counsel for defendant testified that so far as he recalled, he first learned of defendant's claim against plaintiff at the time the insurance cases were settled.

The issues litigated in the federal court, it was evidenced, include the essential issue of negligence to support the counterclaim.

The propriety of the trial court's conclusion that the maintenance of the insurance cases in the federal court on claims assigned by defendant, together with the compromise and settlement of those claims, was ground for abatement of this action, governs the disposition of this appeal.

The fire occurred on July 1, 1952. Plaintiff finished his roofing job and rendered the defendant his statement for \$5,243 on January 26, 1953. The assignment by way of receipt on subrogation was dated August 8, 1952. As far as material, it provides as follows:

"Subrogation Receipt

"Received of the General Accident Fire & Life Ins. Co. Company the sum of Four thousand, seven hundred eighty-seven and 88/100 Dollars (\$4,787.88) in full satisfaction of all claims and demands of the undersigned against the said company under its policy No. 562254 arising from or connected with any loss or damage by reason of Hot tar bucket accidentally

spilled and communicated to Building which loss or damage occurred on or about the 1st day of July, 1952.

"In consideration of and to the extent of said payment, the undersigned hereby subrogates, assigns and transfers to the said company all the rights, claims, demands and interest which the undersigned has or may have against any parties for said loss or damage, and said company is hereby authorized and empowered to sue, compromise or settle same in the name of the undersigned or otherwise, but for the sole use of said company and at its own cost. * * * and said company is hereby constituted the attorney-in-fact for the undersigned for said purposes and to sign releases * * * that may be necessary in the prosecution, litigation or settlement of said claims * * * The undersigned has not released and will not release any portion of said claims. * * *

This document is signed by defendant and the Lakeside Union School District.

[1] Defendant alleged as affirmative matter in his answer that the parties had "an understanding" that defendant would not pay plaintiff his bill until the federal court litigation, begun June 11, 1953, was terminated. This litigation terminated in February, 1955, which is also the time in which the plaintiff's present action was filed.

We do not think that plaintiff's willingness to forego the collection of the debt due him until the later date, as an accommodation to defendant, constituted a waiver of defendant's obligation to him. That evidence might bear upon the finding of an account stated but it does not effect the questions of abatement by the assignments, splitting the cause of action, and the compromise and settlement of the claims.

[2, 3] As to these questions, a situation somewhat similar occurred in *Kidd v. Hillman*, 14 Cal.App.2d 507, 58 P.2d 662.

The defendant was charged with negligence in causing an automobile collision and was sued therefor by the victim. Damages were recovered and the defendant given a release. The victim was insured and the insurance company instituted a further action in the name of the victim after judgment in the prior action. Two grounds of decision are pertinent here, 14 Cal.App.2d at page 510, 58 P.2d at page 663:

"* * * an insured may not split his cause of action, and the insurer is in no better position than the insured. * * * She cannot now pursue appellant [after releasing the tortfeasor] in another action for damage to her property arising out of the same accident. * * *

"Appellant has been subjected to two actions. He should not be harassed by a third. It was the duty of the insurer to protect its right of subrogation, assuming it had such right. Not having done so, it cannot now be heard to complain."

The *Kidd* case is also authority for the proposition that by subrogation the insurer acquires all the rights of action of the insured and a release obtained with knowledge of subrogation rights would not avail the tort-feasor. Citing *Bernhard v. Del-luitante*, 5 Cal.App.2d 585, 43 P.2d 338.

[4] *Wulfjen v. Dolton*, 24 Cal.2d 891, 151 P.2d 846, was an action for damages for fraud. The court carefully defined the reasons underlying the rule against splitting a cause of action. We quote from page 894 of 24 Cal.2d, page 848 of 151 P.2d of the opinion:

"It is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim."

The court then states the reasons for the rule 24 Cal.2d at page 895, 151 P.2d at page 848:

"(1) That the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action. Thus, it is said in *Bingham v. Kearney*, supra, 136 Cal. [175] at page 177, 68 P. [597] at page 597: 'It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated. Neither will the law allow the parties to trifle with the courts by piecemeal litigation.'"

[5] The subrogation receipt by its terms conveyed away any and all rights of defendant against plaintiff. But if it were interpreted to convey only the rights covered by the insurance, defendant is met with the rule against splitting a cause of action. Defendant, as the insured, and his assignees, as subrogated insurers, are "privies" and the same parties under section 1910 of the Code of Civil Procedure. *California State Auto. Ass'n v. Brunella*, 14 Cal.App.2d 464, 58 P.2d 694.

[6] The counterclaim in this action is based on plaintiff's negligence in causing the fire and the damages sought to be recovered in the federal action were for the same negligence, and, moreover, the same damages. We conclude that defendant's demands in his counterclaim are no longer available to him by the assignment and they are abated by the prior actions.

[7] The setoffs alleged in the counterclaim are not proved. They fail because of an attempt to split a single cause of action for the violation of a right. This right has not only been litigated but fully settled and compromised in the federal court action. We deem it unnecessary to consider whether or not there has been an account stated. 4 Cal.Jur.2d, Appeal and Error, p. 382, sec. 531; *Colorado Corp., Ltd. v. Smith*, 121 Cal.App.2d 374, 377, 263 P.2d

79, 81. In the case last cited the court says: "Since these findings alone support the judgment, it is unnecessary to discuss the sufficiency of the evidence to support the remaining findings." We conclude that the judgment is supported by the findings that the plaintiff fully performed his contract and since the counterclaim fails of proof, plaintiff is entitled to judgment for the stipulated price of the work performed.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



144 Cal.App.2d 588

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Abel Torres GAMBOA, Billie Jean Tercero
and Rudolfo Murus Casarez, Defendants,
Abel Torres Gamboa, Appellant.
Cr. 5542.

District Court of Appeal, Second District,
Division 1, California.
Sept. 24, 1956.

Proceedings on a petition for writ of error coram nobis. From an order of the Superior Court of Los Angeles County, Clement D. Nye, J., denying the petition, the petitioner appealed. The District Court of Appeal, Fourn, J., held that the writ is not proper vehicle for vindicating constitutional rights and may not be used to challenge legality of evidence admitted on trial of criminal action.

Affirmed.

1. Criminal Law — 1081

Even though notice of appeal from denial of petition for writ of error coram nobis was not timely filed, reviewing court

would consider matter on merits where attorney general had made no motion to dismiss appeal and it appeared (1) that defendant, who had been confined in state prison when his petition was filed, had attached thereto a notice of appeal with a request that the clerk file the same in event his petition for writ of error *coram nobis* was denied and (2) that such purported notice had been found premature. West's Ann.Rules on Appeal, rule 31.

2. Criminal Law §997(1)

Office of writ of error *coram nobis* is to bring to attention of trial court errors of fact which, without negligence on part of defendant, were not presented to court at time of trial.

3. Criminal Law §997(2, 6)

A writ of error *coram nobis* never issues to correct error of law or to redress an irregularity occurring at trial which could be corrected on motion for new trial or by an appeal.

4. Criminal Law §997(2)

Writ of error *coram nobis* cannot be used to serve purpose of appeal when that remedy was lost through failure to invoke it in time, even though such failure occurred without fault or neglect on part of one seeking remedy.

5. Criminal Law §997(5)

A writ of error *coram nobis* is not proper vehicle for vindicating constitutional rights.

6. Criminal Law §997(4)

Writ of error *coram nobis* may not be used to challenge legality of evidence admitted in trial court.

This case commenced with a filing of an information by the District Attorney of Los Angeles County charging the defendant Gamboa and two other defendants with violation of section 11500 of the Health and Safety Code and alleging that the defendants, on the 8th day of November, 1954, had in their possession a preparation of heroin. A prior felony conviction and service of a term of imprisonment therefor was alleged as to Gamboa, namely conviction of grand theft. A prior narcotic conviction was charged as to the co-defendant Casarez.

The defendants were represented by counsel and were duly arraigned and made a motion under section 995 of the Penal Code, which motion was denied as to Gamboa. A co-defendant, Tercero, entered a plea of guilty at such time. Defendants Gamboa and Casarez entered pleas of not guilty and denied the prior convictions alleged. The matter proceeded to trial, the People's case being submitted on the preliminary transcript, and the trial court adjudged each defendant guilty and found the prior convictions true.

Gamboa's application for probation was denied and he was sentenced to the state prison for the term prescribed by law. It was ordered that the sentence run concurrently with any time owing on parole. Judgment was entered March 24, 1955. No appeal was taken from the judgment.

On or about August 22, 1955, there was filed in the superior court a document entitled "Petition for writ of error *coram nobis*, writ of habeas corpus, recall of remittitur and for the order to show cause why the writ or writs should not be granted."

In his petition the defendant Gamboa alleged that he was illegally charged with joint possession of narcotics and that the defendant's constitutional guarantees were violated when the officer entered and searched him and co-defendants without a warrant. The petition for writ of error *coram nobis* was denied on August 23, 1955. A purported notice of appeal filed

Abel Torres Gamboa, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from an order denying defendant's petition for writ of error *coram nobis*.

at the same time as the petition was found to be premature and of no force and effect. The clerk was thereupon directed to send a certified copy of the order to Gamboa at the state prison at Represa.

Thereafter, on the 7th day of September, 1955, there was filed with the Clerk of the Superior Court a document entitled "Notice of Appeal". This document bore a postmark at Represa of September 1, 1955. It would appear that the defendant filed his notice of appeal from the order of denial of his petition at a time beyond the period provided in the Rules on Appeal (Rule 31, Rules on Appeal).

[1] Since appellant was confined in the state prison at Represa and since, when his petition was filed in the superior court, appellant attached thereto a notice of appeal requesting the Clerk of the Superior Court to file the same in the event his petition for writ of error *coram nobis* was denied and the court found said notice of appeal to be premature, we are nevertheless disposed to consider the matter on the merits. *People v. Olgin*, 137 Cal.App.2d 286, 290 P.2d 77; *Mendez v. Superior Court*, 137 Cal.App.2d 465, 466, 467, 290 P.2d 270. While it is true appellant made no showing to excuse the delayed filing, neither did the attorney general move to dismiss the appeal, contenting himself with calling the matter to our attention when he filed his brief in reply to appellant's opening brief. Had a formal motion to dismiss been made, appellant would have had an opportunity to present the reasons for the belated filing of his notice of appeal.

[2] Repeatedly it has been said that the writ of error *coram nobis* is a limited writ aimed at reaching errors of fact outside of the record and is available only where no other remedies exist. The office of the writ is to bring to the attention of the trial court errors of fact, which, without negligence on the part of the defendant, were not presented to the court at the time of trial. *People v. Tuthill*, 32 Cal.2d 819, 821, 198 P.2d 505; *People v. Gennaitte*, 127 Cal.App.2d 544, 548, 274 P.2d 169.

[3] A writ of error *coram nobis* never issues to correct an error of law or to redress an irregularity occurring at the trial which could be corrected on motion for a new trial or by an appeal. *People v. Martinez*, 88 Cal.App.2d 767, 771, 199 P.2d 375.

[4] It is very well settled that where the remedy of the motion for a new trial or appeal exists, the writ is not available. And the writ cannot be used to serve the purpose of an appeal when this remedy was lost through failure to invoke it in time, even though such failure occurred without fault or neglect on the part of the one seeking the remedy. *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325; *People v. Pryor*, 87 Cal.App.2d 352, 353, 196 P.2d 948.

In this instance the appellant did not state a ground entitling him to the issuance of a writ of error *coram nobis* and therefore the appeal is without merit. If the petition be deemed a petition for habeas corpus, the appellant improperly directed the petition. He could not apply to the court below for "Recall of Remittitur".

[5] The writ of error *coram nobis* is not the proper vehicle for vindicating constitutional rights. *People v. Adamson*, 34 Cal.2d 320, 327, 210 P.2d 13.

[6] The writ of error may not be used to challenge the legality of evidence admitted in the trial court. It has been settled that a charge that evidence was illegally obtained does not support an application for writ of error *coram nobis*. *People v. Collins*, 136 Cal.App.2d 756, 757-758, 289 P.2d 302.

It is our opinion that the defendant has stated no ground entitling him to a writ of error *coram nobis*, and that the action of the trial court in denying the petition was proper.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

144 Cal.App.2d 578

Cite as 301 P.2d 393

**BANK OF AMERICA NATIONAL TRUST
& SAVINGS ASSOCIATION, Plaintiff
and Respondent,**

v.

**E. A. TALIAFERRO, Defendant and
Appellant.
Civ. 16934.**

District Court of Appeal, First District,
Division 2, California.

Sept. 24, 1956.

Action by bank, as assignee of conditional sales contract, for conversion of refrigerator by defendant. The Superior Court, County of Contra Costa, Thomas Coakley, J., entered judgment for bank and defendant appealed. The District Court of Appeal held that objection that assigned conditional sales contract was inadmissible as hearsay because not executed by any of the parties to the action, was insufficient to raise question of validity of its execution, and by introduction of contract into evidence, bank made a prima facie case of its title and right to possession and cast burden on defendant to prove an interest from conditional vendee sufficient to constitute defense against claim of conversion.

Affirmed.

1. Evidence ⇨314(1), 318(1)

Written or oral utterances which are not merely statements or assertions offered as evidence of truth of what is stated, but acts in themselves constituting legal results in issue in the case, do not come under hearsay rule.

2. Evidence ⇨318(1)

Where assignee of conditional sales contract brought action for conversion of refrigerator covered by contract against person other than purchaser, conditional sales contract and the assignment on the back thereof were not subject to hearsay rule.

3. Trial ⇨149

Where party does not question the due execution or delivery of a contract, it

is a waiver of such objection and an admission of genuineness, equivalent to proof thereof.

4. Appeal and Error ⇨231(7)

Objection that contract was hearsay, incompetent, irrelevant and immaterial was insufficient to reserve for purpose of appeal the ground of lack of foundation or lack of proof of due execution, notwithstanding appellant's cursory reference in stated objection to a contract purportedly signed by certain person.

5. Trial ⇨83(1)

Objection to admission of evidence must be made in a manner that clearly informs the court of point on which a ruling is desired and the proponent of the defect to be corrected.

6. Sales ⇨475

In action by assignee of conditional sales contract for conversion of property subject to such contract by one other than conditional purchaser, where evidence showed that contract was acquired by assignee by virtue of undated assignment and purchaser named therein failed to make any payment according to the contract, there was sufficient proof of assignment prior to conversion when it could be inferred from the testimony that the bank became entitled to possession of refrigerator on day after first payment was due under contract and that assignment had taken place prior to such date.

7. Landlord and Tenant ⇨161(1)

Where tenant failed to pay rent due and vacated premises, in which she left a refrigerator, landlord had a right to remove and store refrigerator.

8. Landlord and Tenant ⇨161(1)

Where landlord took possession of a refrigerator left on premises vacated by tenant who had failed to pay his rent, landlord became a bailee of the refrigerator and held under tenant as bailor.

9. Sales ⇨480(4)

In action by assignee of conditional sales contract for conversion of refriger-

ator removed from premises by landlord after tenant, the conditional purchaser, had vacated premises without paying rent, both assignee and landlord claimed a common source of interest, and by introduction of unperformed conditional sales contract assignee made out a prima facie case of title and right to possession and shifted burden to landlord to prove interest from another source sufficient to constitute a defense against assignee's claim of conversion.

10. Sales ◊480(4½)

In action by assignee of conditional sales contract for conversion of refrigerator covered by such contract, whether evidence proved identity of refrigerator taken by defendant and the one mentioned in the contract was a question of fact.

E. A. Taliaferro in pro. per.

H. H. Bechtel, George Chadwick, Jr.,
Oakland, for respondent.

PER CURIAM.

This is an appeal by defendant from a judgment for \$200, the stipulated value of a Frigidaire refrigerator, found to have been converted by him. The action was originally brought in Justice Court as an action in claim and delivery. Counterclaims which caused it to be transferred to the Superior Court are not involved in the appeal. A motion to amend the complaint to allege conversion was there granted. The appeal is restricted to two points: (1) Insufficiency of the evidence to show that plaintiff was owner of the refrigerator and entitled to its possession; (2) Insufficiency of the evidence to show that the refrigerator allegedly taken by defendant was the one of which plaintiff claimed ownership.

Plaintiff, herein further called the Bank, based its claim on an assignment by seller of a conditional sales contract dated March 26, 1952 by which a certain Ruth Sheffield bought a specific refrigerator from said seller, Wiseman's. The contract was received in evidence, over defendant's ob-

jection, to be discussed later. The contract, made on a printed form of the Bank, provided for payment of the installments to the Bank, the first to be made on May 9, 1952 and on its reverse contained the assignment to the Bank for value received (sale) of the contract and the property therein described. Mr. Bruner, an employee of the Bank, testified without objection that said contract was acquired by the Bank, that the purchaser failed to make any payment and that on May 10, 1952, the Bank under the contract became entitled to the possession of the refrigerator.

The contract provided also that the refrigerator was accepted and would be kept by purchaser at 2607 Standard Avenue, San Pablo. The evidence showed that this property was owned by defendant and that Ruth Sheffield was the tenant of a downstairs apartment in it. She vacated the apartment in August 1952 as a result of a three days notice served on her by defendant because of a delinquency in rent. When she left she took everything she had in the apartment with her except a refrigerator. She told a neighbor, Mrs. Vanderveer, that she wasn't able to pay for it, that Wiseman's was to pick it up and that she wanted Mrs. Vanderveer to watch for it. (The testimony of Mrs. Vanderveer to this effect was admitted without objection.) Ruth Sheffield had shown her her new refrigerator in her apartment and she had seen it there also the night Ruth Sheffield moved. The next afternoon she saw it moved out of the back door of the apartment and loaded on a pick-up truck by men of whom she recognized two as named employees of defendant and the driver as a brother of defendant. She took pictures of the event which were received in evidence. A brother of defendant, Richard Taliaferro, testified that at the time Sheffield moved out they moved a refrigerator out of her apartment which looked like a new one, he thought a Frigidaire. He was then working for his brother next to the apartment house. The witness' truck was used in removing the refrigerator, driven by his brother David. Two or three

months thereafter defendant said to him and David: "I got a stool pigeon working for me somewhere. Somebody told the Bank where the refrigerator is." Defendant then told his employee Brown that he wanted the refrigerator moved the next morning.

Appellant's contention that the written conditional sales contract with assignment was not a proper part of the record is without merit. Before the contract had been actually offered appellant made the following objection: "we'll make the objection that this is purportedly signed by a party by the name of Ruth Sheffield as buyer, and Wiseman's as seller, and insofar as that is concerned, that is a contract between two parties who are not in as parties to this suit, and it would be hearsay insofar as the defendant to the suit is concerned. In other words, this party was not present or participating in the transaction, and it would be hearsay, incompetent, irrelevant and immaterial." (Ruth Sheffield had originally been made a party defendant, but was dismissed as such at the trial because she could not be found.) The objection was overruled subject to motion to strike. After Mr. Bruner had testified as stated the contract was offered in evidence but only marked for identification. At the end of the trial the contract was received in evidence over defendant's renewed objection as follows: "I am going to make the same objection to the contract, that I think it's hearsay involving two parties that are not part of this matter." Said objection was then overruled. No further evidence with respect to the contract had been received except that defendant in cross-examining Mr. Bruner brought out that the witness had not seen the contract signed by Ruth Sheffield or by Florine Beardsley (who signed for Wiseman's).

[1,2] The objection that the contract with the assignment was hearsay was correctly overruled. Utterances, written or oral, which are not merely statements or assertions offered as evidence of the truth of what is stated, but acts in themselves

constituting legal results in issue in the case, like in our case the conclusion of the conditional sales contract and the assignment do not come under the hearsay rule. 31 C.J.S., Evidence, §§ 260-261, pp. 1012-1014; VI Wigmore on Evidence, §§ 1766, 1768(3), 1770; Jones on Evidence, 3d Ed., § 300; Security Trust & Savings Bank v. Carrier, 107 Cal.App. 333, 336-337, 290 P. 458; Melkon v. H. B. Kirk & Co., 232 App. Div. 134, 249 N.Y.S. 229; Kansas City Southern Ry. Co. v. Keffer, 96 Okl. 63, 220 P. 361, 362; Naylor v. Washtenaw Circuit Judge, 250 Mich. 698, 231 N.W. 85, 88; Claggeet v. Chicago M. & St. P. Ry. Co., 156 Minn. 37, 193 N.W. 957; Republic Creosoting Co. v. Foulkes Contracting Co., 103 Ind.App. 457, 8 N.E.2d 416, 417.

[3-5] Appellant urges on appeal that the introduction of the contract required the laying of a proper foundation by showing of due execution and delivery. It is true that, if such objection had been made in the court below, it would have been good. Ten Winkel v. Anglo California S. Co., 11 Cal.2d 707, 720, 81 P.2d 958. However, if the opponent does not question the due execution or delivery (Genuineness) by objection, such is a waiver of the objection and an admission of genuineness, equivalent to proof thereof. The ground of the rule is that the proponent would have had opportunity to obviate the objection if it had been made at the trial. VII Wigmore, supra, 576; Burnett v. Lyford, 93 Cal. 114, 117, 28 P. 855; Shain v. Sullivan, 106 Cal. 208, 211, 39 P. 606; Burke v. Watts, 188 Cal. 118, 127, 204 P. 578; French v. Atlas Milling Co., 17 Cal. App. 226, 227-228, 119 P. 203; Tilden Lumber & Mill Co. v. Bacon Land Co., 116 Cal.App. 689, 692, 3 P.2d 350. The objection that the evidence is hearsay, incompetent, irrelevant and immaterial is insufficient to reserve for purpose of appeal the ground of lack of foundation or of lack of proof of due execution. Burke v. Watts, supra. Appellant contends that his cursory reference to a contract *purportedly* signed sufficiently expressed his intention to object for lack of foundation. We do

not agree. An objection must be made in such a manner that it clearly informs the court of the point on which a ruling is desired and the proponent of the defect to be corrected. The defect of lack of foundation was not so pointed out. That appellant's attorney was himself not clearly aware of said objection is shown by the fact that when he restated his objection at the end of the trial, no reference whatever to lack of foundation was made, not even by implication. It must be noted that because of the ruling subject to motion to strike (which was not made) and the admission of the contract for identification only the first objection and ruling were preliminary and the last objection and ruling the decisive ones.

[6] Appellant contends that there is no evidence that the assignment had taken place prior to the time of the conversion, because the assignment is not separately dated. However, it can be inferred from the testimony of the witness Bruner, received without objection, that the contract was acquired by the Bank, that the purchaser named therein failed to make any payment and that according to the contract the Bank of America became entitled to possession of the refrigerator named on May 10, 1952, that the assignment had taken place prior to said date. (Such is in accord with the normal procedure with respect to such contracts, which are immediately assigned to the financing company; the form used shows the same intention as it provides for execution in triplicate, the original to go to the Bank, and reserves room for one date for the transaction only.)

[7-9] Appellant further contends that the contract at any rate does not prove that Wiseman's, from whom the Bank derived what title and right of possession it had, originally had title; as no other proof of the title of Wiseman's was offered, the Bank's proof of right is said to be insufficient. The contention is technical and unsound. Appellant as landlord had the right to remove and store the refrigerator left

by Ruth Sheffield on the premises. 52 C.J.S., Landlord and Tenant, § 790, p. 713. By taking possession appellant became bailee of the refrigerator, holding it under Ruth Sheffield as bailor. 8 C.J.S., Bailments, § 15, pp. 249-250. As to Ruth Sheffield, who possessed the refrigerator under the written contract from Wiseman's, no proof of the title of Wiseman's was required, 31 C.J.S., Estoppel, §§ 127-128, pp. 395, 396, if the action was brought by Wiseman's and also if it was brought by the Bank, as Wiseman's was the common source of the interests of the Bank and of Ruth Sheffield. Cf. *Central Nat. Bank of Oakland v. Bell*, 5 Cal.2d 324, 328-329, 54 P.2d 1107. Appellant, as bailee of Ruth Sheffield, is in the same position. It makes no difference that appellant did not claim under Ruth Sheffield, but preferred not to show the weakness of his hand and to rely on denials only, as the Bank's evidence shows his dependence on the interest of Ruth Sheffield. By doing so the Bank made out a prima facie case, after which the defendant had the burden of proving an interest from another source, sufficient to constitute a defense against the Bank's claim of conversion. Cf. *Blume v. MacGregor*, 64 Cal.App.2d 244, 254 et seq., 148 P.2d 656; *Wagner v. Blume*, 71 Cal.App.2d 94, 102, 161 P.2d 1001. No proof of any kind was offered by defendant.

[10] Whether the evidence stated proved the identity of the refrigerator taken by appellant and the one mentioned in the contract is a question of weight decided by the trial court against appellant. No proof of identity of number was essential. It can certainly not be said that no inference of identity could reasonably be drawn therefrom; whether it should be drawn was then solely for the trier of facts. *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868.

The sufficiency of the evidence to show acts of conversion is not attacked. The secretion of the refrigerator and the continued refusal to return it evidently suffice.

Judgment affirmed.

144 Cal.App.2d 466

Willard F. PETERSEN et al., Plaintiffs
and Respondents,

v.

R. D. LANG et al., Defendants and
Appellants.

Civ. 16901.

District Court of Appeal, First District,
Division 2, California.

Sept. 17, 1956.

Rehearing Denied Oct. 17, 1956.

Action to recover for services alleged to have been performed at the request of defendants in connection with development of a supermarket. The Superior Court, Marin County, J. F. Good, J., rendered judgment for the plaintiffs and defendants appealed. The District Court of Appeal, Kaufman, J., held that where findings of trial court were based on an implied contract to pay the reasonable value of services rendered and other findings precluded such a judgment, and it was not possible to determine which findings the judgment was based on, the judgment would be reversed.

Judgment reversed.

1. Work and Labor ⇨28(2)

In action for services alleged to have been performed at the request of defendants in connection with the development of a supermarket, evidence was insufficient to support finding that defendants had verbally employed plaintiffs to prepare or assist in preparing a design for a market.

2. Work and Labor ⇨28(2)

In action for services alleged to have been performed at request of defendants in connection with the development of a supermarket, evidence was sufficient to support a finding that plaintiffs had prepared or assisted in preparing leases.

3. Work and Labor ⇨28(2)

In action for services alleged to have been performed at request of defendants in connection with the development of a supermarket, evidence was insufficient to support finding that defendants had agreed to

pay plaintiffs an amount equal to reasonable value of services rendered in assisting defendants in finally executing a lease with the prospective tenants and discontinuing solicitation of other prospects.

4. Appeal and Error ⇨1071(1)

If findings on either an express contract or an implied contract are sufficient to support judgment, findings on unsupported count may be disregarded, but if findings do not have sufficient clarity so that it is possible to determine what the theory of the trial court may have been, the judgment cannot stand.

5. Work and Labor ⇨5(1)

Where no fixture salesman was given exclusive right to choose tenants for a market owner, there was no obligation on the part of the market owner either contractual or moral to compensate fixture salesmen for service which they were rendering primarily to promote contracts between themselves and the proposed tenant.

6. Contracts ⇨56

If oral contract obligated plaintiffs to assist defendants in getting certain prospective tenants for a supermarket signed to leases and to desist in soliciting others, and if defendants made contract under belief that plaintiffs' influence would be an important factor in closing the deal with the prospective tenants, there would be a sufficient consideration to support defendants' promise to pay.

7. Damages ⇨118

If there is a valid express contract, recovery must be measured by its terms.

8. Appeal and Error ⇨1071(1)

In action to recover for services alleged to have been performed at request of defendants in connection with development of a supermarket, where evidence supported finding that defendants had orally employed plaintiffs and would have supported finding of implied promise to pay reasonable value of services but did not support finding that there was an express agreement to pay reasonable value of serv-

ices, uncertainties and apparent conflict in essential findings required reversal of judgment.

McFarland, Laumeister & Ferdon, San Francisco, for appellants.

Gardiner, Riede & Elliott, San Rafael, for respondents.

KAUFMAN, Justice.

Defendants appeal from a judgment rendered in favor of plaintiffs in the sum of \$5,940, in an action brought to recover for services alleged to have been performed at the request of defendants and appellants in connection with the development of a supermarket in San Francisco. The action is based on counts II and IV of the first amended complaint, counts I and III having been dismissed on motion of plaintiffs.

Count II of the complaint alleged that appellants doing business as Lang Construction Company owned certain real property in San Francisco upon which there is presently constructed the "Alemany Super Market"; that appellants verbally employed respondents to prepare or assist in preparing a design for a commercial structure of the kind now existing on appellants' premises, and that they also then employed respondents to find and assist in getting tenants signed up on leases therefor. It was further alleged that respondent, Willard Petersen, was engaged in the business of selling marketing equipment to persons conducting food markets, and that in endeavoring to procure tenants for said supermarket, respondent with the knowledge and consent of appellants, R. D. Lang, Jr., and Boyd R. Lang, endeavored to procure contracts with said tenants for the fixture business; that he procured the tenants, Angelo and Vincent Nicolai, Vincent and Raymond Palmmini and Roy Beckman who were willing to lease the entire premises. Respondent was unable, however, to secure a contract for the market equipment from these prospective tenants, and it is alleged, appellants were so informed. Respondents advised appellants that they could secure other tenants

with whom they could negotiate a contract for such business. It is then alleged that appellants agreed that if respondents would consummate the lease with the above named prospective tenants and refrain from soliciting others, appellants would pay respondents a commission for all of their services to be computed on the amount of profit respondent would otherwise have made if he had procured the fixture contract, and that such reasonable profit was \$12,000; that respondents proceeded to consummate a lease with the aforementioned tenants, hence appellants are indebted to respondents in the sum of \$12,000.

The fourth count of the amended complaint re-alleged the principal paragraphs of count II with the exception of the paragraph concerned with the special contract to refrain from soliciting other tenants and help conclude negotiations with the first five prospective tenants. It alleged that all of said services had been performed at the special instance and request of appellants, and were of the reasonable value of \$12,000.

Respondent Willard Petersen had been in the business of promoting supermarkets since 1946. His usual procedure was to find a suitable location for such a market, then contact the owners of the property to find out if they would be willing to construct such market providing suitable tenants could be found. Respondent would then proceed to find such tenants, and would write fixture contracts with them. Leases would be executed between the tenants and the property owner. Respondents' compensation was always secured from profit on the fixture contracts with the tenants. Respondent Petersen, who also held a general contractor's license, would begin by drawing up floor plans for a market, showing thereon the space for each department and placement of fixtures.

The Lang brothers, appellants therein, were associated in the real estate business, and employed a salesman, Mr. Evans, who was a brother-in-law of respondent Petersen. Petersen also had office space at Lang Realty in San Francisco. He too held a

real estate salesman's license under a San Anselmo broker, the other respondent herein, Columbus Pierce.

In 1951, while concerned with the promotion of the Cal Mart, another supermarket in which the Langs were interested, the matter of developing the Alemany Super Market was first discussed. Respondent saw each of the five prospective tenants who were later accepted, between ten and fifteen times, and two general meetings with the group were held at the Lang office. The group talks began with discussion of placement of fixtures, and led up to the matter of respondents' selling them. The plans which respondent prepared for the layout of fixtures was, he testified, the plan ultimately used by the tenants. Petersen was, however, unable to secure the fixture contract from these tenants on a basis that would be satisfactory to him. It was the custom of fixture men in endeavoring to promote a deal, to prepare drawings of the premises showing the layout of fixtures. Petersen himself testified that the preparation of such drawings is customary with fixture men in the promotion of markets. Lang testified that it was common practice to work with fixture men in finding out about tenants, and that he contacted several to let them know that the market was available. Respondent stated that the placement and the type of fixtures in the completed market were with minor changes the same as recommended in his design. Lang admitted that Petersen had worked with him in the design and assisted in the drawing up of sketches, but claimed that respondent has done no more than some of the other fixture men.

Appellants had owned the Alemany property for about two years prior to 1951, and were anxious to get something developed on it. Respondent Petersen began looking for tenants in the summer of 1951. Lang admitted that he expected that Petersen and other fixture men to whom he gave the plan would be out looking for prospective tenants for him. Rudy Lang was aware of respondent's negotiations with the five

prospective tenants and had given his approval.

Boyd Lang testified that one meeting of the prospective tenants was held in Petersen's office in the rear of the Lang Realty Company, that on this occasion Petersen and Baher, a partner of Petersen's, were present, as well as Jerry Evans, Lang's salesman. The terms of the lease were discussed at this meeting. Such a lease was ultimately entered into by these tenants.

Petersen testified that he first put Evans in touch with these tenants. He stated that Evans was to handle the real estate end of the deal, and respondent the fixture end when negotiations were first begun concerning the Cal Mart. Evans was not very active, according to respondent, in connection with the Alemany deal. Three of the tenants of Cal Mart were also three of the five tenants who signed the lease for the Alemany market. Petersen learned in the process of fixturizing the Cal Mart that he could not get an exclusive right to fixturize a market, as the tenants would not stand for that sort of agreement.

After negotiating between this group of tenants and the appellants, respondent Petersen found that they were not going to buy their fixtures from him. He then told appellants that he could get other tenants who would buy from him, and with whom he was negotiating for leases. Appellants, however, wished to keep the first group of tenants because of their sound financial position. Rudy Lang told respondent Petersen that "rather than lose them he felt that he would rather pay us." Lang wanted respondents to continue and not interfere with present negotiations, and that if they would rather pay them the profit they would make on the fixtures rather than lose these tenants. He said he would pay them such profit if they would abstain from trying to get other tenants. One of appellants testified that this conversation did not occur but in his deposition stated that he didn't believe that there was such a conversation, but that it "could have happened." Peter-

sen testified that he did cease other negotiations as requested which made it possible for them to consummate the lease, and that it was likely that the lease would not have been possible if respondents had not so acted, as appellants had had several possible tenants up to the point of signing who had "backed up."

Respondent Petersen testified that the minimum cost of fixturing on this market was \$60,000, and that the normal profit expected by fixture men on such contracts is from 17 to 19 per cent.

The case was reopened for further testimony on the reasonable value of the services rendered, following a memorandum opinion by the trial judge indicating that a percentage of the real estate commission on such a lease would probably be a measure of reasonable value. Testimony was offered that such a commission would be in the sum of \$5,940. The judgment in favor of respondents was entered for that sum.

Appellants contend that the findings of the trial court are indefinite, inconsistent, fail to disclose the basis for the decision, and are not supported by the evidence. The contention has merit and finds support in the record as hereinafter pointed out.

[1] Finding IV which finds all the allegations of paragraph XIII of the first amended complaint to be true is attacked as unsupported by the evidence. That paragraph of the complaint alleged that defendants verbally employed plaintiffs to prepare or assist in preparing a design for a market. Appellant is correct in stating that there is no evidence to support such a promise. There is evidence that respondent as well as others in this line of business were contacted to submit plans to appellants and were asked to contact prospective tenants. Respondent's own evidence, as well as that of other witnesses, is to the effect that men in the market fixture business customarily solicited prospective tenants for market owners in order to get the fixture business for themselves, and that they looked to the profit on such contracts with tenants for all of their compensation. Respondent

Petersen himself testified that appellants had given him no guarantee that he had the exclusive right to select the future tenants. There was also evidence that Mr. Evans, a brother-in-law of Petersen, was the leasing agent for appellants. There is no evidence of an *employment* of respondents in the preliminary stages of the market development. Respondents were assisting appellants to find tenants in order that respondents might profit by selling equipment to said tenants.

[2] Finding V finds that respondents "prepared, or assisted in preparing leases." Respondent Petersen testified that Rudy Lang wanted him to continue and not to interfere with the negotiations with the five prospective tenants, that after that conversation he sat in on the next meeting with the prospective tenants "where some of the finer points were brought out on the building and the differences, what the tenants wanted and what the Langs needed, and from that time on we did nothing, we just dropped out of the picture." Viewing this testimony most favorably to the respondents it may be said that it is subject to the interpretation that they participated in preparations concerned with the terms of the lease. It is true that Petersen testified that he did not prepare the lease that was ultimately signed on November 20, 1950, but this could mean that he did not actually assist in the mechanical work of drafting it. It appears, therefore, that there is evidentiary support for the finding.

[3] In finding VII, the trial court stated that defendants "would pay to said plaintiffs an amount equal to the reasonable value of said services." It was Petersen's testimony that appellants had promised him the profit that he would have made if he could have secured the fixture contract in return for his assistance in concluding the deal with the five tenants which appellants desired instead of the new prospects suggested by him. Petersen's co-partner, Baher, testified that Rudy Lang had pointed out the financial soundness of these tenants when Petersen had suggested the others

with which he could do business. He reported that Lang said "don't lose them * * * and we will pay you the profit that you derive off of these fixtures, this fixture business." Baher also testified that Petersen had three other prospective tenants from whom he was practically certain of getting the fixture business and that the sum of \$60,000 for said fixtures was agreeable to one of them.

It is apparent from the findings that the trial judge believed that a promise to pay had been made to respondents for not upsetting the final signing up of these financially desirable tenants. It is clear that he disbelieved the testimony that the profit on a fixture contract was to be the measure of the compensation. There is, of course, no direct evidence in the record as to what price was agreed upon by appellants in return for respondents' favorable attitude toward the five tenants and their discontinuance of negotiations with others. There is certainly no direct evidence that they expressly agreed that appellants would pay respondents an "amount equal to the reasonable value of said services." Having found that the profit was not agreed upon as the measure of compensation, the court then goes on to find that "it is not true that the reasonable profit plaintiffs would have made, if they had procured such contracts for said fixture business * * * was or is in the amount of \$12,000, but the same was or would have been equal to or in excess of \$5,940." The only testimony supporting the sum of \$5,940 is that such a sum would be a real estate salesman's commission on the lease which was executed by appellants and the five tenants. This sum is in no way related by the evidence herein to the profit on a possible fixture contract.

This finding apparently attempts to find that an express contract was entered into to pay respondents' compensation for assisting appellants in finally executing a lease with the highly prized prospective tenants, and for discontinuing solicitation of other prospects. It is, however, contradictory in

certain respects and in other respects, as noted above, is unsupported by the evidence if it is to be interpreted as stating that there was an express agreement that reasonable value of the services was the measure of compensation.

[4] If the findings on either the express contract or the implied contract are sufficient to support the judgment, the findings on the unsupported count may, of course, be disregarded. *Baird v. Ocequeda*, 8 Cal.2d 700, 67 P.2d 1055. *But if the findings do not have sufficient clarity so that it is possible to determine what the theory of the trial court may have been, the judgment cannot stand.* *Block v. D. W. Nicholson Corp.*, 77 Cal.App.2d 739, 176 P.2d 739; and see, *Andrews v. Cunningham*, 105 Cal. App.2d 525, 233 P.2d 563.

Had the trial court found that the appellants requested respondents to assist in securing the lease with the five tenants offering to pay them, that the respondents accepted by cooperating in the securing of these tenants, and that the measure of compensation not having been agreed upon, the reasonable value thereof was impliedly promised, the finding would be supported. The sum of \$5,940 could also be supported as the reasonable value, for if respondents' services in the final stages of negotiations were considered by appellants as indispensable to securing the execution of the lease, then it is not unreasonable to measure that service by the standard of a real estate commission.

Paragraph VIII of the findings states that all allegations of paragraph XVII of the complaint are true except that the reasonable value of the services is \$5,940. That paragraph of the complaint alleged that the services rendered by plaintiffs "as hereinabove set forth and the aforementioned oral agreement" were of the value of \$12,000.

Finding IX finds all allegations of paragraph XXI of the complaint true except that the reasonable value was \$5,940. This paragraph alleged that all of the services

above were performed at the special instance and request of defendants. Paragraph XVI of the second count relating to the oral agreement discussed just above, was not re-alleged in this count.

The court finally found that Petersen first contacted the tenants who were accepted, that he first developed the market plans and first brought this program to the attention of defendants, that during the development of the plans and negotiations of leases, defendants promised they would pay plaintiffs the reasonable value of all of plaintiffs' said services if leases were consummated with the present tenants of Alemany Super Market and if plaintiffs would refrain from soliciting other tenants from whom they anticipated a profit on the sale of fixtures; that as a result of such promises and discussions, leases were negotiated with the present tenants and plaintiffs complied with the requests and terms of defendants and actively assisted in procuring the present tenants; that defendants are unjustly enriched by the use of such services and equity requires that defendants pay to plaintiffs the reasonable value of such services.

[5] Appellant contends that prior to the alleged oral undertaking of defendant Rudy Lang there was no obligation either express or implied on the part of appellants. According to respondents' testimony the drafting of designs and layouts for placement of fixtures and the contacting of prospective tenants for market owners was customarily done by fixture men who looked to fixture contracts with such tenants for all of their compensation. Therefore, when as in the present case, no fixture man was given an exclusive right to choose tenants for a market owner, there was no obligation on the part of the market owner either contractual or moral, to compensate the fixture salesman for service which they were rendering primarily to promote contracts between themselves and the tenants.

Respondents maintain that the general rule that where services which are valuable

are rendered by one to another and accepted, there is a presumption of an implied promise to pay the reasonable value thereof, citing *Fancher v. Brunger*, 94 Cal.App. 2d 727, 211 P.2d 633; *Shepherd v. Perea*, 98 Cal.App.2d 518, 220 P.2d 776; *Lazzarevich v. Lazzarevich*, 88 Cal.App.2d 708, 200 P.2d 49; *Lloyd v. Kleefisch*, 48 Cal. App.2d 408, 120 P.2d 97. None of the situations involved in those cases was similar to that herein, where the evidence is uncontradicted that both parties up to the point of the alleged oral agreement, assumed that any compensation for respondents' work would arise out of contracts which respondents hoped to make with a third party. The case of *Geisenhoff v. Mabrey*, 58 Cal.App.2d 481, 137 P.2d 36, is concerned with an implied promise to pay for promotional services, but in that case a written agreement which was unenforceable against some of defendants, showed the intention that plaintiff was to be paid for his services. The Restatement of Restitution, sec. 107, p. 450, states that "In the case of services, the inference of a promise to pay may be rebutted * * * by the fact that such services when rendered under like circumstances customarily are given without compensation." It has been said that the question which must be determined in each case is "whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered". *Crane v. Derrick*, 157 Cal. 667, 109 P. 31, 33; and, see, *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464; *Eklund v. Eklund*, 76 Cal. App.2d 389, 173 P.2d 50.

[6] In regard to the alleged oral contract requiring respondents to assist in the final negotiations with the five tenants and desist from soliciting others, appellant argues that there was no intention that the parties enter into an express contract. The evidence discussed above discloses sufficient intention to enter into an express contract. There is testimony from which it can be inferred that appellants believed respondents' influence was an important factor in

closing the deal with these tenants, and this would be sufficient consideration to support their promise to pay respondents.

[7] It is urged by appellants that if the language attributed to appellant Rudy Lang may be construed as an express undertaking, it was likewise for an express consideration binding upon respondents. That express consideration, they say, was the profit respondents would have made from a contract with the five tenants first contacted by them, and respondent Petersen testified that respondents could not make any money out of a contract with these tenants, and did not even bid on the contract. The testimony, while somewhat ambiguous, seems subject to the interpretation that appellants would pay the profit respondents would have received if they could have substituted other tenants with whom they could do business. However, the trial court's findings show that the court did not believe respondents' testimony that the payment was to be measured by profit on any contract. It is true that if there is a valid express contract, recovery must be measured by its terms. *Thacker v. American Foundry*, 78 Cal.App.2d 76, 177 P.2d 322. But here, although one of respondents testified that such profit was the measure of payment, the court did not believe him. The trial court evidently believed respondents' testimony that appellants expressly agreed to pay in return for the requests made of respondents. It is said in 12 Cal.Jur.2d 395 that where work is done under an express contract which does not specify the compensation to be paid, the law implies a promise to pay the reasonable value of the service. And, see, *Carney v. Hayter*, 62 Cal.App.2d 792, 145 P.2d 712; *Elconin v. Yalen*, 208 Cal. 546, 549, 282 P. 791.

[8] In finding VIII, the court found that plaintiffs' performance of services was made pursuant to the oral agreement referred to in the preceding paragraph of the findings, and that by reason of these services rendered pursuant to such agreement

defendants became indebted to plaintiffs in the sum of \$5,940, the reasonable value of said services. If paragraph VII of the findings could be construed to mean that the appellants promised to pay respondents for said services, and therefore the reasonable value is implied, those findings would then appear to be sufficient to support the judgment in the amount of \$5,940. The subsequent findings on the common count in the fourth cause of action base this same amount on the value of services rendered by respondents in first contacting these tenants, and drawing designs, etc. with no reference to the alleged oral contract, and as noted earlier herein, all such services, apart from the contract alleged in paragraph XVI of the complaint, were rendered without expectation of compensation from appellants.

Respondents cite section 1606 of the Civil Code to the effect that "a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation * * *." They point out that appellants had a moral, if not a legal, obligation to respondents for the promotion services rendered when they learned that respondents would not be compensated through securing contracts with these tenants. This moral obligation, they argue, was sufficient consideration to support the oral agreement for payment by appellants. The above section of the Civil Code has been construed in *In re McConnell's Estate*, 6 Cal.2d 493, 58 P.2d 639, 642, to mean that "a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once existed." And, see, *Foltz v. First Trust & Savings Bank*, 86 Cal.App.2d 59, 194 P.2d 135. However, the express agreement alleged to have been made herein does not necessarily depend upon past services for its consideration. There is evidence that appellants placed great value on respondents future conduct in regard to the desirable tenants, and that respondents

followed the course for which appellants bargained.

In view of the uncertainties and apparent conflicts in essential findings, the judgment must be reversed.

Judgment reversed.

NOURSE, P. J., and DRAPER, J. pro tem., concur.



144 Cal.App.2d 560

Irving L. BROOKS, Plaintiff and Appellant,

v.

Paul L. MUTH and Genevieve S. Muth, Defendants and Respondents.

No. 16803.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1956.

Rehearing Denied Oct. 24, 1956.

Hearing Denied Nov. 21, 1956.

Action between parties to joint venture contract for feeding and marketing of beef cattle, under which parties were to share gross profits as determined by "highest cash bid obtainable" for cattle unsold on certain date. The Superior Court, County of Santa Clara, W. W. Jacka, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where party, who sought to apportion losses which had allegedly occurred under joint venture agreement, failed to prove amount of highest bid that could have been obtained if oral bids had been appropriately sought, party failed to prove whether or not there was a profit or loss on the venture, and could not recover.

Judgment affirmed.

1. Animals ⇨22

Where ranchers, as parties to joint venture contract for feeding and marketing

of beef cattle, addressed separate writing to other party which provided that, with respect to paragraph of agreement providing for sharing of profits and ascertainment of amount of profits, in event of loss, ranchers agreed to pay other party 60 per cent of loss, this writing would be deemed part of contract.

2. Appeal and Error ⇨878(2)

Joint Ventures ⇨2

Where defendants did not appeal, they could not challenge finding that separate writing had been made integral part of parties' joint venture contract, and, in any event, two writings were properly read together in accord with applicable principles. West's Ann.Civ.Code, § 1642.

3. Animals ⇨22

Under joint venture contract for feeding and marketing of beef cattle, by terms of which parties were to share gross profits on basis of 40 and 60 per cent, as determined in manner provided, and under provision of separate writing, which became integral part of agreement, providing that in respect to paragraph of agreement providing for sharing and ascertainment of profits, in event of loss, ranchers would pay investor 60 per cent of loss, losses, if any, would be determined and shared in same manner and proportion as would profits, except that monthly payments made by investor pursuant to another paragraph of agreement would not enter into such calculation, because such payments, under agreement, could only be recouped out of profits.

4. Animals ⇨22

Under joint venture contract for feeding and marketing of beef cattle, by terms of which parties were to share gross profits as determined by "highest cash bid obtainable" for cattle unsold on certain date, party who handled bids at auction at ranch on that date breached contract by failing to take oral bids, which was customary and effective method of ascertaining highest cash bid obtainable.

5. Animals ⇨22

Mere fact that party to joint venture contract for feeding and marketing of beef cattle had failed to get highest cash bid obtainable for cattle at auction which he controlled, as required by contract, would not defeat his right to an accounting.

6. Joint Adventures ⇨4(1)

Not every default of a joint venturer operates to divest him of his interest in the property of the venture or of his right to an accounting.

7. Joint Adventures ⇨2

The contract rules which govern in the case of an ordinary contract do not invariably apply to cases of agreement involving the joint venture relationship.

8. Joint Adventures ⇨4(1)

The rights and liabilities of joint venturers, as between themselves, are governed by the same principles which apply to a partnership.

9. Partnership ⇨84

The failure of a partner to pay his full share of the cost of acquisition or upkeep of the common property does not necessarily terminate his interest in the enterprise.

10. Joint Adventures ⇨4(1)

A joint venturer may forfeit his rights by a material breach which, committed at the very threshold of the enterprise, renders it impossible for his associates to proceed, or when he fails to furnish materials essential to the enterprise and stipulated as a condition of the creation of the enterprise, or when he defaults in a material respect and abandons the enterprise.

11. Animals ⇨22

Where joint venture contract for feeding and marketing of beef cattle had been carried out except to divide profits or apportion losses, upon determination of "highest cash bid obtainable" for cattle unsold on certain date, fact that party who conducted auction, by taking only written bids, had failed to obtain highest cash bid obtainable would not preclude judicial inquiry and determination of amount of high-

est bid that could have been obtained, if evidence on that subject were available. West's Ann.Civ.Code, § 3353.

12. Animals ⇨22

Where party, who sought to apportion losses which had allegedly occurred under joint adventure agreement for feeding and marketing of beef cattle, failed to prove amount of highest bid that could have been obtained if oral bids had been appropriately sought, party failed to prove whether there was a profit or a loss on the venture, and could not recover.

13. Animals ⇨22

Fact that ranchers, as party to joint venture contract, for feeding and marketing of beef cattle, by terms of which parties were to share profits and apportion losses, had made their books and other records available to other party for inspection before trial of action between parties, did not disentitle other party to an accounting.

14. Animals ⇨22

Party to joint venture agreement for feeding and marketing of beef cattle, who had failed to prove overall profit or loss on venture, was not entitled to an accounting, where party's breach of contract precluded ascertainment of any offset to which other parties might have been entitled, and area of accounting had been considerably reduced by finding on other counts of complaint, and trial court had determined numbers of various classes of live stock originally purchased, and number which had died or were born during period of joint venture.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, Robert H. Fouke, Robert A. Wertsch, John Alfred Davis, San Francisco, for appellants.

Burnett, Burnett & Somers, San Jose, for respondents.

FRED B. WOOD, Justice.

The parties entered into a joint venture contract for the feeding and marketing of beef cattle covering the period of March

28, to October 31, 1952. Plaintiff furnished the money for the purchase of the cattle and certain advances to defendants for their care; defendants furnished the ranch, the feed and the care. The main issues upon this appeal pertain to the determination of the question whether this venture resulted in a profit or a loss and, in either case, how much. Three clauses of the agreement are especially significant to this inquiry.

The duration of the venture and the accounting period were fixed by subdivision (c) of paragraph 5 of the contract: "(c) On November 1, 1952, the parties hereto agree to account for all cattle and the increment thereof to each other, and to give a full account of their activities and services hereunder; that full and complete books, records and accounts shall be kept by First Party [defendants] as to all cattle received from Second Party [plaintiff] and cattle sold and on hand, including increases of cattle as of October 31, 1952."

The agreement for the sharing of profits and ascertainment of amount of profits was expressed in subdivision (d) of paragraph 5 of the contract: "(d) On November 1, 1952 the parties agree to divide all gross profits on the basis that forty per cent (40%) shall be retained by Second Party and sixty per cent (60%) shall be paid to First Party. That in ascertaining and determining the gross profits hereunder, the sale price of all cattle sold on or before November 1, 1952 shall be added to the highest cash bid obtainable¹ of all cattle unsold on November 1, 1952, from which sum shall be subtracted the cost of purchasing said cattle and delivering them to the

Ranch, including purchase price, commissions, transportation, service on route, and other usual charges in acquiring and delivering cattle, and the balance remaining after said subtraction shall constitute the gross profits as hereinabove referred to. From the sixty per cent (60%) of the gross profits due First Party there shall be deducted and retained by Second Party the monthly payments actually paid by Second Party to First Party pursuant to subparagraph a. of paragraph 4 of this Agreement,² and the actual payment and retention of the sums due as herein determined shall constitute full and final payment and compensation of the share of each of the parties and shall be binding upon them and shall release each of the parties from any claim of the other."

[1,2] By a separate writing addressed to plaintiff, (a writing which by the trial court and by this court is deemed a part of the contract) it was provided that "with respect to paragraph (d) of page 5 [also paragraph 5] of said agreement, in the event of a loss, rather than a profit, we agree to pay you forthwith sixty percent (60%) of said loss."³

[3] The trial court correctly held that the losses, if any, were to be determined and shared in the same manner and proportion as would profits, if any, except that the payments made by plaintiff to defendants pursuant to paragraph 4(a) would not enter into the calculation; i. e., such payments could be recouped only out of profits.

Plaintiff handled the taking of bids at the ranch on November 1, 1952. He took written bids only. Defendants protested, claiming that oral bidding was the customary

1. Plaintiff struck out "market value" and inserted "highest bid obtainable" and the parties initialed the change before execution of the contract.

2. By paragraph 4(a) plaintiff agreed to pay defendants for care of the cattle: \$5.25 per month for each cow and its calf; \$5.00 per month each for other matured animals.

3. Defendants contend that this separate writing had no connection with the writ-

ing first signed; hence, was without consideration and void. Not having appealed, they are not in a position to challenge the finding. Moreover, we have examined the record and are convinced that the trial court properly read the two writings together in accord with the principles enunciated in section 1642 of the Civil Code and in *Cadigan v. American Trust Co.*, 131 Cal.App.2d 780, 782-787, 281 P.2d 332, and the authorities therein reviewed.

and effective method of ascertaining the "highest cash bid obtainable." On this question the court found upon sufficient evidence that "the accepted practice and custom in the cattle industry to obtain the highest price for cattle is by oral bid, and that there is normally a substantial spread between opening and closing bids"; and that "plaintiff failed and refused to determine the 'highest cash bid obtainable' for the cattle described and referred to in Exhibit A on November 1, 1952; and that said failure and refusal to obtain the 'highest cash bid obtainable' on the part of plaintiff consisted as follows:

"A. Plaintiff refused to meet with defendant Paul Muth and his attorney prior to November 1, 1952 to agree to or discuss any method of obtaining the 'highest cash bid obtainable'.

"B. Plaintiff arrived at the ranch of defendant in the middle of the afternoon of November 1, 1952, passed out written forms of bid calling for lump-sum written bids on the cattle, refused to show said written bids to the defendant or disclose their content to him while the bidders were present, refused to call for oral bids, refused to permit bidders to raise one another, refused to exhibit bids obtained to defendant until late in the evening of November 1, 1952 at a time when it was impossible to see whether any bidders could be induced to raise their bids, and refused to accept the bid of defendants"; and that "the bid of defendants in the sum of \$55,000.00 was the highest bid actually made but that said bid

was not the 'highest cash bid obtainable' on November 1, 1952."

[4] From these findings the trial court concluded: Plaintiff was obligated to cooperate in obtaining the highest cash bid obtainable. His conduct in connection with obtaining such a bid constituted a refusal to obtain the "highest cash bid obtainable." This refusal was a breach of the contract which relieved the defendants from any obligation to perform the contract on their part. By virtue of plaintiff's said conduct and "by virtue of the failure to obtain 'the highest cash bid obtainable' for said cattle on November 1, 1952 there is no basis or method or evidence on which the court can determine the 'highest cash bid obtainable' for said cattle on November 1, 1952"; that "plaintiff has failed to prove by a preponderance of evidence that there was any loss on November 1, 1952"; and that "plaintiff is not entitled to any judgment against defendants."

[5-10] The mere fact that plaintiff failed to get the highest bid *obtainable* on November 1, 1952, did not of itself necessarily bar him from the right to have a determination of the amount which could have been obtained had he invited oral bids and given suitable notice. Nor would such a default upon his part necessarily defeat his right to an accounting. Not every default of a partner or of a joint venturer operates to divest him of his interest in the property of the venture or of his right to an accounting.⁴ A joint ven-

4. "When persons execute a contract which has the legal effect of constituting them partners or joint adventurers, they acquire rights and subject themselves to duties growing out of the fiduciary relationship which they thus create." *Pacific Atlantic Wine, Inc. v. Duccini*, 111 Cal.App.2d 957, 965, 245 P.2d 622, 627. The contract rules which govern in the case of an ordinary contract do not invariably apply to cases of agreements involving the partnership or the joint venture relationship. *San Francisco Iron & Metal Co. v. American Milling etc. Co.*, 115 Cal.App. 238, 251, 1 P.2d 1008. The resemblance between the joint venture

and a partnership is so close that "the rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership." *Zeibak v. Nasser*, 12 Cal. 2d 1, 12, 82 P.2d 375, 380. See also *McSherry v. Market Corporation*, 129 Cal. App. 330, 333, 18 P.2d 776.

"The fact that persons engaged in a joint venture may quarrel or be at odds over the business in which they are associated, or may even be involved in litigation with one another, does not as a matter of law relieve them of their fiduciary duties." *Sime v. Malouf*, 95 Cal.App.2d 82, 97, 212 P.2d 946, 955, 213 P.2d 788.

turer may of course forfeit his rights by a material breach which, committed "at the very threshold of the enterprise", renders it impossible for his associates to proceed, *San Francisco Iron & Metal Co. v. American Milling etc. Co.*, supra, 115 Cal.App. 238, 249, 1 P.2d 1008, 1012; or when he fails to furnish materials essential to the enterprise and stipulated as a condition of the creation of the enterprise, *Staples v. Leidecker*, 216 Cal. 604, 606, 15 P.2d 514, or when he defaults in a material respect and abandons the enterprise. *Middleton v. Newport*, 6 Cal.2d 57, 56 P.2d 508; *Sly v. Abbott*, 89 Cal.App. 209, 264 P. 507.

[11] But ours is not that type of case. Here the enterprise had been carried out and consummated. The time to divide the profits or apportion the losses had arrived. Plaintiff, in whom the contract vested legal title to the cattle, took the lead in seeking "the highest cash bid obtainable." In that undertaking he failed to get such a bid, though he obtained written bids varying from \$48,000 to \$55,000. That, however, should not prevent a court of equity from undertaking to ascertain the amount of "the highest cash bid obtainable" for these cattle on November 1, 1952. Essentially the same problem is presented as that which confronts a court or jury when ascertaining the market value of real property taken in an eminent domain proceeding.⁵ It is also somewhat like the situation which ob-

tains when the value of property is sought to be determined by use of the test furnished by section 3353 of the Civil Code.⁶ The failure of the plaintiff herein actually to get the highest cash bid obtainable should not of itself bar judicial inquiry and determination of the amount of the highest bid that could have been obtained, if evidence on that subject be available.

However, no such question was presented to the trial court. No evidence was offered tending to show the amount of the highest bid that could have been obtained if oral bids had been appropriately sought. There was evidence that oral bidding would have produced the highest bid obtainable and testimony as to the probable spread between the first and final bids if oral bids had been invited, but no evidence upon which to predicate a determination of the highest oral bid that could have been obtained. Plaintiff tried the case, it would appear, upon the theory that the highest written bid actually received (\$55,000) was the highest bid obtainable, a theory which the trial court, upon sufficient evidence, found erroneous.

[12] The failure to prove the amount of the highest bid obtainable amounted to a failure to prove whether there was a profit or a loss on the venture; i.e., whether the highest bid obtainable would have been greater or less than \$82,367.25, the difference between the cost of acquisition of the

The failure of a partner to pay his full share of the cost of acquisition or upkeep of the common property does not necessarily terminate his interest in the enterprise. *Kimball v. Gearhart*, 12 Cal. 27, 47; *Bowman v. Carroll*, 91 Cal.App. 56, 62, 266 P. 840. Even if a "partner or joint venturer by his wrong has caused the dissolution of the partnership or joint venture he does not forfeit all his rights, although, he may become subject to damages and loss of his share in the goodwill." *Gardner v. Shreve*, 89 Cal.App.2d 804, 808, 202 P.2d 322, 324. See also *Martin v. Burris*, 57 Cal.App. 739, 742, 208 P. 174.

5. In such a proceeding "[m]arket value is the price that would be paid by a will-

ing purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted", *City of Daly City v. Smith*, 110 Cal.App.2d 524, 531, 243 P.2d 46, 50, quite similar to the test or measure of value specified by the parties herein, "the highest cash bid obtainable of all cattle unsold on November 1, 1952."

6. That test or measure of value is "the price which he [the seller] could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer * * *."

For a discussion of this measure of value and its use, see *Lund v. Lachman*, 29 Cal.App. 31, 34-35, 154 P. 295.

cattle (\$93,663.88) and the amount realized upon sales made prior to November 1, 1952 (\$11,296.63).

Accordingly, the trial court correctly found and concluded that plaintiff "failed to prove * * * that there was any loss on November 1, 1952." We perceive no basis upon which a reviewing court could disturb that ruling; hence, no basis for granting plaintiff a retrial of that issue.

[13] This leaves for consideration the question of plaintiff's right to an accounting.⁷ The mere fact that plaintiff failed in the due and complete performance of some of his obligations as a joint venturer would not of itself, we have observed, disentitle him to an accounting. However, under the circumstances of this case, we see no basis for reopening it for an accounting.

The failure to prove an overall profit or loss on the venture removes a very important element, perhaps the most important element, from the scope of any accounting that yet might be had. Suppose, for example, it should develop that plaintiff is entitled to a credit in a certain amount against the defendants based upon their activities during the course of the joint venture. Defendants would be entitled to offset that against their share of the profits, if any. But the amount of their share, if any, is no longer ascertainable. This entails the loss of their potential right to an offset. That loss, under the circumstances of this case, is properly chargeable to the plaintiff. Defendant should not suffer for plaintiff's fault.

In addition, the area of accounting has been considerably reduced by the findings made by the trial court on the second, third and fourth counts of the complaint and

plaintiff's waiver⁸ of his appeal in respect to those findings.

The trial court found untrue (1) the allegations of the second count that defendants violated their obligation to furnish inspection services, treatment and other care for the cattle purchased, as a result of which certain of the cattle proved defective, to the damage of plaintiff in the sum of \$9,000; (2) the allegations of the third count that defendants failed in their obligation to care for and maintain the cattle, at the ranch, in a good and husband-like manner, to the damage of plaintiff in the sum of \$31,000; and (3) the allegations of the fourth count that defendants obstructed and prevented the sale of the cattle at a time [prior to November 1, 1952] when a profit could have been realized thereon, to the damage of plaintiff in the sum of \$31,000. The abandonment of the appeal in respect to these findings would withdraw from the scope of any accounting that might now be had, most if not all of the activities and transactions of the defendants which occurred during the period of the joint venture.

Finally, in response to the issues presented by the first count of the complaint, the trial court among other things found and determined the numbers of the various classes of livestock (cows, calves and bulls) that were originally purchased and brought to the ranch; also, the number that died and the number that were born during the period of the joint venture.

[14] Under these circumstances we perceive no basis upon which we might properly order a further accounting.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

7. The trial court held that the defendants gave him an accounting prior to the filing of this action, an incorrect holding because all that they did was to make their books and other records available for plaintiff's inspection.

8. This waiver appears in plaintiff's opening brief: "While there are other causes

of action in the complaint, namely, the second, third and fourth causes of action, as the evidence respecting these is in conflict it will not be necessary to burden this Court with a discussion of the record as it pertains to such causes of action."

A.O.B., pp. 2-3.

144 Cal.App.2d 668

Violet E. NESS, Plaintiff and Appellant,
v.

**CITY OF SAN DIEGO, Defendant and
Respondent.**

Civ. 5418.

District Court of Appeal, Fourth District,
California.

Sept. 26, 1956.

Action for injuries sustained by plaintiff as a result of a fall on a public sidewalk. The Superior Court, San Diego County, Arthur L. Mundo, J., granted defendant city's motion for judgment notwithstanding verdict of jury favorable to plaintiff and plaintiff appealed. The District Court of Appeal, Burch, J. pro tem., held that where the jury found on conflicting evidence that the extent of variation in the adjoining blocks of sidewalk was but seven-eighths of an inch at the time of the accident, evidence was not sufficient to justify verdict for plaintiff.

Affirmed.

1. Municipal Corporations ⇨757(1)

The statutory duty of city to repair defects in sidewalk after notice depends on the danger. West's Ann.Gov.Code, § 53051.

2. Municipal Corporations ⇨755(1)

A city is not insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident therefrom.

3. Evidence ⇨25(2)

It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition and minor defects are bound to exist.

4. Municipal Corporations ⇨768(1), 821(6)

A city is not necessarily liable for injuries caused by minor sidewalk defects due to continued use, or action of the elements, or other cause, and what constitutes minor defect is not always a mere question of fact. West's Ann.Gov.Code, § 53051.

5. Municipal Corporations ⇨768(1)

The responsibility to determine the question of dangerous or defective conditions of public sidewalks rests with the legislative body, board, or person authorized to remedy the condition. West's Ann.Gov.Code, § 53051.

6. Evidence ⇨83(2)

Municipal Corporations ⇨762(1)

It may be assumed that official duty is regularly performed and that, having notice, the responsible official inspected sidewalk defect and exercised a judgment, but liability for injuries resulting from defect would still exist if officer exercised bad judgment in performing his imposed duty.

7. Municipal Corporations ⇨795

Where a dangerous condition of a sidewalk is involved, it is incumbent on the public authority to make inspections commensurate in scope with the nature and character of its knowledge and peril to be avoided.

8. Municipal Corporations ⇨768(3)

Where variation in adjoining blocks of sidewalk was but seven-eighths of an inch at time pedestrian fell, city had no duty to repair defect, notwithstanding city had notice of defect, and city was not liable for pedestrian's injuries. West's Ann.Gov.Code, § 53051.

9. Judgment ⇨199(3.10)

Where evidence is not sufficient to justify verdict, court correctly orders judgment notwithstanding verdict.

C. Ray Robinson and Eugene L. Stockwell, Jr., Los Angeles, for appellant.

J. F. DuPaul, City Atty., by J. K. Stickney, Jr., and Edward Strop, Sp. Deputies, San Diego, for respondent.

BURCH, Justice pro tem.

The plaintiff sued the City of San Diego to recover damages for injuries occasioned by a fall, "when she was caused to lose her balance and fall to the sidewalk in front of the residence at 927 Beryl Street",

in San Diego. The case was tried before a jury; a verdict was returned in favor of plaintiff for damages assessed in the sum of \$3,258.01. Judgment was entered on the verdict. Defendant moved for a judgment notwithstanding the verdict. The court granted the motion, vacated the judgment for plaintiff, and entered judgment for defendant. Plaintiff appeals from the judgment notwithstanding the verdict.

The appeal is on a stipulated narrative statement which discloses that "at or about the place where the plaintiff fell, there was a variation of the level of two adjoining sections of sidewalk caused by the growth of tree roots, which condition had existed over a period of several years, with the result that the variation in height between the sections of block gradually increased; that the section of the sidewalk to the east of the variation in levels was higher than the section to the west of the variation; that said variation between the levels of the sections of the sidewalk was the same from the north to the south edges of the sidewalk; that testimony was presented by plaintiff and defendant as to the height of the variation between the levels of the sidewalk and that said testimony was in conflict; that the said conflict was presented to the jury in the form of a special interrogatory and that the jury found that the variation between the levels of the two sections of the sidewalk was $\frac{7}{8}$ ths of an inch at the time of the accident herein complained of; that the jury found, by special interrogatory, that the defendant, City of San Diego, had actual notice of the condition (of the sidewalk) by reason of a telephone call by an adjoining property owner at least six months prior to the plaintiff's fall: that there was no evidence of any prior falls caused by this condition in the sidewalk; * * *."

[1] In this case the City's liability depends upon whether or not the stated condition is one of such danger as to enjoin upon it the duty of repair under the Public Liability Act of 1923, Stats.1923, ch. 328,

now incorporated into the Government Code. The City had notice in time to repair if it had the duty to repair, Government Code, Sec. 53051; *Whiting v. City of National City*, 9 Cal.2d 163, 165, 69 P.2d 990, and the duty depends on the danger.

[2-4] No hard and fast rules can be laid down, *Fackrell v. City of San Diego*, 26 Cal.2d 196, 206, 157 P.2d 625, 158 A.L.R. 773, and so each case must depend upon its particular facts, yet "The city is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident therefrom." *Whiting v. City of National City*, supra, 9 Cal.2d at page 166, 69 P.2d at page 991. Pertinent to our question is this statement in the *Whiting* case, 9 Cal.2d at page 165, 69 P.2d at page 991:

"It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. *What constitutes a minor defect is not always a mere question of fact.* If the rule were otherwise, the city could be held liable upon a showing of a trivial defect." (Emphasis ours.)

The quoted rule narrows the question here to whether the imperfection may be denominated "dangerous or defective" under the statute which would make it a question of fact, or only a minor defect such as would avoid the statutory duty to remedy. In *Barrett v. City of Claremont*, 41 Cal.2d 70, 73, 256 P.2d 977, 979, it is stated:

"Growing out of the difficulty of maintaining heavily traveled surfaces in perfect condition is the practical recognition that minor defects inevitably occur, both in construction and

maintenance, and that their continued existence is not unreasonable. In such case: * * * no liability may result."

There a joint of five inches was filled in with asphalt so as to form a half-inch ridge tapering to the walk on either side. A judgment for plaintiff was reversed as a matter of law.

In the case of *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725, 726, "One block had tilted up so that there was a difference in grade at the break of not more, and possibly less, than an inch and a half. The plaintiff approached from * * * the high side of the break * *." The trial court had found as a matter of fact that this was a dangerous condition and constituted a menace to pedestrians. The appeal resulted in a reversal on the ground of no notice or knowledge, actual or constructive, of a dangerous condition which was assumed for the purpose of deciding that there was no notice, and is only relevant here for the value in the assumption. There is no decision that the condition described was properly a factual question.

In the *Whiting* case, *supra*, the reversal was based upon the nondangerous character of the condition of the sidewalk thus described: "the sidewalk was constructed of contiguous cement squares with expansion joints between them; that the square upon which the plaintiff tripped was raised at its easterly edge above the square next adjoining it on the east; that at the highest point of such rise it was about three-quarters of an inch above the surface of the adjoining square; and that the rise extended for several feet to the north gradually lessening in height until the surface was approximately level."

[5,6] Government's responsibility to determine the question of dangerous or defective condition rests with "the legislative body, board, or person authorized to remedy the condition", Government Code, Sec. 53051. The expressed opinion of a volunteer, though it may serve as notice, is not

determinative of defect. It may be assumed as a matter of official duty regularly performed, Code Civ.Proc. Sec. 1963, subd. 15, that, having notice, the responsible official inspected the situation and exercised a judgment. Liability would still exist under the act if he exercised bad judgment in performing his imposed duty.

[7] The duty of inspection is thus stated in *Aguirre v. City of Los Angeles*, 46 Cal.2d 841, 299 P.2d 862, 864, involving a dangerous condition of a sidewalk:

"* * * it is incumbent on it (the public authority) to make inspections commensurate in scope with the nature and character of its knowledge and the peril to be avoided".

In *Fritsche v. City of Seattle*, 10 Wash. 2d 357, 116 P.2d 562, 564, the Supreme Court of Washington said:

"A test which is sometimes applied to determine whether a city has performed its duty is whether a reasonably cautious man, having the duty to preserve and repair the sidewalks, would or would not consider a particular defect as one where pedestrians might be injured."

The Tennessee Supreme Court says the test is governed not by possibility of injury but probability. *Forrester v. City of Nashville*, 179 Tenn. 682, 169 S.W.2d 860. Under that test it was held that a water meter box imbedded in the sidewalk and projecting one inch above the pavement was not actionable. The same case approved its former holding in *City of Memphis v. McCrady*, 174 Tenn. 162, 124 S.W.2d 248, 249. In the *McCrady* case the variation of height of two adjoining blocks of a concrete sidewalk was 2½ inches. In reversing a judgment for the plaintiff the court held (quoting from the syllabus):

"* * * where defect or obstruction is such that reasonable men would not differ in their conclusion that the obstruction or defect is not dangerous to travel in ordinary mode by persons exercising due care, a verdict should be directed."

In *Balkwill v. City of Stockton*, 50 Cal. App.2d 661, 123 P.2d 596, 597, a question of fact was posed where for a period of years two holes were permitted to exist in the surface of a concrete sidewalk in the business portion of Stockton. "They were only a few inches apart, and were approximately four or five inches long, two inches wide and from one-half to two inches in depth." In *Balmer v. City of Beverly Hills*, 22 Cal.App.2d 529, 71 P.2d 854, the factual situation was more favorable to the plaintiff than is the case here in that one part of the cement walk was elevated one inch above an adjoining slab. In reversing a judgment for plaintiff the court said, 22 Cal.App.2d at pages 531-532, 71 P.2d at page 855:

"In the *Whiting Case* [supra] one portion of the sidewalk was left three-fourths of an inch above the adjoining portion. In the case now under review one portion of the sidewalk was left one inch above the adjoining portion. The difference of one-fourth of an inch is not sufficient to take the present case outside the ruling in the *Whiting Case*, and on the authority of that case the judgment must be reversed."

In *Hook v. City of Sacramento*, 118 Cal. App. 547, 5 P.2d 643, the evidence of the nature of the defects in the sidewalk, which were numerous at the place of the fall, was in conflict, and thus a factual question was presented.

[8] On the authority of the *Whiting* and *Balmer* cases we hold that an even break between two adjoining slabs of a concrete walk of $\frac{7}{8}$ ths of an inch elevation along the expansion joint is but a trivial defect and without danger to pedestrians walking thereabouts with due care.

The general verdict for plaintiff must fall because of the special finding of the jury that the extent of variation in the adjoining blocks was but seven-eighths of an inch. *Lowen v. Finnilla*, 15 Cal.2d 502, 504, 102 P.2d 520.

[9] The conclusion is inescapable that the evidence cannot, as a matter of law, be held sufficient to justify a verdict for plaintiff. It therefore follows that the court correctly ordered a judgment notwithstanding the verdict, *Girvetz v. Boys' Market, Inc.*, 91 Cal.App.2d 827, 206 P.2d 6.

Judgment notwithstanding the verdict is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



144 Cal.App.2d 659

Murlel M. BROWN, Plaintiff and Respondent,

v.

Ralph I. GUY, doing business as Rigko Offices and The Rig Company, Defendant and Appellant.

Civ. 21641.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1956.

Patient brought action against chiropractor for alleged malpractice. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered an order granting motion of plaintiff for new trial, after verdict for chiropractor, and the chiropractor appealed. The District Court of Appeal, Ashburn, J., held that evidence was sufficient to support a verdict for patient and hence to afford a basis for granting new trial.

Order affirmed.

1. New Trial Ⓒ13

On consideration of motion for new trial, trial court must make an independent

appraisal of the evidence, including all presumptions and reasonable inferences, and must judicially determine whether judgment effects a miscarriage of justice.

2. New Trial ⚖️71

In considering motion for new trial, trial court is not bound by a conflict in the evidence, but may be governed by any substantial proof that would reasonably warrant a judgment for the moving party, even though such evidence consists of nothing more than inferences from established facts.

3. Appeal and Error ⚖️1015(1)

On appeal from order granting a new trial, the order will not be reversed unless the reviewing court concludes that, as a matter of law, there is no substantial evidence to support a contrary judgment.

4. Appeal and Error ⚖️867(2)

Function of reviewing court on appeal from order granting plaintiff a new trial begins and ends with a determination of whether the evidence, viewed most favorably to plaintiff, affords sound basis for a verdict in the plaintiff's favor, and reviewing court does not review the weight of the evidence or the propriety of permissible inferences.

5. Appeal and Error ⚖️1015(1)

If cumulative effect of proof, direct or indirect, contradicted or uncontradicted, whether produced by one side or the other, is legally sufficient to sustain a finding for plaintiff, order granting plaintiff a new trial must be sustained on appeal.

6. New Trial ⚖️69

On motion by plaintiff for new trial, trial court was authorized to accept part and reject part of plaintiff's testimony.

7. New Trial ⚖️70

In malpractice action by patient against chiropractor, evidence was sufficient to support a verdict for patient and hence afforded a proper basis for the granting of a new trial to the patient after verdict for chiropractor.

8. Physicians and Surgeons ⚖️15(18)

A chiropractor cannot lawfully pierce the skin of a patient for treatment purposes.

9. Torts ⚖️27

Each of several joint tort-feasors or independent wrongdoers, who inflict simultaneous or practically simultaneous injuries, must carry burden of establishing that his own wrong did not contribute to the damages, or the extent to which it did so.

10. Physicians and Surgeons ⚖️18(8)

Patient could prove a cause of action against chiropractor for malpractice by showing that chiropractor, in treating her, departed from accepted standards and that such departure caused her increased and prolonged pain, even though patient was unable to establish that chiropractor's treatment was the proximate cause of the loss of patient's leg, which was amputated when gangrene set in.

Carl Sturzenacker, De Forrest Home and Albert Hampton, Los Angeles, for appellant.

Elmer Patrick Friel and Henry E. Kappler, Los Angeles, for respondent.

ASHBURN, Justice.

Malpractice action against a doctor of chiropractic. Verdict for defendant. Plaintiff's motion for new trial was granted upon the ground of insufficiency of the evidence to support the verdict. Defendant appeals.

[1-3] Upon the consideration of a motion for a new trial the court must make an independent appraisal of the evidence, including all presumptions and reasonable inferences, and must judicially determine whether the judgment effects a miscarriage of justice. In considering such motion the trial court is not bound by a conflict in the evidence but may be governed by any substantial proof that would reasonably warrant a judgment for the moving party even though such evidence consists of nothing

more than inferences from established facts. On appeal from the order it will not be reversed unless the reviewing court concludes that as a matter of law there is no substantial evidence to support a contrary judgment. *Edler v. Sepulveda Park Apts.*, 141 Cal.App.2d 675, 297 P.2d 508; *In re Estate of Green*, 25 Cal.2d 535, 542, 154 P.2d 692; *Hames v. Rust*, 14 Cal.2d 119, 124, 92 P.2d 1010; *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 358, 359, 170 P.2d 465.

The principal factual issue at the trial was whether defendant had injected into plaintiff's ischemic (blood starved) right foot a quantity of ozone, and secondly whether that precipitated gangrene which ultimately caused amputation of the leg.

[4, 5] Appellant's counsel argue that the evidence was legally insufficient to support a verdict for plaintiff because her testimony was inherently improbable. To reach that conclusion it is necessary, however, to show "either a physical impossibility that they [the witness' statements] are true, or their falsity must be apparent without resorting to inferences or deductions." *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759. Appellant's arguments, though somewhat persuasive, consist at best of a review of the inferences and deductions which counsel claim should be drawn from the evidence. Hence they cannot prevail. The evidence, viewed most favorably to plaintiff, affords sound basis for a verdict in her favor. The function of the appellate court begins and ends with a determination of whether that is the case; we do not review the weight of the evidence or the propriety of permissible inferences; if the cumulative effect of the proof, direct or indirect, contradicted or uncontradicted, whether produced by the one side or the other, is legally sufficient to sustain a finding for plaintiff, the order must be sustained. *Edler v. Sepulveda Park Apts.*, supra, 141 Cal.App.2d 675, 297 P.2d 508; *Primm v. Primm*, 46 Cal.2d 690, 299 P.2d 231. The statement which follows is constructed on the basis of accept-

ing the evidence most favorable to plaintiff.

For more than a year prior to September 13, 1953, plaintiff, then aged 55, suffered from a symptom pattern known as the Leriche Syndrome. This consisted of increasing amounts of pain in the lower back and through the hips which would come on after walking about a half block; after a short rest walking could be resumed and the pain would recur; her feet were unusually cold at night, requiring use of hot pads. There is only one condition that can cause that, namely, occlusion of the arterial circulation to the part where the muscle pain occurs; the pain is caused by lack of blood supply to the muscles. This evidence immediately takes the court into the field where expert testimony is essential and controlling. *Moore v. Belt*, 34 Cal.2d 525, 529-530, 212 P.2d 509. In the light of subsequent events the medical experts agreed that plaintiff had a partial occlusion in the saddle of the aorta, which impaired the blood supply to both lower extremities rendering them susceptible to spontaneous necrosis or gangrene; also to a precipitation of that condition by trauma or infection.

On said September 13, plaintiff was seized with nausea and vomiting followed shortly by severe pain, chills and numbness in the right leg, mostly in the foot; there was tingling in the toes and the pain extended from foot to upper thigh; the foot felt like a block of wood. This acute episode pointed to a severe blockage of the right iliac artery and a less severe one in the left iliac. (The aorta bifurcates into the two iliac arteries which supply the blood to the respective limbs.) Being in much pain and unable to diagnose her own trouble, plaintiff invoked the aid of several doctors, chiropractic and osteopathic, who failed to diagnose her trouble and did little for her.

On November 3, 1953, being in great and constant pain, she went to see defendant, Dr. Guy, whom she had known for some years. She told him she had a steady and

severe pain in her right leg and thought it was sciatica. He said she told him it was arthritis. He took no further history, made only a casual examination of the foot and leg, which then appeared to be normal, and made no diagnosis whatever. Dr. Guy told plaintiff he would give her a shot of "polyzone," "a liquid oxygen." He had a polyzone machine present; it passes oxygen (O-2) over an electrical field and converts it into ozone (O-3), which is a gaseous oxidizing agent; when applied to tissues of a human body it has a burning effect. Ozone has been rejected by the medical profession and other scientists as a therapeutic agency because it is an irritant which causes injury to the tissues when used in concentrations sufficient to be effective; an injection of same would cause injury similar to a chemical burn; the gas would not be absorbed.

[6] Defendant held plaintiff's foot with his left hand and with the right injected 28cc of ozone into the arch, or immediately beside it. He denies this, but plaintiff testified that he did so. Another witness, Mildred Bredesen, was present. She was then acting as practical nurse for plaintiff. Initially she gave plaintiff's attorneys a statement saying that defendant had made the injection in question. Later, after talking to him, she changed her story and testified, as defendant did, that he made no injection and merely sprayed the ozone on plaintiff's foot,—a procedure which defendant and all other witnesses agreed would do no good whatever. The trial judge, in performing his duty of independently weighing the evidence, *People v. Robarge*, 41 Cal.2d 628, 633, 262 P.2d 14, concluded "that the implied finding of the jury that the defendant Ralph I. Guy did not administer injection by hypodermic needle into the tissues of the plaintiff's foot a substance called ozone is not supported by the evidence, and that the credible evidence is insufficient to support such a finding * * * that the witness Mildred Bredesen was thoroughly impeached." It is true, as argued by appellant's counsel, that there are phases of

plaintiff's testimony upon this issue which cast doubt upon its verity, but the trial judge was authorized to accept part and reject part of the witness' version, *Murphy v. Ablow*, 123 Cal.App.2d 853, 858, 268 P.2d 80, and the record is in such shape that we are bound on this appeal to accept the trial judge's finding. We therefore proceed upon the assumption that the injection was given as testified by plaintiff.

When that occurred she screamed with pain, and following the incident suffered severely and continuously. When she reached home the foot was swelling, the point of insertion of the needle was described by her as a hole with dark red around it and further surrounded by a blue-gray puffing. The next morning the skin was wrinkled and mottled and the pain was "terrible."

On the 5th of November a friend brought Dr. Porter to see her and he gave an injection of novocain in that same area to relieve the pain. Soon after that, Dr. Shropshire, an osteopathic physician, was employed. He took a history which included injection of "polyzone" followed by an abscess, and he sent her to the Glendale Community Hospital. The abscess was incised and the underlying tissues were found to be "quite necrotic." Apparently there was no infection at that time, for a laboratory examination of tissue revealed it to be a "sterile abscess." It was Dr. Shropshire's opinion that the condition he found was the result of the injection of "polyzone" into the tissues. Plaintiff was in the hospital from November 16 to November 25, and then went home. She was still having pain in the right foot and leg and the foot continued to get worse. Plaintiff employed Dr. Craven in January, 1954, then Dr. Talmadge and finally, in February, sought the help of Dr. Lawrence W. Smith, an M.D. specializing in surgery and peripheral vascular diseases, a well-qualified expert.

He first saw plaintiff at St. Vincent's Hospital on February 19, 1954, took a history and made an examination which dis-

closed a large area of gangrene on the medial aspect of the right foot, at the site of defendant's injection. He was of the opinion that the basic existing condition was one of occlusion of the arteries to the extremities, and that the block was above the groin. His diagnosis was gangrene of the foot and "beginning possible gangrene in the right upper thigh" due to severe occlusion of the lower aorta. The sole basis for any gangrene is lack of blood supply to the affected area. It is an invariable rule that leg gangrene, when starting spontaneously, appears first in the toes. Dr. Smith found none there. That meant that the precipitating cause of its starting above the toes was due to a local injury or infection. There being no history of an original infection in that area and a positive showing of injury, he concluded that the latter was the precipitating cause. The blood-starved condition of the foot had been such that a slight trauma would easily set up a gangrene and the penetration of a hypodermic needle would be sufficient trauma to do so. An injection of 28cc of ozone would irritate or burn the starved tissues, distend them, cut off the circulation and cause death of the tissues and skin. Plaintiff at the time of Dr. Smith's first examination had a gangrenous ulcer at the site of defendant's injection. Although Dr. Smith endeavored to do so, it was impossible to save the leg.

On March 30, 1954, a sudden change for the worse occurred and the upper thigh began to show a breakdown of tissues, a local gangrene which later proved to be the dry type. About the same time, a fresh thrombus completely blocked the popliteal artery (back of the knee). Dr. Smith called Dr. Atlas, another specialist, into consultation and an immediate amputation was deemed necessary. This was performed on April 2nd, but there was so much infection and blood starvation that the stump would not heal and a second operation was necessary and was done on May 21, 1954.

[7] Dr. Smith testified that in his opinion the original gangrene in the foot was

precipitated by the injection given by defendant; that the popliteal blockage was caused by inflammation and infection spreading from the foot gangrene; also that the gangrene in the thigh was incipient when he first saw the patient but before the second operation was becoming more extensive and the tissues around it inflamed, thus requiring an operation above that area. He also said that the gangrene did not come down from the thigh to the foot and that the thigh condition alone would not have made an amputation inevitable. Dr. Atlas concurred in most of these conclusions. He said the injection was responsible for the primary necrosis in the foot; that infection was bound to occur sooner or later; that it had progressed to the groin before the operation; concerning the thigh he said he was unable to explain that area of gangrene but that it alone would not have required an amputation at the time of the operation; on the other hand the foot condition with its spreading infection had already doomed the leg. Clearly the evidence is sufficient to support a verdict for plaintiff and hence afford a proper basis for the granting of a new trial.

This conclusion does not reflect any weighing of opposing evidence. For instance, Dr. Elmquist, a well-qualified expert called by defendant, testified on the basis of hypothetical questions that the gangrene of the thigh would have caused the amputation of the leg regardless of the foot condition, but that he could not express an opinion as to the proximate cause of the gangrene in the foot. It is not our function to determine which expert expressed a sound opinion. We merely find that there is substantial evidence to sustain a verdict in favor of plaintiff had one been rendered.

[8] A chiropractor cannot lawfully pierce the skin of a patient for treatment purposes, *People v. Mangiagli*, 97 Cal.App. 2d Supp. 935, 940, 218 P.2d 1025, and under some authorities is held liable for any injuries caused thereby regardless of negligence in fact, *Whipple v. Grandchamp*,

261 Mass. 40, 158 N.E. 270; Annotation, in 57 A.L.R. 974. Other cases apply to a chiropractor, or other practitioner who goes beyond the bounds of his license in treating a patient, the same standard of care which is required of practitioners, such as medical doctors, who are authorized to employ the particular method—the absence of a license so to do being deemed not of the essence of a cause of action. See *Kelley v. Carroll*, 36 Wash.2d 482, 219 P.2d 79, Annotation in 19 A.L.R.2d 1188, 1204. The latter seems to be the majority rule. But, after it is found that defendant pierced the skin of plaintiff with an injection used for treatment purposes, it is immaterial which of the above standards is applied to him. The evidence supports the conclusion that a chiropractor who injects ozone into the tissues (1) exceeds the privileges of his license and hence fails to conform to the chiropractic standard of knowledge and care, and (2) fails to conform to accepted standards of medical doctors who have rejected such method of treatment as positively harmful to the patient.

Appellant argues that there were causes other than the Guy injection which equally well could have precipitated the necrosis in the foot. Counsel cite the injection of novocain by Dr. Porter the day after the Guy injection, and the later lancing of the abscess in the Glendale hospital. The experts conceded that these traumas could have been precipitating causes. Therefore, argues appellant, plaintiff failed to carry her burden of proof that defendant's delict was the proximate cause of her gangrene.

[9] It is the law of this state that each of several joint tort feors or independent wrongdoers who inflict simultaneous, or practically simultaneous, injuries upon a plaintiff must carry the burden of establishing that his own wrong did not contribute to the damages, or the extent to which it did so. See *Copley v. Putter*, 93 Cal.App.2d 453, 457, 207 P.2d 876; *Cummings v. Kendall*, 41 Cal.App.2d 549, 558, 107 P.2d 282; *Finnegan v. Royal Real-*

ty Co., 35 Cal.2d 409, 433, 218 P.2d 17; *Prosser on Torts*, 2nd Ed., § 45, p. 226. The *Finnegan* case says, 35 Cal.2d at page 433, 218 P.2d at page 32: "Where several persons act in concert and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established. Even though persons are not acting in concert, if the result produced by their acts are indivisible, each person is held liable for the whole. Death, burning of a building or the sinking of a boat are such indivisible results. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result. 15 So. Cal. L. Rev. 439." *Copley v. Putter*, supra, 93 Cal.App.2d at page 457, 207 P.2d at page 878: "If one of the wrongdoers could escape on the plea that his negligence was independent of that of the other tort-feasor, both might leave the victim of their carelessness without a remedy. It would be a frustration of justice for the wronged person to be permitted to show his injury and the simultaneous negligence of the two tort-feasors and be required to demonstrate which of the two had caused the damage." *Cummings v. Kendall*, supra, speaking of an indivisible injury, 41 Cal.App.2d at page 558, 107 P.2d at page 287, says: "'On the other hand, since it is impossible to prove what share the act of either of the tortfeasors contributed, or whether it contributed any at all, if this prevailed, each would escape—an absurd result. To overcome this difficulty, the law imposes upon each tort-feasor the impossible burden of proof, contenting itself with limiting the injured person's total recovery to one indemnity. The situation is the same when one of the two contributing factors is not the result of actionable fault; again, the single tort-feasor cannot be allowed to escape through the meshes of a logical net. He is a

wrongdoer; let him unravel the casuistries resulting from his wrong.'"

[10] Appellant did not undertake to carry this burden. He will have an opportunity to do so at a new trial. Of course it is true, as argued by respondent, that it is not necessary for her to establish that defendant's tort was the proximate cause of the loss of the leg. She has proved a cause of action when she shows that defendant in treating her departed from accepted standards and that that caused her increased and prolonged pain. Whether it was the proximate cause of the gangrene, and if so was the cause of the amputation of the leg or the cause of the second operation, goes to the question of damages. But those inquiries if answered favorably to defendant's contentions would not deprive plaintiff of a right to a new trial upon the lesser aspect of the case,—a malpractice resulting in pain and suffering.

There was no abuse of discretion in granting a new trial herein.

Order affirmed.

MOORE, P. J., and FOX, J., concur.



144 Cal.App.2d 522

In the ESTATE of Fred E.
HOOPER, alias, Deceased.

No. 16926.

District Court of Appeal, First District,
Division 2, California.

Sept. 20, 1956.

Proceeding for final accounting and distribution of estate, wherein United States filed claim for delinquent income taxes of decedent. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., disallowed claim and United States appealed. The District Court of Appeal, Kaufman, J., held that where total

assets of estate remaining after deduction of expenses of administration were less than income tax claim of United States, such tax claim had priority over other claims against estate, notwithstanding that claim was not filed within six-month period following publication of notice to creditors as required by state law.

Order reversed with directions.

1. States \S 4.14

Where state laws concerning time for filing claims against estates and priority of claims conflict with terms or spirit of federal statutes, the state laws must yield to the federal statutes.

2. Internal Revenue \S 7

Where total assets of estate remaining after deduction of expenses of administrator were less than tax claim of United States for unpaid income taxes, such tax claim had priority over other claims against the estate, notwithstanding fact that the tax claim was not filed within six-month period following publication of notice to creditors as required by state law. 31 U.S.C.A. \S 191; West's Ann.Prob. Code, \S 700; West's Ann.Code Civ.Proc., \S 1204.

Lloyd H. Burke, U. S. Atty., Charles Elmer Collett, Asst. U. S. Atty., San Francisco, Alonzo W. Watson, Jr., Atty., Office of Regional Counsel, I. R. S., San Francisco, for appellant.

No appearance for respondent.

KAUFMAN, Justice.

This is an appeal by the United States of America from a decree of final distribution and settling the first, final and supplemental account of administrator. This decree disallowed the claim of the Internal Revenue Service of the United States Government on the ground that it was not filed within the time provided by law for presentation of claims.

Decedent died in San Francisco on November 22, 1945, leaving as heirs at law

a son, Fred A. Hooper, who was appointed administrator of the estate of decedent, and a daughter, Vera Epting. Notice to creditors was published on December 12, 1945.

On November 15, 1949, the estate was appraised at \$11,502.90, consisting of \$1,502.90 cash and a liquor and tavern business worth \$10,000. On December 14, 1949, the administrator's first accounting showed cash on hand in the sum of \$7,364.94.

On December 28, 1949, Vera Epting filed objections to the first account. On January 26, 1950, the Collector of Internal Revenue filed a verified creditor's claim setting forth decedent's liability for delinquent income taxes for 1943, 1944 and 1945, plus interest thereon, in the total sum of \$5,376.66. An affidavit of the Collector attached to this claim stated that no payments had been made on said claim and that there were no offsets which would reduce the balance.

On August 12, 1952, the administrator's supplemental report was filed. A referee was appointed by the court on December 12, 1952. The referee found that the administrator had carried on the tavern business until March, 1949, when it was sold for \$9,000. He also found that objections to the administrator's salary claim for conducting this business were well taken and on April 23, 1953, the court confirmed the referee's findings and adopted his recommendations.

On November 19, 1953, the administrator filed a petition for settlement of first account and supplemental and final account and for distribution, again seeking an award for salary, and objecting to the Internal Revenue's tax claim on the ground that it was an arbitrary assessment not supported by competent evidence.

On February 26, 1954, the United States filed objections to the administrator's petition and also petitioned for an order requiring the administrator to account or be held personally liable. The petition asserted that the estate was insolvent, that

the claim of the United States was duly assessed against the estate and was entitled to priority. The United States also objected to the withdrawal of a sum of \$2,145.26 by the administrator, and to said administrator's failure to account for other sums of \$1,081.51 and \$1,502.90.

At the hearings on the above objections, the assessment list of January 23, 1950, showing the assessment of the taxes claimed to be due and owing, and a certificate of assessments and payments for the claim dated December 11, 1953 were introduced in evidence. The administrator then contended that the tax claim should be disallowed because not filed in time.

On April 12, 1955, the decree of final distribution and settling the first final and supplemental account of administrator was filed. It disallowed the claim of the United States on the ground that it was filed too late; allowed the administrator \$10,000 for extraordinary services rendered to the estate, which was to be deducted from the sum of \$13,915.26, the salary which he had paid himself out of said estate and which the court disallowed. He was ordered to account to the estate for the balance, \$3,915.26. The court then distributed the residue of the estate in the hands of the administrator as follows: to Vera Epting, \$3,959; to Fred A. Hooper, \$43.74.

It is immediately apparent that the total assets of the estate remaining after deduction of expenses of administration was less than the tax claim of the United States. Appellant contends that in this situation it is well settled that the tax claim of the United States has a priority that cannot be superseded or impaired by state law.

It is provided in section 191 of Title 31 United States Code, 31 U.S.C.A. § 191, Revised Statutes, § 3466, that "whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all debts due from the deceased, the debts due to the United States shall be first satisfied * * *." Section 700 of the Probate Code of California requires all persons having claims against

decendent to file them in the office of the clerk of court or present them to the executor or administrator within six months after the first publication of notice. It is conceded that the claim of the United States was filed after the six months period following publication of notice to creditors had expired.

A tax claim of the United States, such as that herein, has been held to be included in the term "debt" as used in section 3466, *supra*. *Price v. United States*, 269 U.S. 492, 46 S.Ct. 180, 70 L.Ed. 373. Even unassessed taxes have been included within the definition of debts. *Leggett v. Southeastern Peoples College*, 234 N.C. 595, 68 S.E.2d 263.

[1] In view of numerous decisions of the United States Supreme Court, it must now be considered well established that any filing or priority provisions of state law which conflict with the terms or spirit of federal statutes must yield to the latter. *United States v. Oklahoma*, 261 U.S. 253, 43 S.Ct. 295, 67 L.Ed. 638.

In the case of *United States v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019, 1021, 84 L.Ed. 1283, a decision of the Supreme Court of Florida was reversed which had held void a claim of the United States filed after the eight month period provided for under that state's probate claim statute, had expired. The United States Supreme Court there stated that if the state statute undertook to invalidate a claim of the United States so that it could not be enforced at all if not filed within eight months, that "the statute in that sense transgressed the limits of state power." See, *United States v. Embrey*, 145 Fla. 277, 199 So. 41; *Taylor v. United States*, 324 Mass. 639, 88 N.E. 2d 121.

It was held in *United States v. Division of Labor Law Enforcement*, 9 Cir., 201 F. 2d 857, 36 A.L.R.2d 1197, that the priority granted by section 3466, *supra*, prevailed over the priority granted to wage claimants in cases concerned with assignments for benefits of creditors by section 1204 of the California Code of Civil Procedure.

And, see, *Barnett v. American Surety Co. of New York*, 10 Cir., 77 F.2d 225.

[2] In view of the foregoing it is clear that the lower court erred in disallowing the claim of the United States of America and in failing to accord it priority.

Order reversed with directions to the lower court to allow said claim and accord it priority as provided for by law.

NOURSE, P. J., and DRAPER, J. pro tem., concur.



144 Cal.App.2d 604

The CITY OF SAN RAFAEL, a Municipal Corporation, Plaintiff and Respondent,

v.

Hugh C. WOOD and Lorraine E. M. Wood, John Rossl, Patrick J. Kirrane and Mary E. Kirrane, John Doe, Mary Roe, and White Company, a Corporation, Defendants and Appellants.

Civ. 16742.

District Court of Appeal, First District,
Division 1, California.

Sept. 25, 1956.

Action by a city to condemn part of defendants' lands and certain water rights for erection and maintenance of a drainage pumping plant. From so much of a judgment of the Superior Court, Marin County, Jordan L. Martinelli, J., as denied interest on amount of severance damages awarded defendants, they appealed. The District Court of Appeal, Peters, P. J., held that trial court's finding, conclusion of law and judgment fixed total severance damages on date of judgment at specified sum as compensation for future damages caused by severance and interference with defendants' use of lands not taken from date on which city took possession of condemned lands.

so that defendants were not entitled to interest on such sum.

Portion of judgment appealed from affirmed.

1. Eminent Domain ⇨124

Where city's condemnation action, through no fault of defendants, was not tried until three years and four months after commencement thereof, damages for taking of part of defendants' lands and resulting injuries to remainder thereof were computable under statute as of date of trial, though city took possession of condemned lands before trial. West's Ann.Code Civ. Proc., § 1249.

2. Eminent Domain ⇨124

Where condemner of land secures order for immediate possession thereof, condemnnee is entitled to compensation for loss of use of property from date on which condemner takes possession thereof to date of trial, though value of property is fixed, under statute, at time of trial. West's Ann. Code Civ.Proc., § 1249; West's Ann.Const. art. 1, § 14.

3. Eminent Domain ⇨148

Where value of condemnnee's use of condemned property is not included in condemnation judgment, condemnnee is entitled to interest on amount of compensation awarded from date of condemner's taking of property in lieu of such value. West's Ann.Code Civ.Proc., § 1249; West's Ann. Const. art. 1, § 14.

4. Eminent Domain ⇨148

Just compensation, required by Constitution, for taking of private property for public use, includes not only actual cash value or market value of property, but actual cash value of use thereof from date of condemner's taking of possession to date of judgment in condemnation action, if condemner takes possession before judgment. West's Ann.Const. art. 1, § 14.

5. Eminent Domain ⇨148

In action to condemn portion of defendants' lands, trial court must ascertain actual loss caused defendants by their loss

of use of retained portions of lands because of injuries thereto as result of taking and include sum so ascertained in severance damages. West's Ann.Code Civ.Proc., § 1249.

6. Eminent Domain ⇨148

Interest may be used as measure of actual loss caused landowners by their loss of use of portions of lands injured as result of taking of other portions thereof, but is awarded only when actual loss has not been fixed. West's Ann.Code Civ.Proc., § 1249.

7. Eminent Domain ⇨262(1)

In interpreting trial court's findings, conclusions and judgment in condemnation action, statute requiring court to assess compensation and damages as of date of trial must be considered. West's Ann.Code Civ. Proc., § 1249.

8. Eminent Domain ⇨247(1)

In city's action to condemn portions of defendants' lands, Superior Court's finding, conclusion of law and judgment, fixing and awarding defendants total severance damages in specified sum as compensation not only for future damages caused by severance of lands taken, but for interference with defendants' use of portions not taken by city's use of portions taken from date on which city took possession thereof before trial, so that defendants were not entitled to interest on such sum. West's Ann. Code Civ.Proc., § 1249.

Julius H. Selinger, San Rafael, for appellants.

Harold Jos. Haley, City Atty., City of San Rafael, Harold F. Wolters, San Rafael, John D. Rogers, San Francisco, for respondent.

PETERS, Presiding Justice.

The City of San Rafael condemned a portion of certain properties owned by defendants. The taking of the property resulted in injury to the properties retained by defendants. The trial court awarded defendants \$1,280 for the property taken, plus interest, and \$16,000 severance damages, without in-

terest. Defendants appeal, on the clerk's transcript, from that portion of the judgment that failed to award interest on the severance damages.

On July 2, 1951, the City of San Rafael brought an action to condemn certain real property and certain water rights connected therewith belonging to defendants. The purpose of the condemnation was to erect and maintain a drainage pumping plant. The parcel of land condemned was a part of a larger parcel occupied and used by defendants for the purpose of operating a yacht harbor and a yacht sales business.

On July 5, 1951, the City secured an order for immediate possession of the property and actually went into possession under this order on November 5, 1951. On this date the City began construction on the condemned parcel of a concrete sump on which was constructed electric automatic pumps as part of a large pumping plant. By reason of the construction of the pumping plant a large quantity of silt was deposited in the yacht harbor which materially and adversely interfered with the use by defendants of their remaining properties.

The condemnation proceeding, through no fault of the defendants, did not come to trial until November 9, 1954. The trial resulted in a determination that \$1,280 was the fair market value of the condemned parcels, and that the severance damages, together with the uses to which the condemned parcel has been and shall be put, amounted to \$16,000.

On February 17, 1955, judgment was entered condemning the property and awarding to defendants, \$1,280 as and for the reasonable value of the property condemned, with interest at seven per cent from November 5, 1951, the date of the taking, and awarding to defendants, as severance damages, and because of the uses to which the property has been and shall be put, and for interference with defendants' use of the larger parcel since November 5, 1951, the sum of \$16,000, without interest. The City has deposited in court the amount called for by this judgment. Defendants have appeal-

ed from that portion of the judgment failing to award interest from November 5, 1951, on the \$16,000 severance award.

[1] The legal principles applicable to the problems involved on this appeal are well settled. Code of Civil Procedure, section 1249, fixes the time at which the value of condemned property and the damages flowing from such taking are to be fixed. So far as pertinent here, that section provides: "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected * * * provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial * * *."

In the instant case, through no fault of the defendants, the trial was not had until three years and four months after the commencement of the action. As a result, the damages, under the quoted section, are computable as of "the date of the trial." This is true even though the condemner, as in the instant case, took possession of the condemned property prior to trial. *City of Los Angeles v. Tower*, 90 Cal.App.2d 869, 204 P.2d 395.

[2-4] Under the Constitution of this state, Article 1, section 14, private property cannot "be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner."

Where, as in the instant case, the condemner secures an order for immediate possession, the condemnee is entitled to compensation for the loss of use of the property from the date of possession to the date of trial, even though the value of the property, under section 1249, is fixed at the time of trial. Where the value of such use is not included in the judgment, the con-

demnee is entitled to interest from the date of taking in lieu of the value of such use. The leading case on this subject is Metropolitan Water Dist. of Southern California v. Adams, 16 Cal.2d 676, at page 680, 107 P.2d 618, at page 620, where the court concluded: "There can be no question, we think, that just compensation for the taking of respondents' property includes not only the actual cash value, or market value of said property, but also the actual cash value of the use of said property from the date of the taking possession thereof up to the date of judgment, if possession is taken by the condemner prior to judgment * * *."

"There should be some means or method of procedure, if we are to comply with the constitutional requirement that just compensation be paid to the owner for the taking of his property, whereby compensation for its use prior to the judgment is paid to him * * *."

"* * * Legal interest is frequently accepted as the basis for fixing the measure of damages * * *."

"* * * The value of respondents' property at the date of trial, whether less or more, was the measure of respondents' damage for the taking of their property, but it did not cover respondents' damage for being deprived of the use of said property prior to judgment. In our view of the merits of this appeal, we are of the opinion that interest was properly allowed under the facts of this case." See also Los Angeles Co. Flood Control Dist. v. Hansen, 48 Cal.App. 2d 314, 119 P.2d 734; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597; Sacramento & San Joaquin Drainage Dist. v. Truslow, 125 Cal.App.2d 478, 270 P.2d 928, 271 P.2d 930.

It should be noted that section 1249 of the Code of Civil Procedure provides, in part, for interest from the date of the order letting the condemner into possession. That portion of the section is here inapplicable because it relates only to possession taken under section 1254 of the Code of Civil Procedure, that is, possession taken after judgment. Metropolitan Water Dist. of

Southern California v. Adams, 16 Cal.2d 676, 678, 107 P.2d 618; City of Los Angeles v. Tower, 90 Cal.App.2d 869, 872, 204 P.2d 395.

[5,6] Appellants argue that the damage to their retained properties by the deposit of silt and the turbulence of the waters caused by the construction of the pumping plant commenced on November 5, 1951, when respondent took possession of the condemned property. Therefore, so it is argued, they are entitled to interest from that date as compensation for the "use" of the property involved in the severance damages. Respondent concedes, and it is clearly the law, that appellants are entitled to compensation for the loss of the "use" of the property involved in the severance damages, and that compensation for such loss of use must be computed starting November 5, 1951. But respondent contends that such compensation for such loss of use is not necessarily interest. The proper rule is that the trial court must ascertain the actual loss caused by such loss of use from the date of possession to the date of judgment, and then such sum should be included in the severance damages. Interest may be used as a measure of such loss, but it is only awarded when the actual loss has not been fixed. Metropolitan Water Dist. of Southern California v. Adams, 16 Cal.2d 676, 107 P.2d 618, and Los Angeles County Flood Control Dist. v. Hansen, 48 Cal.App.2d 314, 119 P.2d 734.

[7] Respondent next argues that the findings, conclusions, and judgment in the instant case demonstrate to a certainty that included in the award of \$16,000 severance damages was an award for loss of the "use" of the property involved from the date of possession to the date of judgment, as well as an award for future damages after judgment.

Thus, the real question involved is not a dispute over the law, but the proper interpretation of the findings, conclusions, and judgment. In interpreting these declarations of the trial court the provisions of section 1249 of the Code of Civil Procedure,

above quoted, must be kept in mind. Under that section, in the instant case, the trial court had to assess compensation and damages as of the date of trial.

[8] Finding XII reads as follows: "That by reason of the severance of said Parcel One [the condemned parcel] from said larger parcel of land, together with the use and uses *which have been and shall be made* by plaintiff of the said Parcel One, the remainder of said property of the defendants *has suffered* a diminution of value in the sum of Sixteen Thousand (\$16,000.00) Dollars." (Italics added.)

The pertinent conclusion of law is: "That the defendants * * * are entitled to judgment against the plaintiff for damages in the sum of Sixteen Thousand (\$16,000.00) Dollars, which sum represents the diminution in value of the entire parcel of defendants' land after the taking and condemning of the said Parcel One hereinafter described, plus interest on the foregoing sum of One Thousand Two Hundred Eighty (\$1,280.00) Dollars from and after November 5, 1951, at the rate of 7% per annum, the same being the date of taking, and *which sums represent the total damage suffered by defendants by reason of the condemnation and the severance of said Parcel One, the uses to which said Parcel One has been and shall be put, the use of said Parcel One by condemnor since November 5, 1951, and the interference with defendants' use of said remaining property from and after November 5, 1951.*" (Italics added.)

The pertinent provisions of the judgment are: "2. That defendants are entitled to interest on the foregoing sum of Twelve Hundred Eighty and 00/100 (\$1,280.00) Dollars, from and after November 5, 1951, the same being the date of taking, until final judgment herein, at the rate of seven (7%) per cent per annum, as and for damages for the deprivation by plaintiff of defendants' use of said parcel taken for said period;

"3. That the said parcel taken is a part of a larger parcel of land owned by defend-

ants and that by reason of the severance of said parcel taken from said larger parcel, *and the uses to which said parcel taken have been and shall be put, and the interference with defendants use of said larger parcel from and after November 5, 1951,* defendants are hereby awarded damages in the sum of Sixteen Thousand and 00/100 (\$16,000.00) Dollars." (Italics added.)

It is too clear to require further comment that by these declarations the trial court fixed, as of the date of judgment, the total severance damages suffered by appellants and awarded for all such damages the total sum of \$16,000. This was compensation not only for future damages caused by the severance, but for interference with their use of the property from the date possession was taken. The trial court could hardly have used clearer language to express this intent.

One of appellants' contentions seems to be that their damages accrued on the date possession was taken, and that the trial court fixed the damages at that date. If this were so, they probably would be entitled to interest on the \$16,000 from the date of possession. But this is not what is required by section 1249 of the Code of Civil Procedure, is not in accordance with the law as set forth in *City of Los Angeles v. Tower*, 90 Cal.App.2d 869, 204 P.2d 395, and is not what the trial court did. The trial court first determined, in accordance with the law, that at the time of judgment the value of the property taken was \$1,280, and allowed interest from the date of possession for the loss of the use of such property, and then determined, in one sum, the loss of the "use" or damage caused by interference with the use of the retained property from the date of possession and future damages. This is in precise accord with the law as set forth in the code and in the cases.

Appellants also seem to argue that, admitting that the damages included an award for interference with their use of the retained properties from the date of posses-

sion, they are nevertheless also entitled to interest because from the date of possession to the date of judgment they did not have the full use of their property, nor of the money awarded to them. But, as already pointed out, the \$16,000 award purported to include damages, fixed as of the time of judgment, for the full loss of use from the date of possession, as well as damages for all future losses.

The portion of the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



144 Cal.App.2d 610

Emma YARBROUGH, Plaintiff and
Appellant,

v.

Robert YARBROUGH, Defendant and
Respondent.
Civ. 16835.

District Court of Appeal, First District,
Division 1, California.

Sept. 25, 1956.

Action for separate maintenance. After a default judgment was entered for wife, husband moved to set aside his default. The Superior Court, City and County of San Francisco, William T. Sweigert, J., granted the motion and wife appealed. The District Court of Appeal, Peters, P. J., held that where only facts alleged by husband in his affidavit in support of motion to set aside his default were that he mislaid the summons and complaint served upon him and did not find them until after his default had been taken, and husband did not aver any facts as to why or how he mislaid the papers, where he mislaid them, what attempts he made to find them, and why he did not find them sooner, first court, under such circum-

stances, abused its discretion in setting aside his default.

Order reversed.

1. Appeal and Error ⇨770(1)

Where respondent failed to file a brief in support of an order in his favor, an inference arose that respondent conceded that appellant's appeal was meritorious.

2. Appeal and Error ⇨82(3)

An unconditional order setting aside a default judgment under statute providing for relief from judgments taken through mistake or excusable neglect is a special order after judgment and appealable. West's Ann.Code Civ.Proc., § 473.

3. Appeal and Error ⇨82(3)

Where an order setting aside a default judgment is conditional, it is nevertheless appealable if self-executing, but where such conditional order is not self-executing and contemplates or requires a second order setting aside the judgment, it is interlocutory and not appealable. West's Ann.Code Civ. Proc., § 473.

4. Appeal and Error ⇨82(3)

Where an order provided for setting aside a default judgment on the grounds of excusable neglect, in ten days upon compliance with specified conditions, and did not contemplate or require the making of a second order, such order was self-executing and therefore was appealable. West's Ann.Code Civ.Proc., § 473.

5. Appeal and Error ⇨957(1) Judgment ⇨139

A motion to vacate a default judgment rests in the sound discretion of the trial court, and its order on such a motion will not be disturbed unless an abuse of discretion clearly appears. West's Ann.Code Civ. Proc., § 473.

6. Appeal and Error ⇨957(1)

Appellate courts, generally, are more inclined toward upholding orders vacating defaults than affirming denials of such motions, in order to dispose of cases, where possible, upon their merits, and this rule

applies with particular force to divorce actions.

7. Judgment ⇨139

The discretion conferred upon a trial court to set aside default judgments is not a capricious or arbitrary discretion, but one that is guided and controlled by fixed legal principles. West's Ann.Code Civ.Proc., § 473.

8. Judgment ⇨162(2)

The burden of showing that a default judgment was entered through mistake, inadvertence, surprise or excusable neglect is on the party moving to set aside the default, and in the absence of such a showing, the default may not be set aside. West's Ann. Code Civ.Proc., § 473.

9. Judgment ⇨159

Where only facts alleged by husband in his affidavit in support of his motion to set aside his default in an action by his wife for separate maintenance were that he mislaid the summons and complaint served upon him, and did not find them until after his default had been taken, and husband did not aver any facts as to why or how he mislaid the papers, where he mislaid them, what attempts he made to find them, and why he did not find them sooner, trial court, under such circumstances, abused its discretion in setting aside his default. West's Ann.Code Civ.Proc., § 473.

10. Judgment ⇨139

Where a defendant, with full knowledge of the proceedings, and without being misled by the opposing party or counsel, fails to take action to protect his interests until after a default judgment is entered against him; it is an abuse of discretion for a trial court to set the default aside. West's Ann.Code Civ.Proc., § 473.

11. Judgment ⇨143(16)

A trial court does not have legal power to set aside a default judgment simply because the defendant did not realize the legal effect of failing to file an answer. West's Ann.Code Civ.Proc., § 473.

12. Judgment ⇨143(3)

While under some circumstances a trial court may find excusable neglect necessary to set aside a default judgment where an employee or associate, or attorney of a defendant erroneously files a summons and complaint served upon defendant so that defendant's attention is not called to them, the inadvertence of defendant's officers must rest not on mere forgetfulness but on a misunderstanding in the execution of properly given instructions, or on a mistake which might be easily made without any culpable carelessness on the part of the parties concerned. West's Ann.Code Civ.Proc., § 473.

13. Judgment ⇨159

Where secretary of husband's attorney in an action by wife for separate maintenance in an affidavit in support of husband's motion to set aside his default stated that after husband was already in default she telephoned to the office of wife's lawyer to ascertain if wife's lawyer would allow the husband to file a pleading and was notified by the secretary in wife's lawyer's office that the lawyer was in court and would be informed of the call when he returned, and the same thing happened on four succeeding days, such a showing was not sufficient to warrant setting aside husband's default. West's Ann.Code Civ.Proc., § 473.

14. Judgment ⇨143(17)

The trial court may find excusable neglect or surprise necessary to set aside a default judgment where settlement negotiations are being had between counsel and where there is an oral or implied understanding that no default will be taken without notice, and counsel takes the default judgment without notice. West's Ann.Code Civ.Proc., § 473.

Phil F. Garvey, San Francisco, for appellant.

Joseph E. Isaacs, San Francisco, for respondent.

PETERS, Presiding Justice.

In this action for separate maintenance the default of the defendant was duly taken, and a default judgment and decree entered. Thereafter, defendant moved to set aside his default. The motion was granted. The wife appeals.

[1] The appeal is presented on appellant's brief alone, respondent having failed to file a brief in support of the order. This failure imposes an unnecessary burden on this court, and at least raises the inference that respondent concedes that the appeal is meritorious. *Bendlage v. Kohl-saat*, 54 Cal.App.2d 136, 128 P.2d 691; *Postin v. Griggs*, 66 Cal.App.2d 147, 151 P.2d 887; see discussion, 4 Cal.Jur.2d p. 334, sec. 496.

On December 6, 1954, the wife, appellant herein, in San Francisco, brought an action against her husband, respondent, a San Francisco resident, for separate maintenance, on the grounds of cruelty and wilful neglect, praying for \$150 per month for support, plus certain other sums for hospital and medical care. Summons and complaint were served on respondent on December 30, 1954, in San Francisco. The summons bore on its face the standard provision that if served within San Francisco "You are hereby directed to appear and answer the complaint * * * within ten days after the service on you of this summons * * *

"* * * that unless you appear * * the said Plaintiff will * * * apply to the Court for any other relief demanded in the complaint."

On January 11, 1955, the respondent having failed to appear, appellant secured the entry of respondent's default. On January 18, 1955, respondent moved to set the default aside, the supporting affidavit merely averring in general terms that the default "was taken against defendant by reason of his surprise, inadvertence and excusable neglect" without alleging any supporting facts. An affidavit of merits and a verified answer denying the major allegations of the complaint were also filed,

as was also a cross-complaint for a divorce. On January 28, 1955, this motion to set aside the default was denied, without prejudice.

On February 1, 1955, a default decree of separate maintenance was entered, ordering respondent to pay appellant \$130 per month, to pay community debts up to \$590, and to pay appellant's attorney's fees of \$200 and \$25 in court costs. On this same day respondent again filed a notice of motion for an order to set aside the default. Respondent's supporting affidavit avers that the "default therein was taken against defendant by reason of his surprise, inadvertence and excusable neglect in that when affiant was served with a copy of the summons and complaint on or about December 30, 1954, he mislaid the same and did not find them again until he was in default, at which time affiant immediately took the said copy of complaint and summons to Joseph E. Isaacs, Esq., his attorney, who advised affiant of his said default and further advised affiant he would try and negotiate with the attorney for the plaintiff to give affiant the opportunity to file his answer and cross-complaint."

There was also filed an affidavit of the secretary of respondent's attorney to the effect that she tried to get in touch with appellant's attorney by telephone on several occasions commencing on January 10, 1955 (when respondent was already in default), to ascertain if appellant would permit respondent to file a pleading, but was unable to reach appellant's attorney who was in court when the telephone calls were made.

On March 1, 1955, the trial court ordered "the motion to set aside default and decree granted after 10 days of this order providing defendant has paid \$130.00 temporary alimony and \$200 attorneys fees, otherwise motion denied." On March 10, 1955, the wife appealed from the order.

[2,3] The first question presented is whether the order involved is an appealable order. Of course, an unconditional order under section 473 of the Code of Civil

Procedure setting aside a default judgment is a special order after judgment and therefore appealable. *Colby v. Pierce*, 15 Cal. App.2d 723, 59 P.2d 1046; *Casner v. Superior Court*, 23 Cal.App.2d 730, 74 P.2d 298; *Harth v. Ten Eyck*, 12 Cal.2d 709, 87 P.2d 693. Where, as in the instant case, the order is conditional, if the order is self-executing, it is still appealable. *Paul v. Walburn*, 135 Cal.App. 364, 26 P.2d 1002. It is only where the conditional order is not self-executing, that is, it contemplates or requires a second order setting aside the judgment, that the first order is interlocutory, and not appealable. *Hayes v. Pierce*, 18 Cal.App.2d 531, 64 P.2d 728; *AAIwyn's Law Inst. v. City & County of San Francisco*, 39 Cal.App. 365, 178 P. 966.

[4] In the instant case, it is quite clear that the order sets aside the judgment in 10 days upon compliance with the conditions, and that such order did not contemplate or require the making of a second order. The order, in other words, is self-executing, and therefore appealable.

The second and basic question presented is whether the trial court abused its discretion in setting aside the default judgment on the basis of the affidavits on file. We think such abuse of discretion here appears as a matter of law.

[5-8] We are well aware of the rule that the granting or denying a motion to vacate a default rests in the sound discretion of the trial court, and that the order will not be disturbed unless an abuse of discretion clearly appears. See for good statements of the rule *Baratti v. Baratti*, 109 Cal.App.2d 917, 242 P.2d 22; *Berry v. Berry*, 140 Cal.App.2d 50, 294 P.2d 757; *Wilterdink v. Wilterdink*, 81 Cal.App. 2d 526, 184 P.2d 527; *Shearman v. Jorgensen*, 106 Cal. 483, 39 P. 863. We are also aware of the rule that appellate courts, generally, are more inclined toward upholding orders vacating defaults than affirming denials of such motions, in order to dispose of cases, where possible, upon their merits. *Stub v. Harrison*, 35 Cal.App. 2d 685, 96 P.2d 979; *Montijo v. Robert*

Sherer & Co., 5 Cal.App. 736, 91 P. 261; *Osborn v. Osborn*, 131 Cal.App.2d 191, 280 P.2d 60; *Bodin v. Webb*, 17 Cal.App.2d 422, 62 P.2d 155. We are also aware that this rule applies with particular force to divorce actions. *Garcia v. Garcia*, 105 Cal. App.2d 289, 233 P.2d 23; *Mulkey v. Mulkey*, 100 Cal. 91, 34 P. 621; *Reh fuss v. Reh fuss*, 169 Cal. 86, 145 P. 1020; *Landon v. Landon*, 74 Cal.App.2d 954, 169 P.2d 980; *Hambrick v. Hambrick*, 77 Cal.App. 2d 372, 175 P.2d 269; *Gregory v. Gregory*, 92 Cal.App.2d 343, 206 P.2d 1122. But the discretion conferred is not a capricious or arbitrary one, but a discretion that is guided and controlled by fixed legal principles. *Waite v. Southern Pacific Co.*, 192 Cal. 467, 221 P. 204; *Gilio v. Campbell*, 114 Cal.App.2d Supp. 853, 250 P.2d 373; *Brill v. Fox*, 211 Cal. 739, 297 P. 25; *Essig v. Seaman*, 89 Cal.App. 295, 264 P. 552. The burden of showing that the default was entered through mistake, inadvertence, surprise or excusable neglect is on the moving party, and in the absence of such a showing the default may not be set aside. *Elms v. Elms*, 72 Cal.App.2d 508, 164 P.2d 936; *Bailey v. Taaffe*, 29 Cal. 422.

[9-11] Tested by the standards set forth in the cases we do not think that respondent's affidavit discloses a sufficient excusable inadvertence or neglect to permit the trial court to set aside the default. On December 30, 1954, respondent was served with a summons and complaint which told him that he must appear and answer within 10 days. He did not even consult an attorney for 11 days. His only excuse is that he "mis-laid" the documents "and did not find them again until he was in default." No facts are averred as to why or how he mis-laid the papers, where he mis-laid them, what attempts he made to find them, and why he did not find them sooner. All we have is that the respondent, in full possession of his faculties, mis-laid the papers and did not find them until after his default had been taken. The cases are clear to the effect that where the defendant, with full knowledge of the pro-

ceedings, and without being misled by the opposing party or counsel, fails to take action to protect his interests until after the default, it is an abuse of discretion to set the default aside. *Elms v. Elms*, 72 Cal.App.2d 508, 164 P.2d 936; *Essig v. Seaman*, 89 Cal.App. 295, 264 P. 552; *Bailey v. Taaffe*, 29 Cal. 422; *Fink & Schindler Co. v. Savros*, 72 Cal.App. 688, 237 P. 1083; *Weinberger v. Manning*, 50 Cal.App. 2d 494, 123 P.2d 531; *Dunn v. Standard Acc. Ins. Co.*, 114 Cal.App. 208, 299 P. 575. Nor does the trial court have the legal power to set aside the default simply because the defendant did not realize the legal effect of failing to file an answer. *Gilio v. Campbell*, 114 Cal.App.2d Supp. 853, 250 P.2d 373.

[12] While, under some circumstances, the courts have held that the trial court may find "excusable neglect" where an employee or associate, or attorney of the defendant erroneously files the papers so that defendant's attention is not called to them, *Benjamin v. Dalmo Mfg. Co.*, 31 Cal. 2d 523, 190 P.2d 593; *Gorman v. California Transit Co.*, 199 Cal. 246, 248 P. 923; *Downing v. Klondike Min. & Mill. Co.*, 165 Cal. 786, 134 P. 970, the courts have been careful to point out that in such cases "The inadvertence of defendant's officers rested not on mere forgetfulness [citation] but on a misunderstanding in the execution of properly given instructions, a mistake which "might be easily made * * * without any culpable carelessness" on the part of the parties concerned." *Bernards v. Grey*, 97 Cal.App.2d 679, 685, 218 P.2d 597, 601; see also *Slater v. Selover*, 25 Cal.App. 525, 144 P. 298.

[13] The affidavit of the secretary of respondent's attorney adds nothing in sup-

port of respondent's case. It is to the effect that on January 10, 1955, after respondent was already in default she telephoned to the office of appellant's lawyer "to ascertain if [appellant's lawyer] would allow the said defendant to file a pleading." The affiant was notified by the secretary in the lawyer's office that appellant's counsel was in court, and would be informed of the call when he returned. The same thing happened on the four succeeding days. This is not a sufficient showing that would warrant setting aside a default.

[14] There can be no doubt that a trial court may find excusable neglect or surprise where settlement negotiations are being had between counsel, and where there is an oral or implied understanding that no default will be taken without notice, and counsel takes such a default without notice. *Waybright v. Anderson*, 200 Cal. 374, 253 P. 148; *Greenamyer v. Board of Lugo E. S. Dist.*, 116 Cal.App. 319, 2 P.2d 848; *Beard v. Beard*, 16 Cal.2d 645, 107 P.2d 385; *Bonfilio v. Ganger*, 60 Cal. App.2d 405, 140 P.2d 861; *Greenwell v. Caro*, 114 Cal.App.2d 35, 249 P.2d 573. But those cases are predicated upon the fact that opposing counsel acted so as to deceive or mislead the defaulting counsel. In the instant case no negotiations for settlement were taking place. There was no conduct or act on the part of appellant's counsel which deceived or misled the respondent or his counsel. When the secretary of appellant's counsel was first approached by respondent's counsel, the time to plead had already expired. Respondent was already in default.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

144 Cal.App.2d 698

Cite as 301 P.2d 431

**Louis S. SALMONS and Hodgle B. Salmons,
Husband and Wife, Plaintiffs and
Respondents,**

v.

**Moroni JAMESON and Adelina L. Jameson,
Husband and Wife, Defendants and
Appellants.**

Civ. 5433.

District Court of Appeal, Fourth District,
California.

Sept. 27, 1956.

Rehearing Denied Oct. 23, 1956.

Hearing Denied Nov. 21, 1956.

Action was brought for specific performance and to quiet title. The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment in favor of the plaintiffs, and the defendants appealed. The District Court of Appeal, Mussell, J., held that where written contract for the purchase of ranch of 930 acres for \$65,000 provided that it was understood that thirty acres, starting about 400 feet west of cattle guard on south side of county road on east grade of certain mountain, were to be deeded back to vendors by purchasers, and vendors gave purchasers a deed to entire ranch and vendors constructed a house and made improvements of about \$25,000 on the 30 acres, the contract provided a means by which the description of the 30 acres could be applied to the earth's surface, and a metes and bounds description of the 30 acres could be prepared, and that therefore contract was enforceable by vendors by specific performance with respect to the 30 acres.

Judgment affirmed.

1. Frauds, Statute of §110(1)

To satisfy the statute of frauds, memorandum affecting sale of realty must so describe realty that it can be identified with reasonable certainty.

2. Specific Performance §29(3)

Where written contract for the purchase of ranch of 930 acres for \$65,000 provided that it was understood that 30 acres, starting about 400 feet west of cattle guard on south side of county road on east grade

of certain mountain, were to be deeded back to vendors by purchasers, and vendors gave purchasers a deed to entire ranch and vendors constructed a house and made improvements of about \$25,000 on the 30 acres, contract provided a means by which description of the 30 acres could be applied to the earth's surface, and a metes and bounds description of the 30 acres could be prepared, and therefore contract was enforceable by vendors by specific performance with respect to the 30 acres.

3. Estoppel §52 Limitation of Actions §13

A person by his conduct may be estopped to rely on defenses of laches or limitations. West's Ann.Code Civ.Proc., §§ 335, 337, subd. 1.

4. Equity §80 Limitation of Actions §138

Where delay in commencing action is induced by conduct of defendant, delay cannot be availed of by defendant as a defense, on ground of laches or limitations. West's Ann.Code Civ.Proc., §§ 335, 337, subd. 1.

5. Equity §72(1)

Mere lapse of time does not constitute laches, unless accompanied by circumstances showing prejudice to opposing party.

6. Limitation of Actions §60(7)

Where plaintiffs repeatedly asked defendants for a deed to realty, but defendants made excuses, and defendants did not refuse to execute a deed until shortly before plaintiffs instituted suit for specific performance, and defendants were not prejudiced by delay of plaintiffs in bringing the suit, the suit was not barred by limitations. West's Ann. Code Civ.Proc., §§ 335, 337, subd. 1.

7. Frauds, Statute of §129(9)

Where vendors agreed to sell 930 acre ranch to purchasers with understanding that purchasers would deed back 30 acres of the ranch so that vendors could erect a home thereon, and vendors took possession of the 30 acres and made valuable improvements thereon on the faith of the agreement, the case was taken out of the statute of frauds.

8. Appeal and Error ⇨1010(1)

Where findings on material issues were supported by substantial evidence, they could not be disturbed on appeal.

9. Appeal and Error ⇨996, 1010(1), 1012(1)

The weight and sufficiency of the evidence, construction to be placed on the evidence, and the inferences to be drawn therefrom were matters for the trier of the facts.

10. Appeal and Error ⇨994(3), 1011(1)

Questions as to the credibility of witnesses and the determination of conflicts and inconsistencies in testimony of witness were for trial judge as trier of facts.

Robert E. Krause, Long Beach, and Fox & White, San Diego, for appellants.

Glenn & Wright, San Diego, for respondents.

MUSSELL, Justice.

This is an appeal by the defendants in an action for specific performance and to quiet title. On May 20, 1946, plaintiffs were the owners of a 930 acre ranch of mountain property in the vicinity of Palomar Mountain in San Diego county. They had acquired this property in 1905 or 1906 and had lived on it continuously from 1907 or 1908 and used it for farming and cattle raising. On May 20, 1946, plaintiffs were visited by the defendants, Dr. Jameson and his wife, and Dr. Jameson's brother, Joseph. The Jamesons were interested in buying the ranch. Salmons said that it was for sale at the total price of \$65,000. A memorandum of agreement was then signed by Dr. Jameson and Louis Salmons purporting to be an option to purchase 900 acres at a total purchase price of \$65,000 and it was agreed that an escrow should be opened. Salmons testified that he told Jameson he wished to retain 30 acres of the ranch and build a house on it; that he "showed them" the 30 acres. On June 30, 1946, the parties entered into a written contract whereby defendants agreed to purchase the ranch, containing 930 acres, for the sum of \$65,000. This agreement further provided as follows: "It

is further understood that 30 acres are to be deeded back to Louis S. Salmons and Hodg-
ie B. Salmons starting approximately 400' west of the cattle guard on south side of county road on east grade of Palomar Mt." Louis Salmons testified that when Mrs. Jameson was writing this agreement "We told her to hold the 30 acres there and we would build our house there"; that "I showed Mr. Jameson right where the 30 acres lay and explained everything to him before the contract was drawn up"; that "We stood and pointed a hundred feet across the road. I said, 'Now there is the 30 acres in there. I am going to build on that point'" and "I showed him where the spring was"; that he had an understanding with Dr. Jameson that the 30 acres was to start at a point approximately 400 feet west of the cattle guard on the south side of the county road and run west.

The parties went into escrow at the Security Trust and Savings Bank of San Diego and escrow instructions were signed on July 10, 1946. These instructions contained, among other things, the following provision: "The purchaser herein is to deed to sellers 30 acres of the property involved in this escrow after close of escrow. Description of said 30 acres to be agreed upon by both parties. It is understood by both buyer and seller that your bank assumes no responsibility or liability as to the description of the said 30 acres or to the delivery of the deed conveying said 30 acres."

On July 16, 1946, Salmons and his wife executed and delivered to the escrow holder a grant deed to the entire ranch, including the 30 acres here in question. Defendants executed and delivered a note and trust deed to the escrow holder as security for the unpaid balance of the purchase price. Both the deed and the trust deed were recorded in 1946 and defendants paid the entire balance by 1954. In the spring of 1947 plaintiffs began the construction of their house and the making of improvements on the 30 acre tract referred to in the agreement of June 30, 1946, and expended approximately \$25,000 thereon. The house was adobe,

with a tile roof. A mixed black top road leading from the county road to the house was laid and a water system was installed from the spring on the property. Dr. Jameson knew in the early part of 1947 that Salmons had built his house on the 30 acres involved and made no objection, stating that the reason he did not object was that he understood that the property would come back to them when the Salmons died and that the general area surrounding the house was all right with him.

On numerous occasions after the sale had been completed, Salmons asked Dr. Jameson for a deed to the 30 acres. Dr. Jameson "stalled it off" but never said until 1954 that he was not willing to deed back the 30 acres. In the latter part of 1954 Salmons went to Dr. Jameson's office in Fallbrook and demanded a deed. The doctor then for the first time claimed that the Salmons had only a "life lease" and he refused to give Salmons a deed to the 30 acres. It is undisputed that defendants paid the taxes on the entire 930 acres, including the house built by plaintiffs and that the property taxes on the said 30 acres and improvements between 1946 and 1955 amounted to \$1,434.86.

Garth Batt, a title engineer, employed at the Security Title Company as a title engineer, prepared from the agreement of June 30, 1946, a map of the 30 acres involved. He used a point 400 feet west of the cattle guard referred to in said agreement as a starting point on the south side of the county road. A fence ran north and south from this point and he established the east boundary as parallel to this fence. He used the United States Geological Survey of the area made in 1950 to indicate the location of the Salmons house and to place it on the map which he prepared (plaintiffs' exhibit 7). He extended the east boundary south parallel to the fence to a section line; thence west approximately 1,200 feet; thence north to the county road; thence generally southeasterly along said road to the point of beginning. The trial court accepted the description prepared by Batt as describing the 30 acres involved and found that the de-

fendants now hold legal title to the said 30 acres so described as trustees for plaintiffs. Judgment was entered decreeing, inter alia, that the defendants execute and deliver to plaintiffs a grant deed conveying to them all of the 30 acres described in the decree, free and clear of all encumbrances, and decreed that defendants are disbarred, restrained and enjoined from asserting any right, title or interest therein, and further that plaintiffs pay defendants the sum of \$1,434.86 taxes theretofore paid by defendants.

Defendants appeal from the judgment and set forth numerous grounds, principally based upon the argument that the evidence is insufficient to support the findings. The first argument presented is that "The trial court erred in holding that a written contract to deed back 30 acres of land after close of escrow—description of said 30 acres to be agreed upon by both parties, where no agreement was reached, was specifically enforceable in equity."

[1] As was said in *Beverage v. Canton Placer Mining Co.*, 43 Cal.2d 769, 774, 775, 776, 278 P.2d 694, 698:

"To satisfy the statute of frauds, the memorandum affecting the sale of real property must so describe the land that it can be identified with reasonable certainty. * * * This is one of the most essential parts of such an agreement."

It was further held:

"Preferably, the writing should disclose a description which is itself definite and certain. Alternatively, however, a description fulfills the test of reasonable certainty if it furnishes the 'means or key' by which the description may be made certain and identified with its location on the ground. * * * The applicable principle is that that is certain which can be made certain * * and parol evidence in proof thereof, admitted not for the purpose of furnishing or supplying a description * * but for the purpose of applying the given description to the earth's surface, thereby identifying the property. * *

Courts have been most liberal in construing executory contracts for the sale of real estate and have sought, as far as is consistent with the above established rules, to give effect to the intention of the parties in applying descriptions to property. * * * A description or designation in itself of meagre and doubtful character may be deemed sufficient on its being made to appear by proper allegation and proof that at the place indicated the vendor owned premises answering to its terms and owned at that place no other such property."

In the instant case the evidence shows that plaintiffs have fully performed their part of the agreement, have been let into possession of the 30 acre tract and have made substantial improvements thereon with the knowledge and consent of the defendants.

In *Pomeroy*, Specific Performance of Contracts, (3rd Ed.), Sec. 145, p. 378, the author states:

"In order that any agreement, whether covered by the statute or not, whether written or verbal, may be specifically enforced, it must be complete in all its parts; that is, all the terms which the parties have adopted, as portions of their contract, must be finally and definitely settled, and none must be left to be determined by future negotiation; and this is true without any regard to the comparative importance or unimportance of these several terms. * * It should also be remarked that, when a contract has been partly performed by the Plaintiff, and the Defendant has received and enjoys the benefits thereof, and the Plaintiff would be virtually remediless unless the contract were enforced, the Court, from the plainest considerations of equity and common justice, does not regard with favor any objections raised by the Defendant merely on the ground of the incompleteness or uncertainty of the agreement. Even if the agreement be incomplete, the Court will then, in fur-

therance of justice and to prevent a most inequitable result, decree a performance of its terms as far as possible * * * In fact, one ground of the equitable jurisdiction to decree specific performance is the incompleteness of the contract which would prevent an action at law, but which exists to such a limited extent and under such circumstances that a refusal to grant any relief would be plainly inequitable."

In *Kelley v. Russell*, 50 Cal.App.2d 520, 529, 123 P.2d 606, 611, the court said:

"Appellant's next point is that these option contracts cannot be specifically enforced because they were uncertain and lacked mutuality. This is based on one of the findings of the court to the effect that there is no ten-acre parcel containing a water well, spring or other water supply which is defined or can be identified by the terms of the leases, and that the appellant has failed and refused to properly designate or specify any such ten-acre parcel which he claims the right to except from the conveyance. From this it is argued that the option provisions are so uncertain that they cannot be specifically enforced. Any uncertainty which exists arises neither from the terms of the options nor from the court's finding but from the refusal of the appellant to designate any such parcels upon which a water supply existed without including land upon which the oil wells were located. The mere fact that the appellant had the right under the options to claim and exclude from the forty-acre tracts, which the respondents were obliged to offer to purchase, any ten-acre parcels upon which a water supply had existed at the time in question, does not make these option contracts so uncertain as to be unenforceable. *Lange v. Waters*, 156 Cal. 142, 103 P. 889, 19 Ann.Cas. 1207; *Stamm v. Colvin*, 94 Cal.App. 180, 270 P. 744; *Janssen v. Davis*, 219 Cal. 783, 29 P.2d 196. If the appellant desired to exercise the right

given him to exclude any ten-acre tracts from the conveyances he was required to make, this exclusion depended upon facts which were readily determinable and the entire matter was one which was well within the powers of a court of equity. *Relovich v. Stuart*, 211 Cal. 422, 295 P. 819; *Fleishman v. Woods*, 135 Cal. 256, 67 P. 276."

[2] Under the rules announced in the foregoing authorities, we are in accord with the trial court's finding that the agreement of June 30, 1946, provided a means or key by which the description of the 30 acres contained therein could be applied to the earth's surface and the metes and bounds description of said 30 acres prepared, and further that the contract was enforceable by specific performance under the circumstances shown.

It was conceded at the trial by counsel for the defendants that the Salmons "had a perfect right to live the rest of their days on this property and to build their home there." Dr. Jameson had no objection to the particular location of the 30 acre tract described, stating that this was because it was coming back to the ranch when the Salmons died. In this connection, the doctor testified that at the time of the execution of the contract of June 30, 1946, Salmons said that "* * * (h)e and Mrs. Salmons had lived all their life on Palomar Mountain, or approximately 50 years, and they wished to remain, that is, live the rest of their lives on the mountains, and would it be all right with us if they lived on the ranch, and we said certainly. So Louie and Mrs. Salmons asked if we would deed them 30 acres, and we said yes, and I asked Louie what would become of the 30 acres when he and Mrs. Salmons died, and he said it would return to the ranch because they never wished to see the ranch broken up." However, Salmons testified that some time in 1954 he was informed for the first time by Dr. Jameson that he, Salmons, had only a life lease on the property; that there were several discussions about the 30 acres and

Dr. Jameson never mentioned a life lease until he, Salmons, demanded a deed. The escrow officer testified that none of the parties mentioned anything about a life estate to him. No mention is made of such an estate in the contract of June 30, 1946. The foregoing testimony merely created a conflict for the determination of the trial court and its implied finding that no life estate was agreed upon is supported by the record.

[3-7] Defendants argue that the court erred in finding that the statute of limitations did not bar plaintiffs' cause of action and cite sections 335 and 337, subdivision 1, of the Code of Civil Procedure (four year limitation). However, in *Adams v. California Mut. B. & L. Ass'n*, 18 Cal.2d 487, 488, 489, 116 P.2d 75, it is held that it is well settled that a person by his conduct may be estopped to rely upon these defenses (of laches or the statute of limitations) and that where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense. In the instant case the evidence shows that Salmons repeatedly asked for a deed to the property and that Dr. Jameson "stalled it off" and that his refusal to execute a deed was not made until 1954. Mere lapse of time does not constitute laches unless accompanied by circumstances showing prejudice to the opposing party. *Beverage v. Canton Placer Mining Co.*, supra, 43 Cal.2d 769, 777, 778, 278 P.2d 694. In the instant case no prejudice was shown. Moreover, Salmons and his wife took possession of said property and made valuable improvements thereon on the faith of the agreement. This was enough to take the case out of the statute of frauds. *Magee v. Magee*, 174 Cal. 276, 280, 162 P. 1023.

[8-10] The findings on the material issues here involved are supported by substantial evidence and cannot be here disturbed. The weight and sufficiency of the evidence, the construction to be placed upon it and the inferences to be drawn therefrom were matters for the trier of the facts. Likewise, questions as to the credibility of

a witness and the determination of conflicts and inconsistencies in his testimony were for the trial judge. *Dillard v. McKnight*, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

The judgment is affirmed.

GRIFFIN, Acting P. J., and BURCH, Justice pro tem., concur.



144 Cal.App.2d 653

Isabella DAMIANI and Michele Damiani,
Plaintiffs and Appellants,

v.

Santos Esteran MARTINEZ, Defendant
and Respondent.

Civ. 21622.

District Court of Appeal, Second District,
Division 2, California.

Sept. 25, 1956.

Automobile accident case. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment in favor of defendant and plaintiffs appealed. The District Court of Appeal, Fox, J., held that refusal of plaintiffs' request to have Vehicle Code sections governing conduct of motorists entering intersections of boulevards and arterial highways not controlled by mechanical or electrical stop and go signals read to jury and for instruction that inexcusable or unreasonable conduct in violation of such sections of Vehicle Code would constitute negligence per se, was not error where accident involved occurred at intersection where mechanical or electrical stop and go traffic signals were so twisted as not to be visible to defendant, who was controlled by them.

Judgment affirmed.

1. Automobiles ⇨246(9)

Trial ⇨241

Refusal of plaintiffs' request in automobile accident case to have Vehicle Code sections governing conduct of motorists entering intersections of boulevards and arterial highways not controlled by mechanical or electrical stop and go traffic signals read to jury and also for instruction that inexcusable or unreasonable conduct in violation of such sections constituted negligence per se, was not error, where accident involved occurred at intersection controlled by stop and go signals which were twisted so as not to be visible to defendant motorist who was controlled by such signals. *West's Ann. Vehicle Code*, §§ 552, 577.

2. Automobiles ⇨171(5)

Where intersection of a boulevard or arterial highway with another roadway is controlled by traffic signal light, direction of light controls the right of way.

3. Automobiles ⇨245(14)

In action arising out of collision at T intersection between westbound motorist and southbound motorist, who was controlled by stop sign and traffic signals, which were twisted so as not to be visible to southbound motorist at time of collision, question as to reasonableness of southbound motorist's conduct in driving into such signal controlled intersection without stopping, if he did so, was question of fact for jury.

4. Trial ⇨253(8)

Refusal of trial court to give plaintiff westbound motorists' requested instruction in automobile accident case to effect that if defendant southbound motorist approached an intersection wherein traffic signal was defective and inoperative with notice of defective condition of signal the southbound motorist had duty to stop before entering intersection if there was a stop sign present was not error, as such requested instruction was incomplete, inaccurate and misleading in that it failed to take cognizance of fact that east-west traffic

at such intersection was being controlled by traffic lights, and ignored directional signals of those lights and state of traffic responding to those lights.

Harry K. Mulholland, Santa Monica, for appellants.

Hunter & Liljestrom, Los Angeles, for respondent.

FOX, Justice.

This is an appeal from a judgment in favor of defendant after a jury verdict in a personal injury action arising from an intersection collision. The appeal is based on the ground that it was prejudicial error to refuse to give certain instructions charging defendant with the duty of stopping before entering the intersection.

The accident occurred around noon on March 1, 1954, at the intersection of Firestone Boulevard and Holmes Avenue. The day was clear and dry. Firestone Boulevard is a six-lane thoroughfare running in an east-west direction. It is approximately 70 feet wide in the area here involved, and carries three lanes of traffic on each side of a double centerline. Holmes Avenue is a two-lane highway laid out in a north-south direction, and is 28 feet wide. Holmes Avenue, at the place of the accident, does not completely cross Firestone Boulevard but flows into it from the north only. The prolongation of Holmes Avenue is located some 100 feet to the west. The picture, therefore, presented at the place of the collision is that of Holmes Avenue joining Firestone Boulevard to form a "T" intersection, the upper horizontal bar of which is Firestone Boulevard.

This intersection was controlled by traffic lights which flashed red, green and amber signals. Three such signal lights were located at the intersection, two of which controlled east-west traffic on Firestone Boulevard. The third traffic light was placed at the south curb of Firestone to face north towards Holmes Avenue, its function being to regulate traffic proceed-

ing south on Holmes in the approach to Firestone. There was, in addition, a boulevard stop sign installed on the west side of Holmes Avenue, approximately 12 to 15 feet north of Firestone Boulevard. It was visible to southbound traffic on Holmes Avenue. At the time of the accident all of these traffic lights were in operation. However, through some unexplained mischance, the signal normally governing traffic southbound on Holmes was so twisted from its normal position that the color of its light was not visible to a motorist approaching the intersection.

Plaintiffs Damiani are husband and wife and just prior to the accident they were traveling west on Firestone in an automobile driven by Mr. Damiani. They approached the intersection from the lane of traffic closest to the center line at a speed of 20-25 miles per hour. When he was approximately 200 feet from the intersection, Mr. Damiani observed that the traffic signal on Firestone was red for westbound traffic. Three or four cars in the lanes to his right had already been stopped by that light, but there were no vehicles ahead of him in his lane. When he was about 50 feet from the intersection, the light changed to green for westbound traffic. Upon the signal's changing to green, Mr. Damiani observed one or two of the stationary cars in the lanes to his right start to move forward and then suddenly stop. His car was three or four car-lengths from the intersection when he first observed the cars start up and about two car-lengths therefrom when he saw them stop. Mr. Damiani continued forward at the same speed into the intersection and collided with defendant's car, which was in the process of making a left turn. The point of impact was approximately nine feet west of the east curb of Holmes Avenue and 37 feet south of the north curb of Firestone Boulevard.

Defendant testified that he lived south of Firestone Boulevard and that his wife worked north of the boulevard near Holmes Avenue. It was his custom to

drive her home from her place of employment. Prior to the accident, he had driven north on Holmes Avenue to meet his wife and then started south on that avenue. He approached the intersection at a speed of 15 to 20 miles an hour. He testified that he observed that the traffic light facing north up Holmes Avenue was not working.¹ Two westbound cars on Firestone were approaching the intersection as he neared it. Defendant could not see the state of the traffic signals for east-west bound traffic. He testified that he stopped his car for 30 or 40 seconds near the boulevard stop sign, and while he waited the westbound cars on Firestone came to a halt at the intersection. He thereupon drove slowly into the intersection, and was going about 5 miles an hour when the accident occurred.

A different version of defendant's conduct was given by one William Wickenberg, who testified that he observed defendant's car approach the intersection at a speed of 30 to 35 miles an hour just as the signals for east and west traffic on Firestone were changing to green. He testified that defendant's car seemed to increase its speed as it entered the intersection after the green signal was in effect for traffic on Firestone Boulevard. He testified defendant made no stop at the corner of Firestone and Holmes.

Plaintiffs do not challenge the sufficiency of the evidence to support the judgment. They assert, however, that the court committed prejudicial error in failing to give certain instructions requested by them relating to defendant's duty to halt at an intersection marked with a boulevard stop sign. They complain primarily that the court failed to give the following instructions:

1. In their briefs, appellants state that when defendant first crossed Firestone Boulevard from the south en route to his wife's place of employment, he at that time noticed "that the signals for north and southbound traffic on Holmes were not working." This is not borne out by

1. Veh.Code, sec. 577. "The driver of any vehicle upon approaching any entrance of a highway or intersection, or railroad grade crossing, signposted with a stop sign as provided in this code, except as otherwise permitted or directed in this code, shall stop: (a) Before entering the crosswalk on the near side of the intersection or, if none, then at a limit line when marked, otherwise before entering such highway or intersection."

2. Veh.Code, sec. 552. "The driver of any vehicle shall stop as required by Section 577 of this code at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard."

3. An instruction that inexcusable or unreasonable conduct in violation of appropriate sections of the Vehicle Code constitutes negligence per se.

[1,2] It is at once manifest that the trial court correctly refused to read to the jury the aforementioned provisions of the Vehicle Code or to instruct the jury that a violation thereof without excuse would charge defendant with negligence per se. By their plain terms, these sections state the rule enacted specifically for the purpose of governing the conduct of motorists entering intersections of boulevards and arterial highways not controlled by mechanical or electrical "Stop" and "Go" traffic signals. They were not formulated to impose a statutory criterion of conduct for motorists proceeding into an intersection at a time when electrical stop-and-go signals are in operation as the traffic control device. "Where the intersection of a boulevard or arterial highway with another

the record so far as the traffic signal here involved is concerned. The record shows defendant was referring solely to the traffic signal controlling northbound traffic, obviously on the section of Holmes Avenue south of Firestone.

roadway is controlled by a traffic signal light, the direction of the light controls the right of way, and not the usual rule at stop and arterial highways." 7 Cal.Jur.2d, sec. 242, p. 54; *Carlin v. Prichett*, 81 Cal. App.2d 688, 694, 184 P.2d 945.

[3] It is not the law that because the traffic light controlling Holmes Avenue traffic was askew and not visible to defendant, he was under a duty enjoined by statute to come to a complete stop before entering Firestone Boulevard regardless of the directional signals of the lights then controlling east-west traffic thereon. No provision of the Vehicle Code demands this. The reasonableness of defendant's conduct, under the particular circumstances then confronting him, in driving into a signal-controlled intersection without stopping, if he did so, was a question of fact for the jury to determine without reference to statutory rules that have been prescribed for an entirely different type of intersection. Granted that to enter an intersection controlled by electric traffic lights without knowing definitely the color of the light may be incompatible with the ordinary care required of a reasonably prudent man, that result does not flow from any violation of sections 577 or 552, which do not purport to cover the situation here presented. Plaintiffs themselves concede, in their brief, that "the situation here involved is not specifically provided for in the Vehicle Code." It would be egregiously improper to instruct that defendant was guilty of negligence per se if by his conduct he has contravened statutes not designed to encompass within their purview the conduct in question. The mischief of instructing that defendant's failure to stop as provided by sections 577 and 552 constituted negligence per se is graphically illustrated by postulating the situation wherein defendant motorist entered the intersection in question without stopping though the signal was in fact green in his favor and red for east-west traffic. Under the inexorable logic of plaintiff's theory, defendant must be charged with negligence per se though east-west traffic was in fact halted by vir-

tue of the red light and the right of way was his to claim. It would be unfortunate if such an inequitable result were to be countenanced by resort to a Procrustean manipulation of inapplicable statutes. The law sets no such statutory trap for the unwary. See *Carlin v. Prichett*, supra; 7 Cal.Jur.2d, sec. 242, p. 54.

[4] Equally without merit is the claim that the court's refusal to give the following instructions was erroneous: "If you find that a party to this action was approaching an intersection wherein the traffic signal controlling his avenue of traffic was defective and inoperative and if you further find that such party had notice of the defective and inoperative condition of the signal, and if you further find that there was a boulevard stop sign present at the intersection in question, you are instructed that it was the duty of such motorist before entering the intersection to make a complete stop at the boulevard stop sign before entering the intersection." This is patently an incomplete, inaccurate and misleading statement. There existed no such requirement of an absolute and unqualified duty to stop on the part of defendant, as set out in the instruction, at the type of intersection here involved. The instruction fails entirely to take cognizance of the fact that east-west traffic at this intersection was being controlled by traffic signals and ignores the directional signal of those lights and the state of the traffic responding to those lights. It was for the jury to decide under the evidence and the instructions given (none of which are challenged) whether the exercise of ordinary care required a "complete stop at the boulevard stop sign" in the light of the prevailing conditions. Since plaintiffs' instruction purported to lay down a categorical rule nowhere to be found in the Vehicle Code that would have usurped the jury's function as trier of the facts, it was properly refused.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

144 Cal.App.2d 637

Denise SINGER, a minor, by Mortimer Singer, her Guardian ad litem, and Mortimer Singer, Plaintiffs and Appellants,

v.

Zeppo MARX, Marion Marx and Tim Marx, Defendants and Respondents.

Civ. 21589.

District Court of Appeal, Second District,
Division 2, California.
Sept. 25, 1956.

Hearing Denied Nov. 21, 1956.

Action by guardian ad litem on behalf of minor for injuries received by minor when she was struck by a rock hurled by defendant minor. Injured minor's father sought recovery of expenses incurred. Joined as defendants were the parents of defendant minor. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered nonsuit as to both plaintiffs and all causes of action and they appealed. The District Court of Appeal, Ashburn, J., held that it could not be said as a matter of law that nine year old defendant minor was not liable for battery or not guilty of negligence, and evidence of his mother's knowledge of prior habit of rock throwing was sufficient to present a jury issue as to her negligence, but evidence was insufficient to make a prima facie case as to negligence of father who apparently had no personal knowledge of prior rock throwing.

Reversed in part and affirmed in part.

1. Appeal and Error ⇨927(3)

On appeal from order granting nonsuit as to plaintiffs, District Court of Appeal assumed as established all evidence and inferences favorable to the plaintiffs' causes of action.

2. Infants ⇨59

An infant is liable for his torts. West's Ann.Civ.Code, § 41.

3. Infants ⇨60

An infant who forcibly invades the person of another is liable for a battery regardless of an intent to inflict injury; the

only intent which is necessary is that of doing the particular act in question.

4. Infants ⇨102

In action for battery of eight year old girl who was struck by rock thrown by nine year old boy, whether boy had sufficient mental capacity to intend the harmful striking of another was a question of fact.

5. Assault and Battery ⇨2

If nine year old boy indicates to two eight year old girls that he is throwing a rock at one girl and then aims at the other girl, whom he hits, the boy is liable to the other girl for a battery.

6. Assault and Battery ⇨3

If a nine year old boy throws a rock at an eight year old girl and inadvertently strikes another eight year old girl, he is liable under doctrine of transferred intent for the battery on the second girl.

7. Assault and Battery ⇨3

The doctrine of "transferred intent", under which a defendant unlawfully aiming at one person and hitting another is guilty of assault and battery on the party he hit, is not confined to criminal cases.

See publication Words and Phrases, for other judicial constructions and definitions of "Transferred Intent".

8. Infants ⇨61, 102

The negligence of a minor is to be determined on basis of whether he used that degree of care ordinarily exercised by children of like age, mental capacity and experience, and such question is usually one of fact for the jury.

9. Infants ⇨102

In action for injuries to eight year old girl who was struck by a rock hurled by nine year old boy, whether boy was negligent and whether he used the care required of a boy his age were questions for jury.

10. Trial ⇨142

Whenever the evidence affords room for several inferences favorable to the plaintiff, the jury should determine the one to draw, and plaintiff does not have to elect or establish one inescapable inference.

11. Evidence ⇨587

* Plaintiff relying on circumstantial evidence does not have to exclude possibility of every other reasonable inference possibly derivable from the facts proved.

12. Parent and Child ⇨13(2)

In action against parents of nine year old boy who threw rock which struck eight year old girl, evidence relating to parents' notice of boy's dangerous proclivities and to the discipline administered was sufficient to raise question for jury as to whether mother was negligent but was insufficient to raise question for jury as to whether father was negligent.

13. Evidence ⇨67(1)

Traits of character and habits of conduct are in their nature continuous and hence within statutory presumption that a thing once proved to exist continues as long as is usual with things of that nature. West's Ann.Code Civ.Proc., § 1963, subd. 32.

14. Evidence ⇨67(1)

Where boy began throwing rocks at people in the spring of 1952 and the throwing continued unabated as long as September, 1952, the presumption was that the proclivity for throwing rocks continued until September, 1953, when the boy was nine years old and the rock throwing occurred again. West's Ann.Code Civ.Proc., § 1963, subd. 32.

Toxey H. Smith and Robert G. Beverly, Los Angeles, for appellants.

Schell, Delamer & Loring, Los Angeles, for respondents Zeppo Marx and Marion Marx.

Betts, Ely & Loomis, Los Angeles, for respondent Tim Marx.

ASHBURN, Justice.

Plaintiff Denise Singer, a minor, sues Tim Marx, another minor, for personal injury alleged to have been inflicted upon her (1) through his negligence, and (2) through a battery of her person. She seeks

recovery from Tim's parents, Zeppo Marx and Marion Marx, on the theory of their negligent failure to control Tim's known penchant for throwing rocks at other people. Denise's father also sues the parents of Tim for recovery of expenses incurred by him as a result of his child's injury, the charge being negligence upon the part of the parents. The trial judge granted a nonsuit as to both plaintiffs and all causes of action. Plaintiffs appeal.

[1] "Under well-established rules we must, in considering whether the judgment of nonsuit was proper, resolve every conflict in their testimonies in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence adduced direct and indirect which tends to sustain plaintiff's case." *Lashley v. Koerber*, 26 Cal.2d 83, 84, 156 P.2d 441, 442. To same effect see *Raber v. Tumin*, 36 Cal.2d 654, 656, 226 P.2d 574; *Blumberg v. M. & T. Inc.*, 34 Cal.2d 226, 229, 209 P.2d 1. In the following discussion the court assumes as established all evidence and all inferences favorable to plaintiffs' causes of action.

On September 13, 1953, Tim Marx was nine years of age. Plaintiff Denise was eight and Barbara Corcoran was also eight. They are the only eyewitnesses to the episode under examination. Tim and Denise were on the front lawn of the Singer residence, which was located on the north side of the street fronting south. Barbara was riding a bicycle back and forth on the pavement. At the time the injury was inflicted upon her Denise was some six, eight or ten feet north of the sidewalk and Tim was to her left and rear about four feet away. The children were not playing any game. Tim had been throwing rocks into or across the street and talking about how far he could throw. Neither girl threw any rocks or clods. Immediately preceding Tim's striking Denise in the eye with a rock, which he admitted, Barbara was riding easterly on the sidewalk and entering

upon the Singer property at the west side, about 30 feet from Denise. Tim, who was looking at plaintiff, said to her, "watch Barbie." He had not previously thrown at her or Barbara. Denise looked toward Barbara and then back at Tim and at the same moment was struck in the eye by the rock, which was a flat, rough one about the size of a small hen's egg. Barbara saw him throw at an angle toward her; saw him let go of the rock but did not see it strike plaintiff. Denise heard him say "watch Barbie" and saw him raise his arm in the throw but did not see the rock leave his hand. She was struck immediately in the left eye. The line of throw toward Barbara would pass several feet in front of Denise. For the rock to strike her, one of two things would have to occur, either (1) Tim changed the direction of throw without any warning, or (2) he held the rock too loosely, or let go of it too soon to control its flight, and inadvertently hit Denise. The evidence is susceptible of either of these inferences.

[2] The general proposition that an infant is liable for his torts is established in this state by statute. Civil Code, § 41, says: "A minor * * * is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful." That statute, it will be noted, does not imply as an element of liability for compensatory damages the existence of capacity to appreciate the wrongful character of the act. But the cases have engrafted upon it certain reasonable qualifications about to be discussed.

[3] An infant who forcibly invades the person of another is liable for a battery regardless of an intent to inflict injury; the only intent which is necessary is that of doing the particular act in question—in this case throwing a rock at somebody. This matter is discussed in *Ellis v. D'Angelo*, 116 Cal.App.2d 310, at page 316, 253 P.2d 675, at page 678, in which it was held that, although a four-year-old child is, as a matter of law, incapable of negligence,

the complaint nevertheless stated a cause of action for battery against the same child. At page 315 of 116 Cal.App.2d, at page 677 of 253 P.2d it is said: "From these authorities and the cases which they cite it may be concluded generally that an infant is liable for his torts even though he lacks the mental development and capacity to recognize the wrongfulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged. Thus as between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence." At page 317 of 116 Cal.App.2d, at page 678 of 253 P.2d: "When it comes to the count charging battery a very different question is presented. We certainly cannot say that a 4-year-old child is incapable of intending the violent or the harmful striking of another. Whether a 4-year-old child had such intent presents a fact question; and in view of section 41 of the Civil Code which makes the recognition of the wrongful character of the tort immaterial so far as the liability for compensatory damages is concerned, we must hold that the count charging battery states a cause of action."

[4, 5] Certainly it cannot be said as a matter of law that Tim did not have sufficient mental capacity to intend the harmful striking of another. If he indicated to both girls that he was throwing at Barbara and then aimed at Denise, whom he hit, he was plainly liable to her for a battery.

This matter of intent in a battery case is also discussed in *Lopez v. Surchia*, 112 Cal.App.2d 314, 246 P.2d 111, which involved an adult defendant who had shot plaintiff and claimed self-defense. At page 318 of 112 Cal.App.2d, at page 113 of 246 P.2d: "The true rule is that intent is the gist of the action only where the battery

was committed in the performance of an act not otherwise unlawful * * *. If the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. In other words, if the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequence which directly and naturally resulted from the conduct, even though he did not intend to do the particular injury which followed. 6 C.J.S., Assault and Battery, § 10."

[6,7] While throwing rocks at trees or into the street ordinarily is an innocent and lawful pastime, that same act when directed at another person is wrongful. The evidence at bar (combining that of Barbara with portions of Tim's own testimony) warrants an inference that Tim threw at Barbara and inadvertently struck Denise. In such circumstances the doctrine of "transferred intent" renders him liable to Denise. On this subject the Lopez case, supra, says at page 318 of 112 Cal.App.2d, at page 113 of 246 P.2d: "If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act. (6 C.J.S., Assault and Battery, § 10, subd. 2.)" See also, Prosser on Torts, 2nd Ed., p. 33. The rule is not confined to criminal cases, as argued by respondents.

[8] The negligence of a minor is to be determined upon the basis of whether he used that degree of care ordinarily exercised by children of like age, mental capacity and experience; and that question is usually one of fact for the jury. 19 Cal. Jur. § 41, p. 605. In Smith v. Harger, 84 Cal.App.2d 361, 369-370, 191 P.2d 25, the question was held to be one of fact in the case of a five-year-old boy.

[9] Tim was nine years old and there is nothing in the record to warrant a holding as matter of law that he could not be guilty of negligence. That was for the

jury to decide. And the question whether he did use the care required of a boy of nine was also one of fact. If, as he testified, the rock slipped out of his hand prematurely, that presents a question of what care was required of a nine-year-old rock thrower who was throwing in the presence of other children and recognized at the time that that is a dangerous practice and so testified.

Incidents occurring in the playing of organized games do not present controlling analogies. These children were not playing a game; the girls were not throwing rocks; Tim alone was performing and he was not under the pressure of a contest. Therefore, cases such as Hoyt v. Rosenberg, 80 Cal.App.2d 500, 182 P.2d 234, 173 A.L.R. 883, are inapplicable. Nor do we have upon this appeal any question of assumption of risk, as was the case in Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P.2d 144.

[10,11] We hold that the evidence at bar would sustain an inference that Tim (1) deliberately threw the rock at plaintiff, or (2) threw the rock at Barbara and accidentally struck plaintiff, or (3) negligently held and threw the rock in such manner as to cause the throw to miscarry and thus strike plaintiff. Pursuing this line of thought counsel for respondent Tim argue that: "When one equally reasonable inference supports a plaintiff's *prima facie* case against an equally reasonable inference supporting the defendant, the plaintiff has not sustained his burden of proof." In support thereof these cases are cited: In re Estate of Moore, 65 Cal.App. 29, at page 33, 223 P. 73; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Chapman v. Title Insurance & Trust Co., 68 Cal.App.2d 745, 158 P.2d 42; Hopkins v. Heller, 59 Cal.App. 447, at page 454, 210 P. 975. While they do hold that evidence which is equally susceptible of opposing inferences, one favorable and one unfavorable to the plaintiff, constitutes no proof at all, we are cognizant of no authority to the effect that that is true of evidence susceptible of sev-

eral inferences all of which point in the same direction, liability of defendant. On principle it seems that whenever the evidence affords room for several inferences favorable to the plaintiff the jury should determine the one to draw, and the plaintiff does not have to elect or to establish one inescapable inference. *Sanders v. MacFarlane's Candies*, 119 Cal.App.2d 497, 500, 259 P.2d 1010, 1012, is apposite. It holds that an inference "must be based on probabilities," "that in civil cases the rule of decision is a rule of probability only"; and further says: "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom * * *." (*Katenkamp v. Union Realty Co.*, 36 Cal. App.2d 602, 617 [98 P.2d 239].) The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved. *Vaccarezza v. Sanguinetti*, 71 Cal.App.2d 687, 692 [163 P.2d 470]; *Spolter v. Four-Wheel Brake Serv. Co.*, supra, 99 Cal.App.2d [690], at page 694, 222 P.2d 307.)" See also, *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 506-508, 106 P.2d 886; 18 Cal.Jur.2d § 64, p. 487.

The granting of a nonsuit in favor of Tim was erroneous.

[12] The propriety of the like ruling in favor of the parents turns upon whether there was substantial proof of negligence on their part in failing to perform the duty of exercising reasonable control over a child known to possess and exercise dangerous proclivities toward other people. *Prosser on Torts*, 2nd Ed., page 681, states the matter thus: "But beyond this, the parent has a special power of control over the conduct of the child, which he is under a duty to exercise reasonably for the protection of others. He may thus be liable for a failure to take the gun away from the child when he finds him with it, or to make reasonable efforts to restrain and correct

him when he manifests a tendency to beat other children with a stick, or to shoot at horses in the street. Probably, however, the effect of the decided cases is that there is no liability upon the parent unless he has had an opportunity to correct a specific propensity on the part of the child, and that it is too much to hold the parent responsible for general incorrigibility and a bad disposition. He may, however, be under a duty to warn others who may suffer from such characteristics." *Martin v. Barrett*, 120 Cal.App.2d 625, 628, 261 P.2d 551, 552, considering the sufficiency of a complaint, says: "The gravamen of the complaint in cases upholding liability is the knowledge of the boy's previous conduct, disposition to do the act charged, and the failure of the parents to warn the plaintiff of this propensity. (See cases collected in *Ellis v. D'Angelo*, supra, 116 Cal.App.2d at page 317, 253 P.2d at page 679.)" *Ellis v. D'Angelo*, supra, 116 Cal.App.2d 310, at page 317, 253 P.2d 675, at page 679: "While it is the rule in California, as it is generally at the common law, that there is no vicarious liability on a parent for the torts of a child there is another rule of the law relating to the torts of minors which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child, where the parent's negligence made it possible for the child to cause the injury complained of, and probable that it would do so."

The evidence at bar shows that Tim began throwing rocks at people in the spring of 1952; the injury to Denise occurred on September 13, 1953. Mrs. James, a neighbor, testified that she could almost say that she never saw Tim or his younger brother when they were not throwing rocks; that when she reprimanded Tim on one occasion for doing so and turned her back to go into the house he gave her "a couple of hits on the back"; that the Marx boys threw rocks at her mother-in-law every time they came around, and "[f]inally, when we did order them off the property every time they would go by on a bicycle or something they had something to throw at the house. They

ruined my front door throwing darts." Mrs. James informed the mother of Tim's throwing rocks and told her "[t]hat I couldn't tolerate the children throwing rocks and clods at me, at my house, and darts also, and which my mother-in-law, in fact, I couldn't stand them throwing anything." But the rock throwing continued. Mrs. Marx, examined under § 2055, Code of Civil Procedure, denied knowing Mrs. James or receiving any such notice from her. Hence there is no evidence of what efforts, if any, the parents then made to control Tim's future conduct. It is inferable, however, that any corrective measures which might have been taken were ineffective because the course of conduct continued.

Mrs. Marx did admit that Mrs. Pogson, Tim's school principal, had told her that Tim threw clods at her car and, anent the subject of punishment, said: "I always used to talk it over with Mr. Marx"; "He was either, as I repeat, he was either made to write that 'I will not throw pebbles' or 'I won't do this' or 'I will stand in line in school as my teacher wants me to,' 'I will try to do better arithmetic'"; "I do believe I remember, I remember, I think, both those punishments absolutely, sitting in his room, being punished sitting in a chair, and also writing, your Honor, writing words."

[13, 14] Mrs. James apparently moved from the neighborhood in September, 1952, and counsel for respondent parents argue that her testimony was necessarily limited to a period which ended a year before the injury to Denise; that that is too remote to have evidential value upon Tim's habits and propensities on September 13, 1953. With or without punishment Tim's throwing had continued unabated as long as September, 1952, and the presumption is that these proclivities continued until Sep-

tember, 1953, when rock throwing is known to have occurred again. The presumption of continuity flows from § 1963, subdivision 32, Code of Civil Procedure. Traits of character and habits of conduct are in their nature continuous and hence within the presumption. 31 C.J.S., Evidence, § 124, p. 739; *Pacific Mut. Life Ins. Co. v. Meade*, 281 Ky. 36, 134 S.W.2d 960, 964; *Kennison v. Chokie*, 55 Wyo. 421, 100 P.2d 97, 98; *Grikietis v. Grikietis*, 319 Ill.App. 216, 48 N.E.2d 775, 776; *McGraw v. McGraw*, 171 Mass. 146, 50 N.E. 526. The punishment imposed in the case of the Pogson incident appears to have been ineffective. The record does not show just when that occurred, except that it preceded the Denise incident.

It is fairly inferable that Mrs. Marx had notice of Tim's dangerous proclivities and did not administer effective discipline. It was for the jury to say whether that was negligence on her part. To draw an inference they would have to find only a probability as its basis, and it cannot be said that in law there was no such probability of failure of Mrs. Marx to exercise reasonable care in the control of her child's dangerous propensities.

So far as the father, Zeppo Marx, is concerned, it does not appear that he had any personal knowledge of the rock throwing. The only evidence as to him is that he was consulted when punishment for any dereliction was due. That is not enough to make a *prima facie* case against him. See *Martin v. Barrett*, *supra*, 120 Cal.App.2d 625, at page 628, 261 P.2d 551.

The judgment of nonsuit is reversed as to defendants Tim Marx and Marion Marx, and affirmed as to defendant Zeppo Marx.

MOORE, P. J., and FOX, J., concur.

144 Cal.App.2d 493

Max P. SCHIFF, etc., et al., Plaintiffs,
Respondents, and Appellants,
v.

C. D. PRUITT, Defendant and Respondent,
City Homes, Inc., a California corporation,
Defendant and Appellant.

Civ. 21530.

District Court of Appeal, Second District,
Division 1, California.

Sept. 18, 1956.

Action by partners against corporation and president of corporation to recover upon a promissory note and to recover upon a common count for money had and received. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment denying recovery upon note and granting partners judgment for money had and received. The corporation appealed and partners filed a cross-appeal. The District Court of Appeal, Nourse, J. pro tem., held that where partnership contracted to loan \$20,000 to corporation for construction of houses and contracted for right to purchase and retain contracts of sale or purchase money deeds of trust upon first 30 houses erected at price based on actual cost of tracts with houses, even if contract did provide for profit to partnership in consideration of loan, the contract did not constitute a contract for payment of interest in excess of that permitted by usury law.

Judgment affirmed.

1. Usury ☞41

Where partnership contracted to loan \$20,000 to corporation for construction of houses and contracted for right to purchase and retain contracts of sale or purchase money deeds of trust upon first 30 houses erected at price based on actual cost of tracts with houses, even if contract did provide for profit to partnership in consideration of loan, such contract did not constitute a contract for payment of usurious interest.

2. Usury ☞113

Where partnership contracted to loan \$20,000 to corporation for construction of houses and contracted for right to purchase and retain contracts of sale or purchase money deeds of trust upon first 30 houses erected at price based on actual cost of tracts with houses, even if right to purchase contracts of sale or purchase money deeds were given in payment of interest on loan, in absence of evidence of value of such right at time contract was entered into, it could not be held that giving of such right constituted payment of interest in excess of lawful rate.

3. Corporations ☞456

Where corporation employed agent to procure financing for corporation and agent solicited persons who formed limited partnership and contracted to furnish such financing, commission paid to agent did not constitute return to partnership of portion of money advanced by partnership and such commission was money had and received by corporation and could be recovered from corporation.

Wolver & Wolver, Eugene L. Wolver,
Los Angeles, for appellant City Homes,
Inc.

Spiegel, Turner & Wolfson, Albert A.
Spiegel, Santa Monica, for respondents
Schiff, et al.

NOURSE, Justice pro tem.

By their amended and supplemental complaint in this action, respondents sought, through their first cause of action, to recover upon a promissory note in the sum of \$20,000 executed by the defendant, and by a second cause of action to recover that amount upon a common count for money had and received.

The judgment of the lower court, from which defendant appeals, denied respondents recovery upon the promissory note sued upon in the first cause of action but granted respondents a judgment for the principal sum of \$2,166.82 with interest

thereon at the rate of 7 per cent per annum from May 11, 1955, together with interest at the rate of 7 per cent per annum on \$20,000 from January 19, 1953, to May 11, 1955. It further allowed plaintiffs their costs. The judgment for costs was by way of amendment to the original judgment, and appellant has appealed separately from that judgment but in its brief has abandoned that appeal.

The respondents have filed a cross-appeal from that portion of the judgment which denied them a recovery upon the promissory note, but have advised this court in their briefs that if the judgment as rendered is affirmed, then they desire to abandon their cross-appeal.

But two points are made by appellant. The first is that the judgment is erroneous insofar as it awards plaintiffs interest, because, so they contend, the basic agreement under which the moneys were advanced by respondents to appellant was usurious. The second assignment of error is that a commission paid to the respondent Kosslyn should have been credited upon the judgment of \$2,166.82 because it constituted a payment of usury.

The relevant facts are:

The plaintiffs and respondents are the general and limited partners in a limited partnership, known as the Duke Investment Company. The defendant C. D. Pruitt is the president and sole stockholder of appellant City Homes, Inc. On July 19, 1952, appellant entered into an agreement with one Philip B. Woodward and his wife, Elizabeth Woodward, to purchase from them certain real property in the city of Whittier at and for the price of \$47,625, and at the same time entered into an agreement with one T. Earle Woodward and his wife to purchase a contiguous parcel of property for the price of \$15,875. Of the purchase price of the first parcel, \$13,000 was to be paid in cash at the time of the consummation of the sale, the balance to

be evidenced by a promissory note secured by a first deed of trust. As to the second parcel, \$4,500 was to be paid in cash, the balance to be evidenced by a promissory note secured by a first deed of trust.¹ Separate escrows were on July 29, 1952, simultaneously opened with the same escrow company, and appellant at that time paid into escrow \$1,000, which was eventually credited one-half to each escrow. Appellant did not have the funds to pay into the escrow the balance of the down payments or its share of the costs of the escrow, and in early December, 1952, contacted Kosslyn and informed him of its desire to obtain money to complete the purchases, agreeing to pay him a commission if he could raise the money necessary so to do. It estimated the amount necessary at \$25,000.

On December 22 the Woodwardes gave notice in writing that unless the required amounts were deposited in escrow before the 31st of that month they would cancel the escrows. The escrow holder then notified appellant of the Woodwardes' demands and that the further sum of \$16,086.80 was necessary in order that appellant might fulfill its obligations under the escrow instructions. At that time Kosslyn had not completed the organization of the limited partnership, but was able to obtain from the prospective limited partners the sum of \$5,000, and appellant or Pruitt raised the sum of \$11,586.80, and these two sums were deposited in the escrows. Together with the \$1,000 originally deposited they met the demands of the escrow holder.

On the 19th of January, 1953, the formation of the limited partnership having been completed, that entity and appellant entered into an agreement in writing whereby the partnership agreed to loan to appellant the sum of \$20,000 and appellant agreed to deliver to the partnership its promissory note in the sum of \$20,000 payable on or

1. These deeds of trust were to be subordinated to deeds of trust securing construction loans in sums not to exceed

\$6,500 as to each lot in the proposed subdivision.

before December 15, 1953, with interest of \$5. It was further agreed that that note was to be secured by a third deed of trust upon the real property which appellant was purchasing from the Woodwards, that deed of trust to be subordinate to a first deed of trust securing notes in an amount not to exceed \$5,500 for each lot in the tract (the construction loan), and a purchase money second deed of trust securing notes not to exceed in the aggregate a sum equal to \$500 for each lot in the tract. It further provided that the third deed of trust should contain a provision for the partial reconveyance of the lots in said tract upon the payment of \$225 in cash for each lot reconveyed until such time as the entire principal of the note had been paid. The contract then sets forth an agreement which, though the language thereof is extremely ambiguous, we interpret as providing as follows: That in further consideration of the loan of \$20,000 from the partnership to appellant, appellant would erect thirty houses on lots in the subdivision which it was contemplated would be created by appellant from the real property upon its acquisition from the Woodwards, and would transfer to the partnership the contracts of sale or purchase money deeds of trust received from the purchasers upon the partnership's assuming the indebtedness secured by the first deeds of trust (the construction loans), and *paying in cash to appellant the difference between the amount of the indebtedness assumed and the actual cost of each parcel of property sold.* That cost was defined as the aggregate of the purchase price of the real property, the cost of the development of the subdivision, title and legal fees, the finance charges upon the construction loan, and the actual direct costs of labor and materials used in the construction of the houses. It was further agreed that if

the total *face value* of the contracts or deeds of trust received by respondent partnership exceeded \$20,000, then respondent partnership should transfer to appellant sufficient thereof to reduce the face value of the contracts or deeds of trust held by said respondent to the sum of \$20,000. The contract ends up with the statement that it is the purpose and intent of the contract that "at the conclusion of all transactions between the parties" the partnership would be repaid the sum of \$20,000 in cash and be the owner of contracts of sale or second deeds of trust with a *face value* of \$20,000 *in excess of the note or notes* secured by the first deeds of trust² (the construction loans).

After this contract was executed, appellant executed a note in favor of respondent partnership in the sum of \$20,000, this note being dated the 19th day of January, 1953, and payable on the 19th of December, 1953. It provided for interest of \$5 for the first ten months and 11 days, and interest at 5 per cent per annum after that time, or a total interest for the full 11 months of \$57.06, or approximately 0.31 per cent per annum. It further executed a deed of trust securing said promissory note which purported to convey to the trustee as security for said note ninety lots in the proposed subdivision. Immediately after the execution of the agreement between appellant and respondent partnership, the note and deed of trust were deposited with the same escrow holder with which the appellant's escrow with the Woodwards had been opened, and the respondent partnership deposited with that escrow holder the further sum of \$15,000.

At this time appellant and respondents agreed that respondents might withdraw from the escrow, and they did withdraw from the escrow, the sum of \$14,700.³

2. By agreement between Kosslyn and the limited partners, he had no interest in the indebtedness from appellant or in the contracts of sale or purchase money deeds of trust which were to be delivered to the partnership under the con-

tract between the parties here adverted to.

3. Appellant was thus able to withdraw all money which it had deposited in the escrow, plus \$2,113.20 of the moneys deposited by respondent partnership.

From this money they paid to Kosslyn the sum of \$1,000 as his commission for obtaining the loan of \$20,000.

Thereafter the Woodwards gave notice of cancellation of the escrow, and suits were commenced by appellant against them. They did not make respondents parties to these suits. These suits were settled by compromise between appellant and the Woodwards, with the result that the escrow for the purchase of the property by appellant from the Woodwards was in effect cancelled.

Kosslyn, acting as trustee for the limited partnership, demanded of the escrow holder possession of appellant's note and the deed of trust deposited with the escrow holder, but appellant refused its consent to the delivery of these instruments and they were retained by the escrow holder, and this action was commenced. At the trial of the action the note sued upon and the deed of trust were received in evidence and delivered into the custody of the court. After the close of the trial but before the court had rendered its decision, the escrow holder, on May 11, 1955, pursuant to the stipulation of the parties, paid to the partnership respondent the sum of \$17,833.18, this being the unexpended balance of the \$20,000 deposited by respondent partnership with the escrow holder.

While no express finding was made as to delivery of appellant's note to the respondents, a finding that it was not delivered is implicit in the findings that were made; and appellant makes no point here of the fact, as found by the court, that the \$20,000 was held in the escrow for the use and benefit of appellant.

[1] Appellant's contention that the provisions of the contract which gave respondent partnership the right to purchase and retain contracts of purchase or deeds of trust having a face value of \$20,000 over and above the amount of the construction loan constituted a contract for the payment of interest in excess of that permitted by the usury law, not only cannot be sustained but is wholly lacking in merit.

The contract contains no promise on the part of appellant to pay anything as interest for the use of the \$20,000 loaned it other than the sum of \$5. The contract only gives respondent partnership a right to purchase, at a price calculated by a formula set forth therein, the contracts of sale or purchase money deeds of trust received by appellant upon the sale of the first thirty houses erected in the tract. It does not guarantee the respondent partnership one cent of additional profit or interest, for there is no provision therein that the contracts of sale or purchase money deeds of trust received from the respective purchasers of the houses and lots would exceed the amount of the first deeds of trust by an amount equal to or in excess of the amount paid in cash by respondents therefor. Unless the face value of these contracts of sale or purchase money deeds of trust did equal the cash payment made by respondent partnership therefor, it would have a loss rather than a profit; and in any event its profit could only be an amount equal to the difference between the cash outlay made by it and the sum of \$20,000. Whether there would be a loss or a profit or, if a profit, what its amount would be, were all matters of speculation and could afford no possible basis for a finding of usury.

It is further self-evident that plaintiffs' right to any possible profit arose not solely out of the agreement to loan \$20,000, but out of their agreement to assume appellant's liability upon the construction loans and to pay in cash such further amounts as would make appellant whole insofar as the lots covered by the contract or trust deeds assigned to the partnership were concerned.

Assuming that the contract did provide for a profit to respondent partnership in consideration of the loan of the \$20,000, it is clear that the right to that profit was contingent and one wholly at hazard, for the entire risk of the venture, insofar as the

thirty houses were concerned, by the terms of the contract became respondents'.⁴

"It is also a general principle that when payment of full legal interest is subject to a contingency so that the lender's profit is wholly or partially put in hazard, the interest so contingently payable need not be limited to the legal rate, providing the parties are contracting in good faith and without the intent to avoid the statute against usury.'" *Miley Petroleum Corp., Ltd., v. Amerada P. Corp.*, 18 Cal.App.2d 183, 189, 63 P.2d 1210, 1214; *Lamb v. Herndon*, 97 Cal.App. 193, 201, 275 P. 503; *Jameson v. Warren*, 91 Cal.App. 590, 595, 267 P. 372; 11 Cal.Jur. 10-yr. Supp. [1950 Rev.] p. 171. We need not further apply this principle here, as its application is clear.

[2] If we should assume, as appellant has, that the right to purchase the contracts of sale or purchase money deeds of trust which was granted respondent partnership by the contract was given in the payment of interest for the use of the \$20,000, still there was no evidence whatsoever what the value of this right was at the time the contract was entered into, and without some evidence as to that value it could not be held that the giving of it constituted a payment of interest in excess of the lawful rate. *Martyn v. Leslie*, 137 Cal. App.2d 41, 55, 290 P.2d 58.

[3] Appellant's contention that the commission of \$1,000 paid to Kosslyn was exacted from appellant by respondent partnership has no foundation in the evidence, and is devoid of merit. At the time appellant employed Kosslyn to procure financing for it, the respondent partnership was not even in existence. Kosslyn acted not as the agent of the respondent partnership but solely as the agent of appellant and, so acting, solicited the respondents who became limited partners to advance the moneys which were eventually loaned by the partnership to appellant. Appellant, in its

brief, has made no reference to any evidence which would support its contention.

It is further appellant's contention that the payment of \$1,000 to Kosslyn constituted a return to respondent partnership of a portion of the moneys advanced by it, and that therefore the court erred in holding that that amount was money had and received by appellant. There is no basis for this contention. The thousand dollars was paid by appellant to Kosslyn in discharge of appellant's obligation to Kosslyn. This payment was retained by Kosslyn, and there is not an iota of evidence that the respondent partnership received any part of it.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



144 Cal.App.2d 677

**Hermine FORD, Plaintiff and
Respondent,**

v.

**Thomas FORD, Defendant and
Appellant.**
Civ. 16960.

District Court of Appeal, First District,
Division 1, California.

Sept. 27, 1956.

Proceeding on divorced wife's motion for issuance of execution more than five years after entry of judgment for child support. The Superior Court, City and County of San Francisco, Theresa Meikle, J., granted the motion and husband appealed. William T. Sweigert, J., entered an order directing husband to pay attorney fees and costs incurred by wife in defend-

4. In what we have said we have assumed, but do not decide, that if the contract had provided for usury, that provision would have precluded the interest award-

ed by the court even though the contract was abandoned and its performance prevented by appellant.

ing the appeal and the husband appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that under the circumstances the wife was entitled as of right to execution to enforce payments which were past due for five years prior to amended support order and that wife was not entitled to execution to enforce payments past due more than five years prior to amended order because of her insufficient reasons for her failure to proceed with execution.

Order as to execution reversed with instructions, and order as to attorney fees and costs affirmed.

1. Divorce ☞311

Where amendment to prior child support order increased payments and provided that divorced wife would not seek recourse against husband so long as he complied with order, wife did not waive past due payments under prior order but merely relinquished right to enforce such payments so long as husband paid increased payments, and hence wife, on termination of increased payments, was entitled as of right to execution to enforce payments which were past due for five years prior to amended order. West's Ann.Code Civ. Proc., § 681.

2. Divorce ☞311

Statement by divorced wife in her affidavit in support of her motion for execution on judgment for child support more than five years after its entry that the reason for her failure to seek execution within five years was that she lived 500 miles from former husband and was without funds to pay for an investigation of his assets did not constitute sufficient reason for failure to proceed with execution within five years from date of judgment, and therefore trial court abused its discretion in ordering execution to issue. West's Ann.Code Civ.Proc., § 685.

3. Divorce ☞312.4

Superior Court had legal power to grant divorced wife her attorney's fees and costs for the defense of husband's appeal

from an order granting her motion for execution after five years on a judgment for child support even though court previously had entered an order terminating husband's liability for support of the children. West's Ann.Civ.Code, § 137.3.

Cameron & Foushee, San Diego, Philip J. Doyle, Stark & Champlin, Oakland, for appellant.

Varnum Paul, Abraham Setzer, San Francisco, for respondent.

PETERS, Presiding Justice.

Appeal numbered 1 Civ. 16,960 is from an order of Judge Meikle of the Superior Court granting respondent's motion for issuance of execution after five years on a judgment for child support. Appeal numbered 1 Civ. 16,522 is from an order of Judge Sweigert directing appellant to pay respondent's attorney fees and costs incurred by her in defending the appeal.

Appellant and respondent were formerly husband and wife. They were divorced in 1936. In the interlocutory, dated May 4, 1936, the appellant was ordered to pay \$30 a month for the support of the two minor children of the parties. The final, granted May 14, 1937, contained a similar provision. No payments of any kind were made pursuant to these orders until November of 1943. In October of 1943 respondent sought the help of the District Attorney of San Mateo County and as a result of his efforts appellant made the payments for November and December, 1943, and for January, 1944. In December of 1943, respondent, by letter, requested appellant to increase the payments, but received no reply from appellant.

In April of 1944 respondent had appellant cited for contempt, and moved to modify the final decree by increasing the child support allowance. On May 31, 1944, the prior support order was amended by stipulation by increasing the \$30 payment to \$60. This order contained the following provision:

"It is further ordered, adjudged and decreed that so long as defendant complies with the order herein made for the support of said children, no recourse shall be had against said defendant on account of the arrears of maintenance and support."

Appellant failed to make the required payments for November and December, 1944, and January of 1945, but, after the issuance of an order to show cause, he made the payments in February of 1945 and the contempt proceeding was abandoned. Apparently, appellant thereafter, and until November of 1950, made the payments called for by the May, 1944, order. On November 22, 1950, appellant secured an order terminating his obligation to pay support for the children on the showing that one, Beverly, was 18 and married, and the other, Helen, was self-supporting. This termination order contained the following provision:

"It is further ordered, adjudged and decreed that this order does not absolve the defendant from any arrears for alimony, support and maintenance which may have accrued to the date hereof, and that this order is without prejudice to the right of the plaintiff at any future time to apply for support and maintenance of Helen Thomasina Ford, minor child of the parties hereto."

It should be mentioned that in October, 1950, just before the request for the termination order was filed, appellant offered respondent \$200 in complete settlement of all his obligations to her for child support. This offer was rejected.

In May of 1953 respondent filed a motion under section 685 of the Code of Civil Procedure for an order directing issuance of execution more than five years after entry of judgment, thus attempting to collect arrearages between 1936 and 1944, and supported her motion by the required affidavit. Appellant filed no counter-affidavit. Respondent's affidavit sets forth several excuses for her failure to execute on the judgment prior to 1943:

1. Execution would have been futile because appellant could not have made the payments. In support of this allegation respondent refers to an averment to that effect in an affidavit of appellant filed in the May, 1944, proceeding, and contends that she had no information contrary to this averment;

2. That the equities favor respondent because appellant has twice remarried since his divorce, respondent was forced to use the contempt process in 1943, and in the same year unsuccessfully sought to get appellant to pay something on arrears, respondent secured the increased allowance in May, 1944, and instituted contempt proceedings early in 1945 to compel compliance, appellant recognized the indebtedness for past support in October of 1950 by offering respondent \$200 in settlement of the past due arrearages, and in 1950 the termination order by stipulation contained the provision quoted, *supra*, in reference to arrearages;

3. That since 1936 appellant has resided in San Diego, more than 500 miles from respondent's abode, and respondent was financially unable to investigate appellant.

On February 15, 1954, the trial court granted the motion for the issuance of an execution after more than five years from the entry of judgment in the amount of \$2,730 principal, and \$2,696.41 interest. The first appeal is from this order.

After appellant filed his appeal, respondent sought an order to compel appellant to pay her attorney's fees and costs incurred in opposing the appeal. The trial court ordered appellant to pay \$250 as attorney's fees and \$150 as costs. The second appeal is from this order.

[1] On the first appeal, there are several questions presented. The first is whether or not the stipulated judgment of May, 1944, resulted in permanently extinguishing respondent's right for arrearages under the 1936-1937 orders. The trial court has found that the parties did not stipulate that the obligation to pay arrear-

ages was to be absolved, that the judgment of May, 1944, did not so order, and that the November, 1950, order so interpreted the May, 1944, order. We are of the opinion that this is a reasonable and proper interpretation.

Appellant argues that the May, 1944, judgment, properly interpreted, amounted to a promise that on condition appellant complied with the order, respondent would not seek recourse against appellant for the arrearages, and that this included a promise not to seek execution; that when he fully performed, the liability for arrearages was erased. This is a strained unnatural construction of the 1944 order. The more reasonable construction of the provision that respondent would not seek recourse against appellant for so long as he complied with the order is that respondent promised not to seek to enforce her rights for past due support payments during the period appellant was making the increased payments, but that she did not waive her rights to these past due payments. This is the interpretation the trial court has placed on the order and we think that interpretation is the proper one.

[2] The second point involved on the first appeal is more difficult. It is whether the trial court properly ordered execution to issue after five years upon the showing made by respondent. The power of the court to order execution more than five years after the entry of judgment is to be found in section 685 of the Code of Civil Procedure. That section provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion."

This section has been a fruitful source of litigation. In December of 1942 the Supreme Court decided three cases trying to reconcile some of the then conflicting decisions interpreting the section, and to clarify its meaning. The first of these opinions is *Butcher v. Brouwer*, 21 Cal.2d 354, 132 P.2d 205. In that case the trial court granted the request for an execution more than five years after entry of the judgment. The Supreme Court affirmed. In discussing the history and development of section 685 the Court stated, 21 Cal.2d at page 357, 132 P.2d at page 206: "Section 685 of the Code of Civil Procedure, before it was last amended, provided in part as follows: 'In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion * * *.' As so worded, it has many times been construed by the appellate courts which held that although the enforcement of a dormant judgment by execution issued in response to the creditor's motion was a matter within the sound discretion of the trial court [citation], mere lapse of time was not in itself a sufficient ground for the denial of the motion. [Citations.] Nor did the failure of the judgment creditor to make any effort to enforce his judgment within five years after its entry, or at a later time, afford a ground for the denial of the motion. [Citations.] And the motion was properly granted, although, during the five years following the judgment, the judgment debtor possessed property which could have been discovered and subjected to the judgment. [Citations.] As a practical matter, therefore, by this construction of the statute a creditor, almost as a matter of right, might obtain an execution many years after the five-year period fixed by section 681."

The court then quoted the 1933 amendment to the section. This amendment added the requirement of notice to the judgment debtor, required the motion to be accompanied with an affidavit showing the reasons for failure to comply with section 681 of the Code of Civil Procedure, and con-

cluded with the language: "The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion." The Supreme Court was of the opinion that these amendments had materially changed the meaning of the section. At page 358 of 21 Cal.2d, at page 206 of 132 P.2d, the Court stated: "Considering the strict construction against the debtor which the appellate courts had placed upon section 685 before the change and the requirements added at that time, it is clear that the principal object of the new enactment was to place upon a creditor seeking to enforce a judgment more than five years after its entry, the burden of showing why he was not able to satisfy his claim within the statutory period during which he is entitled to an execution as a matter of right. * * * in view of the legislative and judicial history of section 685, its present provisions should be construed as authorizing the court to give a creditor an execution only if, during the five years following entry of judgment, he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. And even though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment."

In the second of the three cases—*Beccuti v. Colombo Baking Co.*, 21 Cal.2d 360, 132 P.2d 207—the Supreme Court, after restating many of the rules stated in the *Butcher* case, and in reversing an order granting the execution, stated, 21 Cal.2d at page 363, 132 P.2d at page 209: "But if the facts show of a certainty that, had the judgment creditor exercised even slight

diligence in making inquiry concerning the circumstances of the judgment debtor, he would have discovered property subject to execution, the exercise of sound discretion requires the court to deny the motion."

The Court then refers to certain facts relevant to this issue, and then continues, 21 Cal.2d at page 363, 132 P.2d at page 209: "Under these circumstances it is apparent that a resort to any of the customary sources of credit information would have disclosed property of the judgment debtor, and if the slightest effort had been made by the creditor within five years after the rendition of the judgment to locate property belonging to Lercari, much more in value than the amount necessary to satisfy it would have been discovered. Accordingly, the trial court abused its discretion in making the order appealed from."

In the third case—*Hatch v. Calkins*, 21 Cal.2d 364, 132 P.2d 210—the Supreme Court also reversed an order granting the execution, even though the evidence showed the debtor attempted to conceal some of his assets from his creditors. In the course of its opinion the court stated, 21 Cal.2d at page 371, 132 P.2d at page 214: "This evidence clearly shows that the creditor did not exercise even slight diligence in endeavoring to collect his judgment. But was he excused from making an investigation when there was town gossip in the community where the debtor resided that he had no assets? In other words, does the amendment to section 685 contemplate that a judgment creditor may rely upon the hearsay statements of the debtor's fellow townsmen rather than make any independent search for property of the debtor? To recognize the proposed exception would be to abolish the rule."

The holdings in these three cases are reasonably clear. None of them involved a continuing or accruing type of judgment, such as a judgment for support. In 1946 the Supreme Court was presented with such a judgment in the case of *Lohman v. Lohman*, 29 Cal.2d 144, 173 P.2d 657. The justices split 3-2-2 in their conclusions.

In the Lohman case an ex-wife attempted to file a claim against the estate of her ex-husband, deceased, for alimony and support. The interlocutory was entered in 1925, and the husband died in 1944. The husband had made a few payments during his lifetime. The wife had granted him numerous indulgences and he had assured her that she would get her money. The trial court denied the issuance of the execution.

Three justices—Edmonds, Gibson and Traynor—held that under section 681 of the Code of Civil Procedure the wife was entitled to an execution as a matter of right as to those payments accruing within five years of the filing of the wife's claim, but that as to those payments accruing between the date of the entry of judgment and up to five years from the date of her claim, she had not exercised the due diligence required by law, and that as to these payments she was barred. Two justices—Carter and Shenk—agreed that the wife was entitled to execution for the payments accruing during the five-year-period immediately preceding the filing of the claim, but also were of the opinion that the facts alleged showed due diligence on her part, and that she was entitled to an execution for the entire period. The other two justices—Schauer and Spence—were of the opinion that the wife had not exercised due diligence in the five-year-period immediately subsequent to judgment, and that such lack of diligence barred her from an execution for the entire period.

This same view was expressed by these two justices in dissents in *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 200 P.2d 529. In the majority opinion in that case, which was also a support case, the other five justices affirmed an order of the trial court denying execution for the period prior to five years from the motion of the wife on the ground that she had failed to show due diligence, but reversed the trial court as to the five years immediately preceding the motion (the trial court had recalled an execution for this period), holding that, as

a matter of right, she was entitled to execution for this five-year-period.

If the rule adopted by a majority of the Supreme Court justices in the above cases be applied to the instant case, it is quite clear that in May, 1944, when the order modifying the support order was entered, the respondent, as a matter of right, was entitled to execution for those payments which had accrued within five years of the time of her motion. This right she agreed to immediately forego, respondent agreeing not to enforce this right as long as appellant continued to pay the increased payments. But, as already pointed out, payment of the increased payments did not wipe out the right to execution to enforce payments of arrearages accrued prior to the date of the order, but simply relieved appellant of the obligation to pay the increased support and past due arrearages at the same time. This being so, the necessary legal effect of the 1944 decree was to preserve respondent's rights in connection with the arrearages as they existed at that time. Thus, it follows, that respondent was entitled, as of right, to execution to enforce payment of arrearages accrued between May, 1944, and five years prior thereto.

But the trial court ordered execution issued for the entire period, May, 1936, to May, 1944. For the period prior to May, 1939, the propriety of this order depends upon whether respondent made a showing of due diligence for the period prior to 1939. We do not think that respondent made any such showing.

In the instant case, prior to issuing the order for execution for the entire period, the trial judge prepared and filed a memorandum opinion. In the course of reviewing the facts the judge stated in that opinion: "It does not appear that plaintiff took any steps to enforce collection under the terms of the decree until 1943." Later in the opinion it is stated: "The record does not show that the plaintiff took any steps toward the enforcement for the first seven years following the entry of judgment."

But, in spite of this, the trial judge was of the opinion that due diligence during this period was exercised because of the distance appellant was living from respondent, respondent's financial inability to investigate assets, and because appellant in his affidavit in the 1944 proceeding averred that between 1936 and 1942 he was unable to make the payments.

Thus, it clearly appears that between 1936 and 1943—a period of seven years—the respondent did nothing at all to enforce her judgment. The reasons given by her—she lived 500 miles from appellant; she was without funds to pay for an investigation of his assets—are not sufficient to show diligence. It is not averred that she did not know where appellant resided, or that, during such period she even wrote him requesting payment. No attempt to secrete himself was made by appellant. During this period no attempt to institute contempt proceedings was made. The averment in appellant's affidavit in the 1944 proceeding indicating that any prior attempt to collect would have been futile cannot serve to revive a judgment already barred. The inexcusable inactivity took place between 1936 and 1943. Respondent did not know until 1944 that any prior effort to collect would probably have been unsuccessful.

Although the trial court undoubtedly has a wide discretion in such cases, since the 1933 amendment to section 685 of the Code of Civil Procedure it is our opinion that it was an abuse of discretion to order issuance of the writ of execution for the period from May, 1936, to May, 1939. Thus, the order involved on appeal No. 1 Civ. 16,960 was erroneous, and must be reversed.

[3] In appeal numbered 1 Civ. 16,522 the question presented is whether the trial court had the legal power to grant to respondent her attorney's fees and costs for the defense of the appeal from the order granting execution. We think that the trial court possessed this power, and that the order was proper.

Appellant contends that because his liability for support of the children had been terminated on November 22, 1950, the divorce and support action were not thereafter pending, and that, as a result, the court's power to grant fees and costs had terminated. The argument is without merit. Section 137.3 of the Civil Code, added in 1951 and as amended in 1953, provides, in part: "In respect to services rendered after the entry of judgment, upon application by an order to show cause or motion, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter upon application as aforesaid augment or modify any award so made." In *Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873, the Supreme Court was called upon to determine the nature of certain payments provided for in an agreement between the parties which had been incorporated in a divorce decree. The Supreme Court concluded that the payments were an integral part of the property division between the parties and so were not subject to modification, and also allowed the wife costs and attorney's fees on appeal. The husband contended that since the payments were not subject to modification, the court had no power to order costs and attorney's fees—a contention similar to the one advanced by appellant in the instant case. The court disposed of the contention as follows, 42 Cal.2d at page 44, 265 P.2d at page 878: "Defendant contends that if the payments are not subject to modification, the court had no power to order him to pay plaintiff's costs and attorney fees on appeal. The trial court had jurisdiction, however, to determine in this proceeding the character of the payments involved, and accordingly, the divorce action is still pending within the meaning of section 137.3 of the Civil Code. [Citing 2 cases.] Since plaintiff did not waive any right she might have to attorney fees and costs in her agreement and no abuse of discretion has been shown, the order awarding costs and attorney fees on appeal must be affirmed."

On similar reasoning, in the instant case, in spite of the termination order, the trial court still had jurisdiction to enforce its order for the support of the children. This being so, under section 137.3 it had power to award the wife costs and attorney's fees.

For the foregoing reasons, in appeal 1 Civ. 16,960, the order appealed from is reversed, with instructions to the trial court to order execution to issue under section 681 of the Code of Civil Procedure for the five-year-period prior to May, 1944; on appeal numbered 1 Civ. 16,522 the order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



144 Cal.App.2d 597

In the Matter of the ESTATE of Charles
F. HERRESHOFF, Deceased.

Virginia T. HERRESHOFF, Appellant,

v.

William Stewart HERRESHOFF, Union Title
Insurance & Trust Company, a corporation,
as Trustee, Respondents.

Civ. 5429.

District Court of Appeal, Fourth District,
California.

Sept. 24, 1956.

Proceeding in the matter of the estate of deceased testator, wherein a construction was sought of will. The Superior Court, San Diego County, Dean Sherry, J., entered a decree construing the will and providing for final distribution, and an appeal was taken. The District Court of Appeal, Mussell, J., held that where will provided that half of net income of trust should be distributed to intended wife of testator for or during her lifetime, or for so long as she remained a widow, and that

one half of net income should be distributed to brothers of testator or the survivor of them, and that on death of brothers one half of net income received by them should be paid to sisters of testator in equal shares, or the survivor of them, and that at death of survivor, income should be paid to intended wife of testator during her life, and that on death or remarriage of intended wife, trustees should distribute income to the brothers or the sisters, if the brothers were not living, intended wife, though she remarried after death of testator, was entitled to the income received by testator's brothers, after the death of the brothers and the sisters.

Decree modified and, as modified, affirmed.

1. Wills ⇐440

The objective in the interpretation of a will is to ascertain the intention of the testator as disclosed by the language he has used in his will.

2. Wills ⇐440

It is not what a testator wanted to do but what he actually did, as expressed in the words used, which governs, in absence of other evidence with respect to his intention.

3. Wills ⇐435

A court may not, under the guise of construction, make a will for a testator to take the place of the one made by him, if its intent is plain.

4. Wills ⇐656

Where will provided that half of net income of trust should be distributed to intended wife of testator for or during her lifetime, or for so long as she remained a widow, and that one half of net income should be distributed to brothers of testator or the survivor of them, and that on death of brothers one half of net income received by them should be paid to sisters of testator in equal shares, or the survivor of them, and that at death of survivor, income should be paid to intended wife of testator during her life, and that

on death or remarriage of intended wife, trustees should distribute income to the brothers or to the sisters, if the brothers were not living, intended wife, though she remarried after death of testator, was entitled to the income received by testator's brothers, after the death of the brothers and the sisters.

Sloane & Fisher, San Diego, for appellant.

No appearance for respondent.

MUSSELL, Justice.

Charles F. Herreshoff died testate in San Diego county on January 31, 1954. His will provided for the distribution of income and principal of his trust estate in the following language:

"Fourth: After the payment of all debts, expenses of administration, commissions, attorneys' fees, court costs and taxes, including State, County, Inheritance, Succession and Federal Estate, if any, I direct that my entire estate be distributed and I hereby give, devise and bequeath my said estate, real and personal, wheresoever situated, including all failed and lapsed gifts, hereinafter termed 'the trust Estate' to San Diego Trust & Savings Bank of San Diego, California, a California Banking Corporation, Virginia T. Herreshoff, and James Brown Herreshoff and Lillian Stuart Herreshoff or the survivor or survivors of them, In Trust Nevertheless, to hold, manage and distribute as follows:

"A. Distribution of Income and Principal.

"(1) One-half of the net income shall be distributed in monthly or other convenient installments, to or for the benefit of my intended wife, Virginia T. Herreshoff, for and during her lifetime, or for so long as she remains my widow.

"(2) One-half of the net income shall be distributed in monthly or other

convenient installments in equal shares to my brothers, James Brown Herreshoff and William Stuart Herreshoff, or to the survivor of them, for and during the lifetime of each of my said brothers.

"(3) Upon the death of the last survivor of my said brothers, I direct that the one-half of the net income received by them during their lifetime shall thereafter be paid to my sisters, Jeannette Brown and Anna Francis, in equal shares, should they be then living, or to the survivor of them, and if neither of my said sisters be then living, that said income be thereafter paid to my said intended wife, Virginia T. Herreshoff, for and during her life..

"(4) Upon the death or remarriage of my intended wife, Virginia T. Herreshoff, the Trustees shall distribute the income from the trust estate to which she was theretofore entitled, to my brothers herein named, in equal shares, if they be then living, or to the survivor of them if one only be living. And in the event that at the time of the death or remarriage of my said intended wife, Virginia T. Herreshoff, neither of my brothers be then living, and my sisters Jeanette Brown and Anna Francis, or either of them be then living, I then direct said Trustees to distribute the income to be distributed to my intended wife, Virginia T. Herreshoff until her death or remarriage, to my said two sisters share and share alike or to the survivor of them."

The trial judge in his decree construing the will and of final distribution, in effect, added the words "provided she does not remarry" to paragraph A(3) above quoted. The language used by the court appears on page four of the decree, page 14 of the clerk's transcript, where the court, in providing for the distribution of the one-half of the net income as provided in the fourth provision of the will A(2), provides as follows:

"During the continuance of the trust the trustees or trustee shall distribute the other one-half of the net income of the trust in monthly or other convenient installments to William Stuart Herreshoff, brother of the decedent, for and during his lifetime; upon the death of the said William Stuart Herreshoff, the trustees or trustee shall distribute said one-half of the net income of the trust in monthly or other convenient installments to Jeanette Brown Herreshoff, and Anna Francis Herreshoff, sisters of the said Charles F. Herreshoff, in equal shares, if they be then living, or to the survivor of them should either have died, and if neither of said sisters be then living, then the trustees, or trustee shall distribute said one-half of the net income of the trust in monthly or other convenient installments to Virginia T. Herreshoff so long as she lives, *provided however she shall not receive any of such income in the event she shall have remarried, and distribution of income to her shall cease and terminate forthwith in the event she shall remarry after she has received any such one-half of such income.* (Italics ours.)

Virginia T. Herreshoff appeals from the above italicized portion of the decree. No brief is filed on behalf of the respondent. Appellant contends that she has the right to receive one-half of the income from the trust estate after the death of the testator's brothers and sisters, even though she may have remarried by that time. We are in accord with this contention. The testator, in providing for the one-half of the income to be paid to appellant under paragraph Fourth A(1) of the will, provided for the payment of the said one-half of the income to appellant as long as she remained a widow and in the event of her death or remarriage, the income would be distributed to his two sisters (paragraph A(4)). However, in providing for the payment of the other one-half of the income to his brothers, he provides in paragraph A(3)

that upon the death of the last survivor of them the income would be distributed to the sisters, if living, and if not, to Virginia T. Herreshoff *for and during her life*. The language used is clear and unambiguous.

[1-3] The objective in the interpretation of a will is to ascertain the intention of the testator as disclosed by the language he has used in his will. In re Estate of Brunet, 34 Cal.2d 105, 107, 207 P.2d 567, 11 A.L.R.2d 1382. It is well settled that it is not what a testator wanted to do but what he actually did, as expressed in the words used, which governs in the absence of other evidence with respect to his intention. Gardner v. Snow, 119 Cal.App.2d 546, 549, 259 P.2d 95. A court may not, under the guise of construction, make a will for a testator to take the place of the one made by him if its intent is plain. In re Estate of Beldon, 11 Cal.2d 108, 112, 77 P.2d 1052; In re Estate of Soulie, 72 Cal.App.2d 332, 335, 164 P.2d 565.

[4] The testator herein clearly provided in said paragraph A(3) for the payment of income to his brothers during their lifetime and thereafter to his sisters, if living. If not, said income was to be paid to his intended wife, the appellant herein, *for and during her life*. By adding the italicized provisions to this paragraph providing that appellant should not receive this income in the event that she should have remarried, the court added a condition not stated in the will and contrary to the plain intent of the testator. The decree is therefore modified by deleting therefrom the following language, appearing on page 14 of the clerk's transcript, lines 29 to 32: "provided, however, she shall not receive any of such income in the event she shall have remarried, and distribution of income to her shall cease and terminate forthwith in the event she shall remarry after she has received any such one-half of such income." As so modified, the decree is affirmed. Appellant to recover costs.

GRIFFIN, Acting P. J., and BURCH, J. pro tem., concur.

144 Cal.App.2d 567

Minnie C. LOBROVICH, Plaintiff and
Appellant,

v.

Helen GEORGINSON, as Executrix of the
Estate of George C. Georgison, also known
as George Mihaljevic, also known as George
Wellington, also known as C. Wellington,
Deceased, Defendant and Respondent.

Civ. 16889.

District Court of Appeal, First District,
Division 2, California.

Sept. 24, 1956.

Rehearing Denied Oct. 24, 1956.

Hearing Denied Nov. 21, 1956.

Claimant's action against estate for allegedly unpaid alimony and support money. The Superior Court, County of Santa Clara, W. W. Jacka, J., entered judgment declaring that action was barred by three month statute of limitations and claimant appealed. The District Court of Appeal held that where executrix' attorney wrote letter to claimant's attorney stating that claim had been rejected but suggested settlement negotiations in order to save money for estate, and there was no rejection of claim filed with clerk as required by statute, receipt of letter was sufficient to start three month statute of limitations running.

Affirmed.

1. Executors and Administrators ⚖437(7)

So long as rejection of claim has been given in writing, failure to file notice with clerk as provided by statute, will not prevent running of three month statute of limitations respecting institution of actions on claims. West's Ann.Prob.Code, §§ 711, 714.

2. Executors and Administrators ⚖437(7)

Where executrix' attorney wrote letter to claimant's attorney stating that claim had been rejected but suggested settlement negotiations to prevent litigation expense for estate, and no notice of rejection of claim was filed with clerk as required by statute, receipt of letter by claimant's attorney was sufficient to start three month

statute of limitations running. West's Ann.Prob.Code, §§ 711, 714.

3. Executors and Administrators ⚖437(7)

Statute requiring that notice of rejection of claim be served and filed with clerk of court, does not require any formal notice of rejection but merely that notice be in writing. West's Ann.Prob.Code, § 711.

4. Contracts ⚖150

When a document is reasonably susceptible of one meaning only, that meaning is binding, and individual misinterpretation is no excuse.

5. Executors and Administrators ⚖221(3)

In claimant's action against estate to recover accrued alimony and support money, involving issue as to whether action was barred because instituted more than three months after receipt by claimant's attorney of letter stating that claim had been rejected and suggesting settlement negotiations, since letter was clear and unambiguous, trial court properly excluded claimant's attorney's testimony that upon reading letter he deemed it to be a letter inviting settlement negotiations. West's Ann.Prob.Code, §§ 711, 714.

6. Executors and Administrators ⚖437(5)

Where executrix' attorney wrote a letter to claimant's attorney rejecting claim but suggested possibility of settlement and pointing out the difficulty of reaching one, such invitation to settlement negotiations was insufficient basis for claiming estoppel against executrix to plead three month statute of limitations. West's Ann.Prob.Code, §§ 711, 714.

7. Limitation of Actions ⚖13

Where there was still ample time to institute an action within the statutory period after circumstances inducing delay had ceased to operate, plaintiff who failed to do so, cannot claim an estoppel.

8. Executors and Administrators ⚖256(1)

Where claimant desired to press claim against estate for unpaid alimony and support money and order by another court granted leave to file a creditor's claim in

estate and there was an appeal from such order, appeal did not stay effectiveness of order which was self-executing.

9. Process ☞

"Process" is a means whereby a court compels a compliance with its demands.

See publication Words and Phrases, for other judicial constructions and definitions of "Process".

10. Executors and Administrators ☞437(3)

Where claimant's action against estate for unpaid alimony and support money was barred because of institution of same more than three months after notice of rejection of claim, fact that delay had not prejudiced the executrix was irrelevant. West's Ann. Prob.Code, § 714.

11. Limitation of Actions ☞166

The statute of limitations is a positive rule of law and the courts must, when it is pleaded, be governed by it where it applies independent of the existence or nonexistence of prejudice to the defendant.

Forrest E. Macomber, Gordon J. Aulik, Stockton, for appellant.

Crist, Peters & Donegan, Palo Alto, for respondent.

PER CURIAM.

Minnie C. Lobrovich, formerly Minnie Georgison, appeals from a judgment holding that her action against the executrix of the estate of her deceased first husband George C. Georgison to establish her claim in said estate was barred by the provision of section 714 of the Probate Code, which requires such suit to be brought within three months after the date of written notice of the rejection of the claim. The facts are undisputed.

The claim was for allegedly unpaid alimony accrued before plaintiff's remarriage in February 1925, and child support accrued before her son reached his majority in March 1944, both under an interlocutory decree of divorce obtained by plaintiff in Alameda Superior Court in 1924, and the final decree obtained in 1925.

The claim was filed with the County Clerk of Santa Clara County, where the will of the deceased was in probate, on December 14, 1952, and a copy was mailed to the attorneys of the executrix, the second wife of deceased. The executrix on December 15th instructed her attorneys to "deny" said claim. On December 17th the Alameda Superior Court on plaintiff's motion ordered that execution issue on the divorce judgment and leave was granted to file creditor's claim in the estate of George C. Georgison. On December 19, 1952, the attorneys for the executrix mailed a letter to the attorneys of plaintiff, which letter the court below considered a notice of rejection of claim and which will be stated hereafter in detail. Enclosed was a copy of the order of December 17th and copy of a notice of appeal therefrom. This letter was received by plaintiff's attorney on December 22nd. On this same date the appeal from the order of December 17th was filed. On December 23rd a more detailed order to the same effect as the order of December 17th was filed in the Alameda Superior Court. On February 6, 1953 a supplement to plaintiff's claim reciting the order granting leave was filed with the Santa Clara County Clerk. After the letter of December 19th, there were settling negotiations between the attorneys of the parties which ceased after letters exchanged on February 12 and 13, 1953. The present action was filed April 6, 1953, more than three months after receipt of the letter of December 19, 1952. Trial in said action was continued until after the appeal of the order granting leave had been decided in favor of plaintiff-petitioner, Georgison v. Georgison, 43 Cal.2d 550, 275 P.2d 3, and the remittitur had come down on November 26, 1954.

Appellant contends that the three month period of Probate Code Section 714 did not begin to run because her claim had not been rejected in the manner provided for by Probate Code Section 710, and because the letter of December 19, 1952 was not a notice of rejection as contemplated by

Section 714; that the running of the statute was tolled pending the appeal from the order of the Alameda Superior Court; that respondent executrix was estopped from relying on the statute because of continuing settlement negotiations and that it was error to strike testimony of plaintiff's attorney that he attached no significance to the letter of December 19th as a notice of rejection and deemed it solely a letter inviting negotiations. We have concluded that none of these contentions can be sustained.

[1] It is conceded that the executrix did not file with the clerk her rejection in writing as provided for in section 710. However, section 714 does not contain a term of three months from the date of the filing of such rejection in writing but from the date of written notice to the claimant for which section 714 itself provides. The effect of failure to file a rejection in writing with the Clerk in accordance with section 710 is not contained in the probate code or decided in any case known to us. With respect to section 711, which regulates the alternative statutory method, the presentation of the claim to the representative himself, and which provides for indorsement of the rejection with the date thereof on such presented claim, it has been said that such indorsement of rejection is not essential and that any act in writing indicating an intention to reject would have the same effect. See *Faias v. Superior Court*, 133 Cal.App. 525, 528, 24 P.2d 567. Accordingly, it was held in *In re Estate of Wood*, 117 Cal.App.2d 132, 254 P.2d 940, that a motion of executors to strike a creditor's claim was a rejection of said claim to be followed by a suit under section 714, and in *San Francisco Bank v. St. Clair*, 47 Cal.App.2d 194, 117 P.2d 703, 704, that a statement that a contingent liability claimed "is now eliminated and is null and void" contained in the first and final account and petition for distribution of the executrix, which statement did not escape the notice of the creditor, was a notice in writing of rejection which started

the running of the three months statute of section 714, although otherwise the executrix had taken no action on the claim. We hold that the same principle must be applied to the filing with the Clerk of a rejection in writing under section 710. This form of rejection has no greater intrinsic importance than the indorsement of the rejection on a claim presented to the representative. The claim with rejection need not even be presented by the clerk to the judge in contradistinction to a claim allowed by the representative, § 710, *supra*.

The material text of the letter of December 19, 1952, the sufficiency of which as a notice of rejection is in dispute, reads as follows:

"Re: Georgison v. Georgison No. 74985

"Gentlemen:

"Enclosed is the order and the appeal therefrom in the above entitled matter. Also, I am in a position now to apprise you of what is really at stake in this controversy. As you will be notified, if you have not already received copy, the inventory in this estate totals \$6,525.00. There is also a claim in this estate of \$50,000.00 arising out an automobile accident in which the deceased husband was involved prior to his death. There is some insurance on this matter and it may be that the estate will not be diminished by that claim. However, that remains to be seen.

"As your claim has been rejected, no doubt you are planning suit against the estate and since the defenses are so strong and the feeling equally strong, I can honestly predict that if we do not prevail in successfully resisting your suit, an appeal from it will be inevitable. With an estate this size, obviously it is a losing proposition for Mrs. Lobrovich.

"I have in mind a realistic approach to this thing and I think you will

agree the sensible thing to do is to get Mrs. Lobrovich to prune her demand down to something that makes sense for this widow, and I will get out the arithmetic and show her how she would save money by settling. However, you know I'm not going to get anywhere if her demand is substantial enough to give it to Lobrovich rather than lose it in fees and costs in resisting Mrs. Lobrovich. In either event, the result would be the same to Mrs. Georginson and with her present feeling, I know she would prefer it not going to Mrs. Lobrovich.

"I suggest you get in touch with your client and let me know your intentions because it seems a little ridiculous with an estate of this size to exhaust it with attorney's fees."

[2, 3] This letter does not only expressly state that the claim has been rejected but moreover the necessity of suit, the availability of strong defenses against such suit, the intention to carry on the defense to appeal, and the taking of appeal from the order granting permission to file the claim. It cannot leave the slightest doubt as to the intent of the executrix to oppose (reject) the claim presented. The statements as to the condition of the estate and the desirability of a settlement cannot have the effect of hiding said rejection because they are made in direct relation to it. The invitation of a settlement offer for a substantially lower amount than the one claimed cannot cause any doubt as to the definitive character of the rejection of the claim as presented. "The code does not provide that any formal notice of rejection be served, but merely requires that the notice be in writing." *San Francisco Bank v. St. Clair*, supra, 47 Cal.App.2d at page 201, 117 P.2d at page 706. The letter is a notice of rejection in writing and an unambiguous one.

[4, 5] Appellant's contention that it was error to strike the testimony of her attorney, that he read the letter, that at the time he attached no significance to it as

a notice of rejection and deemed it solely a letter inviting settlement negotiations, is based on the following language in the *San Francisco Bank* case, supra, 47 Cal. App.2d at page 201, 117 P.2d at page 706: "There was nothing in the caption or title of the papers served by the executrix to indicate that a rejection of the claim was contained therein, and if the rejection had escaped the notice of respondent, it might then be heard to say that it had not received such 'notice in writing' as the statute contemplates." The language has no application to our case. In the *San Francisco Bank* case the rejection was hidden in a document intended for another purpose and for all persons interested in the estate, so that it could without fault of the claimant escape his notice if his attention was not expressly called to it. Here the letter is addressed to the attorneys of claimant only and is concerned with nothing but respondent's opposition to the claim and the consequences of the rejection. The testimony stricken does not say that the rejection escaped the attorney's attention, but gives the attorney's individual understanding of the letter, which he read, an understanding contrary to what we have found to be its unambiguous meaning. When a document is reasonably susceptible of one meaning only, that meaning is binding and an individual misinterpretation is no excuse. Cf. *Restatement, Contracts*, § 501, comment (b) "If the misunderstanding is due to the fault of one party and the other party understands the transaction according to the natural meaning of the words or other acts, both parties are bound by that meaning." The misinterpretation is then irrelevant and evidence as to it should be excluded.

[6, 7] With respect to an estoppel to rely on the statute because of settlement negotiations as here opened by the letter of December 19, 1952, it is said in 34 Am. Jur. 330: "Clearly, an estoppel to plead the statute does not arise in every case in which there are negotiations for a settlement of the controversy." In this case

the delay in commencing action was not induced by any representation of defendant that an amicable settlement would be reached. There was no more than an advice to explore the possibility of a settlement pointing out the difficulty of reaching one. Such is an insufficient basis for estoppel to plead the statute. Cf. *Lo Bue v. Porrazzo*, 48 Cal.App.2d 82, 86, 119 P.2d 346. Moreover the negotiations ended with a letter of the attorneys of executrix of February 12, 1953, stating that any settlement above \$2,000 was out of the question and a letter of the attorneys of plaintiff of February 13, rejecting that offer and stating that they would have to proceed if no counter-offer close to \$5,000 was made. At that time there were still more than five weeks available until the end of the period of limitation. No counter-offer was made but nevertheless plaintiff failed timely to bring action. If there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, the plaintiff who failed to do so cannot claim an estoppel. Annotations, 130 A.L.R. 8, 19; 24 A.L.R.2d 1413, 1423, and cases there digested.

[8,9] Appellant's contention that the statute was tolled during the pendency of the appeal of the order granting leave to file the claim is based on the well recognized rule "that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." *County of Santa Clara v. Hayes Co.*, 43 Cal.2d 615, 618, 275 P.2d 456, 458. However, plaintiff was not legally prevented from bringing action to establish her claim in the estate pending such appeal. The order granting leave to file the claim was self-executing because it requires no process of the court to carry it into effect. The appeal does not stay the effectiveness of such an order. Cf. *Caminetti v. Guarantee Union Life Ins. Co.*, 22 Cal.2d 759, 763, 141 P.2d 423. Process is a means whereby a court compels a compliance with

its demands. See definition of process "in practice" in *Black's Law Dictionary*. No means of compelling compliance derived from the Alameda Superior Court or its officers except the order itself was required to enable appellant to bring her action in the Santa Clara Superior Court. We see in this respect no distinction from the facts in the *Caminetti* case, *supra*, in which it was held that an order approving a rehabilitation agreement under the Insurance Code was self-executing and that the power of the Insurance Commissioner to perform the terms of the agreement was not stayed by an appeal from said order and could not be stayed by a writ of supersedeas. It was there pointed out that the Commissioner was not an officer of the Court. No more is in this case appellant in bringing her action, or the Santa Clara Superior Court in considering it, acting as an officer of the Alameda Superior Court, which granted the permission.

[10,11] Neither was appellant practically prevented from bringing the action pending the appeal by unsurmountable factual difficulties like those present in *Christin v. Superior Court*, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, on which case she relies. Although there would be some risk in bringing action before the permission was final, such risk is not greater than is normally borne by a litigant who brings action relying on the undecided merits of his cause. To restrict the risk the proceedings in the Santa Clara action could, after their timely commencement, be continued until after the final decision of the appeal. Actually, appellant followed exactly this procedure, commencement of the action pending the appeal and continuation of the trial until after its final decision, but she started said procedure some two weeks too late. The fact that this delay did not prejudice respondent is irrelevant. "The statute of limitations is a positive rule of law, and the courts must, when it is pleaded, be governed by it where it applies * * *." *Adams v. Hopkins*, 144 Cal. 19, 28, 77 P.

712, 715. As a statute of repose it prevents the bringing of action after the period provided for, independent of the existence of prejudice to the defendant.

Judgment affirmed.



Marlan WILDMAN and Elvaree H. Wildman,
Husband and Wife, Plaintiffs
and Appellants,
v.

**GOVERNMENT EMPLOYEES INSURANCE
COMPANY, a corporation, Defendant
and Respondent.***

Civ. 5414.

District Court of Appeal, Fourth District,
California.

Sept. 24, 1956.

Rehearing Denied Oct. 23, 1956.

Hearing Granted Nov. 21, 1956.

Action brought by tort judgment creditors of insured for declaration of legal rights and duties of insurer under liability policy and for judgment requiring insurer to pay judgment against the insolvent insured. The Superior Court, San Diego County, Charles C. Haines, J., rendered judgment adverse to plaintiffs and entered an order denying their motion for new trial, and they appealed. The District Court of Appeal, Mussell, J., held that Vehicle Code section requiring liability policy to insure person named therein and any other person using or responsible for use of vehicle with permission of insured did not prohibit endorsement defining "insured" to include named insured and members of his immediate family using automobile or legally responsible for use thereof but making insurance inapplicable in event of use by any person not within such definition.

Affirmed.

301 P.2d—30

* Opinion vacated 307 P.2d 359.

1. Insurance ⇨435.8

There was no ambiguity in liability policy's restrictive endorsement which define "insured" as including the named insured and any member of his immediate family using automobile or legally responsible for use thereof, but making insurance inapplicable in event of "use" by any person not within such definition; and driver of vehicle at time of accident was user of the same.

See publication Words and Phrases, for other judicial constructions and definitions of "Use".

2. Insurance ⇨435.8

Vehicle Code section, requiring liability policy to insure person named therein and any other person using or responsible for use of vehicle with permission of insured, did not prohibit endorsement defining "insured" to include named insured and members of his immediate family using automobile or legally responsible for use thereof but making insurance inapplicable in event of use by any person not within such definition. West's Ann. Vehicle Code, § 415(a)(2).

3. Appeal and Error ⇨110

Order denying motion for new trial was not appealable.

Swing, Scharnikow & Staniforth and Robert O. Staniforth, San Diego, for appellants.

Luce, Forward, Kunzel & Scripps and James L. Focht, Jr., San Diego, for respondent.

MUSSELL, Justice.

This is an action for declaratory relief and upon a judgment against an insolvent insured. On February 3, 1955, Eusebio Bonifacio and Cecilia Bonifacio were the owners of a 1953 Cadillac coupe automobile, which, while being negligently driven by one Victoria Villanueva, caused personal injuries and property damages to plaintiffs herein. Prior to said date, the Government Employees Insurance Com-

pany, a corporation, defendant herein, issued to Eusebio Bonifacio its policy of automobile insurance, No. 4495658. In this policy the said insurance company agreed to indemnify the Bonifacios against any liability not exceeding the sum of \$10,000, together with taxed court costs with interest, which should arise against Eusebio Bonifacio and Cecilia Bonifacio in favor of any person or persons who should sustain any damages to their property and also in favor of any person or persons who should sustain any bodily injury by reason of an accident incurred while the said Eusebio Bonifacio and Cecilia Bonifacio were using said automobile or legally responsible for the use thereof, provided said use was with the consent and permission of said Eusebio Bonifacio or Cecilia Bonifacio. An endorsement to said policy, dated December 3, 1954, provides as follows:

"1. The first sentence of Insuring Agreement III, Definition of Insured, is eliminated and is hereby replaced by the following:

"With respect to the insurance for Bodily Injury Liability and Property Damage Liability the unqualified word 'insured' includes the named insured, the individual named below, and any member of the insured's immediate family.

"No Exceptions

"while using the automobile or legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured.

"2. Such insurance as is afforded by this policy does not apply while any person not an insured as defined in Paragraph 1 above is using the automobile, except that such insurance as is afforded for Medical Payments applies with respect to bodily injury to or sickness, disease or death of the named insured, the individual named below, and any member of the insured's immediate family.

"3. As evidenced by the signature below of the named insured, the named insured acknowledges and agrees that this endorsement forms a part of the above captioned policy issued by the Government Employees Insurance Company and is effective as of 12:01 A. M. Standard Time on the effective date of the endorsement."

On February 3, 1955, while this policy was in effect, and while the Cadillac automobile was being operated and driven by Victoria Villanueva, with the permission and consent of Cecilia Bonifacio and while Cecilia Bonifacio was seated beside Victoria Villanueva in said automobile, said Victoria Villanueva negligently operated said automobile, and as a proximate result, the property of Marian Wildman and Elvaree H. Wildman, plaintiffs herein, was damaged and personal injuries were sustained by Elvaree H. Wildman, which said damages were caused by said accident. Thereafter Marian Wildman and Elvaree H. Wildman obtained a judgment in the Superior Court in San Diego county against Victoria Villanueva and Cecilia Bonifacio in the sum of \$5,000, and costs, for the property damage and personal injuries so sustained. This judgment has become final and is wholly unsatisfied and unpaid.

The instant action was brought by Marian Wildman and his wife for the declaration of the legal rights and duties of the defendant Government Employees Insurance Company under said policy and for a judgment requiring it to pay the said judgment obtained by Wildman and his wife. The trial court found, inter alia, that in the policy of insurance the defendant agreed to indemnify the Bonifacios against liability which should arise against them in favor of any person or persons who should sustain damage to their property and also in favor of any persons who should sustain any bodily injury by reason of an accident incurred while the Bonifacios were using said automobile or legally responsible for the use thereof, provided such use was

with the permission and consent of the said Eusebio P. Bonifacio or Cecilia Bonifacio, and provided further that said automobile was not being used at said time by any person other than the said Eusebio P. Bonifacio or Cecilia Bonifacio or members of their immediate family; that said insurance was in effect on February 3, 1955, subject to the limitations and exclusions referred to herein. The court concluded that the plaintiffs should take nothing by their complaint and entered judgment decreeing that the insurance afforded by said policy did not apply at the time of the accident on February 3, 1955.

[1] Plaintiffs have appealed from the judgment and first contend that the restrictive endorsement on the policy is ambiguous. We do not agree with this contention. In the first paragraph of this endorsement it is stated that the "insured" includes the named insured and any member of the insured's immediate family, with no exceptions, while using the automobile or legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured. This language is clear and unambiguous as to the persons insured. Paragraph two of the endorsement clearly states that such insurance as is afforded by this policy does not apply while any person not an insured as defined in paragraph one is using the automobile. It is conceded that Victoria Villanueva was driving the automobile and that she was not a member of the Bonifacio family. She was using the automobile as she was driving it at the time of the accident and the term "use" includes the person who had the actual, though not physical, control of the car, and who was constituted by the owner its master ad hoc. *Souza v. Corti*, 22 Cal.2d 454, 457, 139 P.2d 645, 147 A.L.R. 861. We find no ambiguity in the wording of paragraph two of the endorsement.

In *Boole v. Union Marine Ins. Co., Ltd.*, 52 Cal.App. 207, 209, 198 P. 416, 417, it is held:

"Contracts of insurance are not different from other contracts. In the

absence of statutory provisions to the contrary, insurance companies have the same right as an individual to limit their liability, and to impose whatever conditions they please upon their obligations, not inconsistent with public policy."

Exclusionary clauses have been held to be binding even when the insured automobile was being operated by one who was an insured under the terms of the policy. *Sears v. Illinois Indemnity Co.*, 121 Cal. App. 211, 9 P.2d 245 is such a case. In it the policy in question, by exclusion, specified that the insurance did not apply while the vehicle was being operated by one under the age of 16 years. The automobile was owned by one Gilbert Angrimson, and his son, an insured, was in the vehicle at the time of the accident. The actual driver of the car was Wilson Parker, who was under the age of 16 years. The trial court found that while Parker was driving the car, the owner's son was controlling, managing and operating the vehicle and it was held on appeal that the terms of the exclusion were applicable and that there was no coverage at the time of the accident.

In *State Farm Mut. Automobile Ins. Co. v. Coughran*, 303 U.S. 485, 58 S.Ct. 670, 671, 82 L.Ed. 970, the policy in question provided:

"(1) *Risks Not Assumed by This Company.* The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for loss or damage; * * * (A) * * * (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license; (F) * * * *"

The trial court therein found that at the time of the accident in question the in-

sured automobile was being operated by Helen Anthony, the assured's wife, and was at the time being jointly operated by one Nancy Leidendeker, an unlicensed minor. It appears from the findings that Nancy was actually in the driver's seat. The United States Supreme Court held that: "If, as found, the automobile was being jointly operated by the wife and the girl, the risk was not within the policy."

In the instant case the defendant insurance company limited its liability by excluding coverage when the automobile was being used by someone other than an insured, as defined in the policy, and such a limitation cannot be disregarded. As is said in *Continental Cas. Co. v. Phoenix Const. Co.*, 46 Cal.2d 432, 296 P.2d 801, 806:

"An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected." (Citing many cases.)

[2] Appellant argues that the interpretation of the policy given by the trial court is contrary to section 415 of the Vehicle Code of the State of California. This section provides, in part, as follows:

"Requisites of Motor Vehicle Liability Policy. (a) * * * A 'motor vehicle liability policy,' as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy shall meet the following requirements: * * *

"(2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured. * * *

The endorsement involved herein, in paragraph one, complies with the quoted code provision and did furnish coverage

in cases where the automobile was being used by one who was not named as an insured. Since the defendant insurance company had the right to limit the coverage of the policy under the rules stated in *Continental Cas. Co. v. Phoenix Const. Co.*, supra, 46 Cal.2d 423, 296 P.2d 801 we cannot here hold that the limitation imposed by paragraph two of the endorsement in question was prohibited by the provisions of section 415 of the Vehicle Code.

[3] The attempted appeal from the order denying motion for a new trial herein is dismissed. In *re Estate of Dopkins*, 34 Cal.2d 568, 569, 212 P.2d 886. The judgment is affirmed.

GRIFFIN, Acting P. J., and BURCH, J. pro tem., concur.



144 Cal.App.2d 706

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

E. L. HENDERSON, Defendant and
Appellant.
Cr. 1084.

District Court of Appeal, Fourth District,
California.

Sept. 27, 1956.

Prosecution for conspiracy to commit theft. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that where questions on defendant's cross-examination and statements of prosecutor on final argument all implied that prosecutor had personal knowledge of defendant's commission of similar crimes

elsewhere and of defense witness' perjury, defendant did not have a fair trial.

Reversed and new trial ordered.

1. Conspiracy Ⓒ48

In prosecution for conspiracy to commit theft involving alleged scheme whereby defendant with advance knowledge of winning numbers on punch boards would play such boards after they had been left at business establishments by an unknown co-conspirator, evidence presented jury questions as to whether theft was committed, whether a conspiracy did exist and whether defendant was connected with the crime. West's Ann.Pen.Code, § 182, subd. 1.

2. Witnesses Ⓒ330(1)

Where defendant is charged with a conspiracy which prosecutor believes was practiced over many states, some greater degree of latitude is allowed in cross-examination of defendant, particularly when it relates to the defendant's memory as to his whereabouts on a particular occasion or as to the intent and pattern, or general plan involved in the claimed conspiracy, or for possible grounds of impeachment. West's Ann.Pen.Code, § 182, subd. 1.

3. Criminal Law Ⓒ726, 730(16)

A defendant is not in a position to complain of prejudicial error in remarks by prosecutor, where remarks in question are elicited by challenge of defendant's counsel and where trial court has ordered jury to disregard such remarks.

4. Criminal Law Ⓒ719(1)

It is misconduct for prosecutor to state or infer the existence of facts concerning which no evidence has been introduced.

5. Criminal Law Ⓒ706, 719(3)

In prosecution for conspiracy to commit theft, where effect of prosecutor's cross-examination of defendant and statements made to jury was to imply that prosecutor had personal knowledge of defendant's commission of similar crimes elsewhere and of perjury by defense witness, defendant did not have a fair trial. West's Ann.Pen.

Code, §§ 182, subd. 1, 1323; West's Ann. Const. art. 6, § 4½.

3. Criminal Law Ⓒ798½

In prosecution for conspiracy to commit theft, instruction to effect that if jury believed defendant guilty of any of the three kinds of theft mentioned in Penal code, it would not be necessary to state, in the verdict, which of the three forms of theft was committed, provided that it also found beyond a reasonable doubt, that defendant was guilty of conspiracy to commit crime of theft, was proper. West's Ann.Pen.Code, § 182, subd. 1.

Wesley B. Buttermore, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant was charged with the crime of conspiracy to commit theft, Pen.Code Sec. 182, subd. 1, claiming that on January 11, 1954, he voluntarily agreed with a person referred to as John Doe to commit said act. Four separate overt acts are charged claiming that in furtherance thereof (1) John Doe sold Glen Fronabarger a punch board; (2) defendant entered a service station; (3) John Doe sold one Lester Root a punch board; and (4) defendant wrote a letter to a certain bank in San Diego. A verdict of guilty was found by the jury and a motion for new trial was denied. Defendant was sentenced to State's prison. On appeal he contends: (1) that the evidence is insufficient to support the judgment; (2) that the prosecuting attorney engaged in prejudicial misconduct; and (3) that the court gave an erroneous instruction.

On January 11 or 12, 1954, an unidentified person (hereinafter referred to as John Doe) appeared at three service stations in San Diego County, to sell certain items, including punch boards, and was seen driv-

ing a certain described light-colored Mercury car. Despite the station operators' unwillingness to accept the punch boards, John Doe left a base-ball punch board at each of these stations upon a consignment basis. This game consisted of a board indicating baseball teams and bets were made by the customer that if a named team was uncovered by the draw, the Phillies would pay nothing and so graduated up to 20 for 1 on New York. The board had painted on it "Play Ball—Pick your favorite team"; "State Approved", with a gold seal; "Tax paid at rate prescribed by law"; "play 10¢ up". Within two or three hours thereafter, on the same day, defendant appeared at each of these service stations and won money from each of the service station operators, all under similar circumstances, namely, that defendant would start out losing, would continue playing, and finally select a 20 to 1 winner, whereupon he would stop playing the punch board, collect the money and leave. John Doe never returned to any of these stations to collect the price of the boards. In each instance he had spoken about selling vending machines when he approached these three service station operators but finally ended the transaction by leaving the punch boards and agreeing to return and collect from the operators \$4.50 for each of them, and allow them to keep the remaining profits which he assured them would return a profit and they could keep it. Altogether, Mr. Root, an oil station operator, lost about \$110 to defendant, and Mr. Fronabarger \$130, \$70 of this amount being represented by a check drawn on the Bank of America, Logan Heights Branch, on which the maker stopped payment. Mr. Siekmann lost \$140. The check was made payable to E. L. Henderson, and was endorsed and forwarded to the bank with a letter of instruction dated January 11, 1956, to send a cashier's check to him at General Delivery, Phoenix, Arizona. The police in Phoenix were alerted to watch the Post Office there but E. L. Henderson did not appear. Considerable publicity was given in the papers of the affair.

It appears that immediately after these transactions the defendant left town and was apprehended in Oklahoma. Before the time set for his extradition hearing, and while out on bail, defendant departed to Mississippi and his attorney, who was on defendant's bond, returned defendant to Oklahoma. The police officer who returned defendant to California, testified that while en route defendant voluntarily stated (retracting a previous statement of denial) that he was the man who punched the punch boards in the service stations; that when he asked him why he visited all of the service stations in one short period of time, defendant declined to answer; that when he asked defendant if he went to the General Delivery window at the Post Office in Phoenix, Arizona, to pick up the check defendant said "No"; that when he remarked to defendant that payment had been stopped on the check defendant said "Someone is liable to get in trouble over that * * * possibly someone at the bank". Defendant was identified by the three service station operators as the one who took the money.

It is the people's claim that the evidence sufficiently shows a conspiracy or agreement between John Doe and defendant by showing a definite pattern of operation by them; that John Doe assured the station operators there was a profit to be made from the boards and they could not lose when in fact both defendant and John Doe knew that within a short period of time defendant would appear, play the game, and, as a "come-along" would lose until the proper time, when a larger wager would be placed and he would win on a 20 to one tab; that in fact he knew the key location of the several tabs all the time by prearrangement with his accomplice; that the accomplice assured the service station owners they could not lose on the boards but would make a profit; that John Doe represented he would return in a short time after he left the boards; that they would show a profit; and that he would then be reimbursed in the sum of \$4.50 each for the cost of the boards.

Defendant relied on an alibi, claiming that at the time of the events in San Diego he was at Hot Springs, Arkansas. He denied playing the punch boards here in question or making the admissions to the officer, and produced a witness who testified that defendant stayed with him during that period at a hotel in that place while defendant was taking a course of baths. On cross-examination the witness acknowledged that defendant was not registered at the hotel.

[1] Defendant's son testified that he drove defendant to Hot Springs around January 1, 1954, and returned for him after January 15th. There is evidence that at about this time and prior thereto defendant owned a light-colored Mercury car. The evidence is sufficient to support the finding of the jury that a theft was committed and that a conspiracy did exist between defendant and John Doe to commit the crime in violation of section 182, subdivision 1 of the Penal Code. *People v. Sica*, 112 Cal.App.2d 574, 581, 247 P.2d 72; *People v. Adams*, 137 Cal.App.2d 660, 669, 290 P.2d 944; *People v. Henry*, 86 Cal.App.2d 785, 195 P.2d 478; *People v. Edwards*, 72 Cal.App. 102, 113, 236 P. 944; *People v. Daener*, 96 Cal.App.2d 827, 216 P.2d 511. Contrary to defendant's claim, the evidence is sufficient to connect the defendant with the commission of the crime. *People v. Porter*, 105 Cal.App.2d 324, 329, 233 P.2d 102; *People v. Daener*, supra.

[2] A more serious question arises as to the claim of prejudicial misconduct on the part of the prosecuting attorney. It principally involves testimony illicitly from defendant by way of cross-examination and in the prosecutor's argument to the jury. As part of the cross-examination defendant admitted he did not register at Hot Springs, Arkansas, but stated he just moved in with a Mr. Sells; that prior thereto he had had Oklahoma, Idaho and Nevada license plates on his Mercury car due to his traveling in the different states in his line of business. He was then asked if he had not played these or similar punch boards before

and he said that he had. Apparently, while the prosecutor was examining some document before him, defendant was then asked if he had not won \$140 from a certain man in Arizona. Defendant answered "No". He was then asked if he did not win \$160 from a certain named person at a gas station in Mahoning, Pennsylvania, and he answered "No" but did say he was in that city with one H. W. Duke, and did win a television set on a punch board owned by the Chief of Police. He was then asked about other cities and places and counsel for defendant objected to this line of questioning. The objection was overruled and the prosecutor continued to ask about other places and about defendant being lucky at punch boards in these several places. Defendant admitted being at some of them at certain times but denied any punch board activities. As to one place he volunteered the information that he was arrested there, but stated it did not involve a punch board; that in these places where punch boards were all about town he played them but lost more money than he won. Defendant's counsel claims that this extended cross-examination as to whether defendant had been lucky on punch boards in the several states was outside the scope of the direct examination, and that cross-examination is permitted only upon matters about which he was examined in chief, citing section 1323 Penal Code, and such authorities as *People v. Zerillo*, 36 Cal.2d 222, 223 P.2d 223; and *People v. Arrighini*, 122 Cal. 121, 126, 54 P. 591. No evidence was presented by the prosecutor to disprove defendant's statements in reference to his whereabouts on these particular occasions or that he was engaged in any wrongful acts pertaining to punch boards. Defendant was charged with a conspiracy which the prosecutor believed was being practiced over many states, and he was endeavoring to show this by the cross-examination of the defendant. It is the rule that under such a charge some greater degree of latitude is allowed in cross-examination of the defendant, particularly when it relates to defendant's memory as to his whereabouts on a par-

ticular occasion or as to the intent and pattern or general plan involved in the claimed conspiracy, or for possible grounds of impeachment. *People v. Theodore*, 121 Cal.App.2d 17, 24, 262 P.2d 630; *People v. Henry*, 86 Cal.App.2d 785, 786, 195 P.2d 478; *People v. Tarantino*, 45 Cal.2d 590, 599, 290 P.2d 505; *People v. Kerns*, 134 Cal.App.2d 110, 285 P.2d 81; *People v. Hoyt*, 20 Cal.2d 306, 318, 125 P.2d 29.

The vice of the prosecutor's conduct was the use of the testimony adduced on this cross-examination by inferring to the jury in his argument, in effect, that he had not been able to prove other similar offenses, but was personally assuring the jury that the defendant was guilty of such other offenses. He said:

"Counsel (for defendant) says, 'Well, there is a little something in here about a punch board winning back in, I believe it is, Mahoning City' * * * He says 'You could have stopped in one of the gas stations and won.'" (Continuing, by the prosecutor): "If you stopped into the gas station and won would I know about it? Would it be a matter of record some place, if it was a legitimate, above-the-board deal, if it was all legal okay, why would I know about it?"

Serious objection was made to the statement but overruled. The prosecutor then proceeded:

"You (the jurors) answer that question for yourselves. If you have won, and I imagine during the course of your life maybe you picked up something, maybe on a punch board, maybe some other way, but would I know about it if it was open and above board?"

This was in reply to the argument of counsel for defendant who said there was nothing wrong about defendant being in these particular towns when he was engaged in the carnival business; that defendant frankly admitted he had been in various states, had been arrested in one place mentioned, and it was easy for the prosecutor to stand up there with a sheaf of papers

and ask him if he wasn't in a certain town at a certain time when there was nothing illegal about it.

[3, 4] While it is a general rule, as held in *People v. Perkin*, 87 Cal.App.2d 365, 368, 197 P.2d 39, and *People v. Smith*, 100 Cal.App. 344, 349, 279 P. 1022, that a defendant is not in a position to complain of prejudicial error where the remarks in question are elicited by the challenge of defendant's counsel, and where the trial court ordered the jury to disregard the remarks. In the instant case the court did not so admonish the jury and there was no request to do so, but objection was made to that line of argument. It is misconduct for a prosecutor to state or infer the existence of facts concerning which no evidence has been introduced. *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1; *People v. Pantages*, 212 Cal. 237, 297 P. 890; *People v. Devine*, 95 Cal. 227, 30 P. 378.

We are again confronted with a similar example of misconduct on the part of the prosecutor in reference to the testimony of the defendant's witness Sells, who testified that defendant was at the hotel with him on the dates indicated. On cross-examination by the prosecutor the witness was asked if it was not true that the only Henderson registered at the Hot Springs Hotel between January 1 and January 21, 1954, was W. D. Henderson from January 4th to January 8th. The witness answered that he did not know W. D. Henderson. Then he was asked: "Now, if a police officer just called Hot Springs, Arkansas, and got that information—". The court properly ordered the question and inference that might be drawn from it stricken. It would be difficult to erase the inference from the minds of the jurors, especially in view of the showing by an uncontradicted affidavit of defendant on a motion for new trial that during the argument of defendant's counsel a police sergeant who had been seated by the prosecutor went to the telephone located at the clerk's desk in the courtroom and carried on a conversation with someone; that the jurors were watching him; that

thereafter he returned to the prosecutor's table and whispered in the prosecutor's ear; that they then turned and nodded in the direction of the witness Sells; that the officer then left the courtroom and returned with a yellow sheet of paper and handed it to the prosecutor and they both looked over toward Sells; that later Sells got up and walked out of the courtroom and both the officer and bailiff followed him; that the bailiff later returned and the other officer and Sells never returned to the courtroom before the case was submitted to the jury.

Previously, in the argument of counsel for the defendant to the jury he remarked about the credibility of Sells' testimony and said: "* * * if that were not the truth, you can bet your bottom dollar that Mr. O'Laughlin would have been on the phone and if he had determined that were not the truth he would have asked for a continuance to get a witness out here to discredit Mr. Sells."

In the final argument of the prosecutor he said: "Don't let perjured testimony walk this man out * * * maybe because of the time element I couldn't prove perjury in this case, but don't let that scare you, I am not going to prove it in another case. That man perjured himself and I am prepared to prove it at a later date, but because of the time element and the fact that I couldn't get subpoenas and get people back here I can't disprove that, but make no mistake about it, it is going to be proved later on in front of another jury. That is perjury and don't let perjury defeat criminal justice."

Then follows a closing statement by the prosecution:

"What good does it do for the police officers, * * * to spend their time and effort in ridding this county of these rascals and its rats if they come in here and a jury, because of the unreal dream of an innocent man * * you rid this county of this rascal and his rackets." On a motion to correct the

transcript, upon a conflicting showing, the word "rats" was changed to "rackets".

There were several other acts of claimed misconduct set forth in the brief such as permitting defendant to be cross-examined on the contents of a postal card purportedly sent out by defendant's counsel to Oklahoma, offering a reward for the apprehension of defendant because of forfeiture of the bail bond on which the attorney was a bondsman. The court rejected the offer of the card in evidence but its contents were otherwise fairly well disclosed by the cross-examination.

[5] Assuming the truth of the affidavit, it is quite apparent that the main argument might well have led the jurors to believe that the prosecutor had just obtained information from the police department in Arkansas pertaining to the incredibility of Sells' testimony and was accordingly going to prosecute him for perjury before another jury. Although the commission of the offense and the evidence of defendant's presence at the scene of the crime was otherwise sufficiently established, we are convinced that defendant did not have a fair trial as is contemplated by law, and the savings clause of Section 4½ of Article VI of the Constitution is not applicable. Some of the instances, standing alone, probably would not be sufficient to justify interfering with the verdict. However, we believe, as to several of the incidents, such is not the case. The cumulative effect of these errors requires a reversal of the judgment. *People v. Kirkes*, 39 Cal.2d 719, 726, 249 P.2d 1. Counsel have no right to avail themselves of the opportunity of addressing themselves to the jury to make assertions upon their own knowledge which, if admissible at all, could be so only under the sanction of a witness' oath. That solemn statements of fact, not by way of argument and deduction from the evidence, but as of counsel's own knowledge, are likely to have weight with juries, cannot be doubted. The respectability and standing of counsel only serve to enhance

the peril. *People v. Pantages*, 212 Cal. 237, 247, 297 P. 890.

[6] The giving of a modified instruction to the effect that if the jury believed defendant guilty of the commission of any of three kinds of theft mentioned in the Penal Code, it would not be necessary to state, in the verdict, which of the three forms of theft was committed, provided " * * * it also finds, beyond a reasonable doubt, that defendant was guilty of conspiracy to commit the crime of theft", was proper.

Judgment and order denying a new trial reversed and a new trial ordered.

MUSSELL, J., and BURCH, J. pro tem., concur.



144 Cal.App.2d 626

Sara MERCURIO and Joseph F. Mercurio,
Petitioners and Appellants,
v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and Russell S. Munro,
Respondents.
No. 16986.

District Court of Appeal, First District,
Division 1, California.
Sept. 25, 1956.

Rehearing Denied Oct. 25, 1956.
Hearing Denied Nov. 21, 1956.

Proceeding upon review of decision of State Department of Alcoholic Beverage Control, finding on-sale liquor licensees guilty of violating rule prohibiting licensee from permitting waitresses to accept alcoholic drinks purchased for them by customers. The Superior Court, County of Contra Costa, Homer W. Patterson, J., sustained decision and denied writ of mandate for which petition had been made. Petitioners appealed. The District Court of Appeal, Bray, J., held, in part, that under rule which prohibits on-sale liquor licensee

from permitting waitress to accept alcoholic drinks purchased for her by customer, and statute which makes violating by licensee or permitting violation of any rule of board adopted pursuant to law, grounds for suspension or revocation of license, violation need not have been "knowingly" permitted and use of word "knowingly" in accusation of violation would be immaterial, and finding that licensee had simply permitted violation would be sufficient.

Judgment affirmed.

1. Intoxicating Liquors ⇨108(5)

In proceeding upon review of decision of State Department of Alcoholic Beverage Control, finding on-sale liquor licensees guilty of violating rule prohibiting licensee from permitting waitress to accept alcoholic drink purchased by customer, evidence sustained finding of board that licensees had permitted waitresses to accept drinks from customers. West's Ann.Bus. & Prof.Code, § 24200(a, b); West's Ann.Const. art. 20, § 22.

2. Trial ⇨397(5)

Findings upon immaterial issues are not required.

3. Licenses ⇨38

Fact that rules and laws providing for violations for which disciplinary action may be taken, in some cases declare that violations must be "knowingly" done, and in other cases omit word "knowingly", indicates that in latter cases there is no requirement that the violations be knowing ones. West's Ann.Bus. & Prof.Code, §§ 24200, 25750; West's Ann.Const. art. 20, § 22.

4. Intoxicating Liquors ⇨106(2), 108(4, 9)

Under rule prohibiting on-sale liquor licensee from permitting waitress to accept alcoholic drinks purchased for her by customer, and statute which makes violating by licensee or permitting violation of any rule of board adopted pursuant to law, grounds for suspension or revocation of license, violation need not have been "knowingly" permitted, and use of word "knowingly", in accusation of violation would be

immaterial, and finding that licensee had simply permitted violation would be sufficient. West's Ann.Bus. & Prof.Code, §§ 24200, 25750; West's Ann.Const. art. 20, § 22.

5. Intoxicating Liquors ⇨108(9)

Where Department of Alcoholic Beverage Control expressly found that on-sale liquor licensees had violated rule, prohibiting licensee from permitting waitresses to accept drinks purchased by customers, issued in pursuance of section 22 of article 20 of State Constitution, and of Alcoholic Beverage Control Act, finding was tantamount to finding that conduct of licensees was contrary to public welfare and morals, within that provision of constitution which declares that department has power to deny or revoke license if it determines for good cause that granting or continuance of license would be contrary to public welfare or morals. West's Ann.Bus. & Prof.Code, §§ 24200, 25750; West's Ann.Const. art. 20, § 22.

6. Intoxicating Liquors ⇨116

Fact that rule of Department of Alcoholic Beverage Control prohibiting on-sale liquor licensee from permitting waitresses to accept drinks purchased for them by customers, might be unreasonable as applied to some hypothetical situation, would not be ground for attack upon its constitutionality; licensee would be limited in his attack to application of rule to factual situation before court. West's Ann.Bus. & Prof.Code, §§ 24200, 25750; West's Ann.Const. art. 20, § 22.

7. Intoxicating Liquors ⇨116

Statutes relating to prohibition upon employment of persons to solicit drinks, and providing for revocation of liquor license of licensee who employs any one to solicit or encourage another to buy drinks, do not pre-empt such subject matter nor preclude Department of Alcoholic Beverage Control from adopting, under its broad constitutional and statutory authority, rule prohibiting liquor licensee from permitting waitress to accept drinks purchased by customers.

West's Ann.Bus. & Prof.Code, §§ 24200, 24200.5(b), 25657, 25750; West's Ann.Const. art. 20, § 22.

8. Intoxicating Liquors ⇨116

Under constitutional and statutory authority, State Department of Alcoholic Beverage Control has broad power to determine what shall be contrary to public welfare or morals and to prohibit liquor licensee from doing or permitting on his premises any such acts. West's Ann.Bus. & Prof.Code, §§ 24200, 24200.5(b), 25657, 25750; West's Ann.Const. art. 20, § 22.

9. Intoxicating Liquors ⇨116

Rule of Department of Alcoholic Beverage Control prohibiting on-sale liquor licensee from permitting waitresses to accept alcoholic drinks purchased for them by customers, has reasonable relation to legitimate ends for which department was created, is in harmony with purposes of Alcoholic Beverage Control Act, and is neither arbitrary nor unreasonable in discriminating against female employees, in view of harm that could result from prohibited acts. West's Ann.Bus. & Prof.Code, §§ 23001, 24200, 25655-25657; West's Ann.Const. art. 20, § 22.

10. Intoxicating Liquors ⇨106(2)

Constitutional amendment, which added to existing provision authorizing state liquor board to revoke liquor license if it determines for good cause that granting or continuance of license would be contrary to public welfare or morals, provision "or that a person holding license has violated any law prohibiting conduct involving moral turpitude", does not restrict violation for which license can be revoked, to violation of law, rather than of board rule. West's Ann. Bus. & Prof.Code, § 24200; Const. art. 20, § 22.

11. Intoxicating Liquors ⇨116

Rule of Department of Alcoholic Beverage Control, prohibiting on-sale liquor licensee from permitting waitress to accept alcoholic drinks purchased for her by customer, is constitutional and valid. West's

Ann.Bus. & Prof.Code, §§ 23001, 24200, 25655-25657; West's Ann.Const. art. 20, § 22.

12. Intoxicating Liquors ⇨108(5)

Where, in proceeding before State Department of Alcoholic Beverage Control upon accusation that liquor licensee had violated rule by permitting waitresses to accept alcoholic drinks purchased for them by customers, in all instances in which department officers had allegedly purchased drinks for girls, drinks were poured from either whisky or vodka bottles, it would be presumed that bottles contained what they purported to contain, in view of presumption that licensee had obeyed law and had not refilled bottles with different liquor or sold other than drink ordered. West's Ann.Bus. & Prof.Code, §§ 24200, 25176, 25177; West's Ann.Code Civ.Proc., § 1963, subds. 1, 33.

13. Intoxicating Liquors ⇨108(10)

All legitimate and reasonable inferences must be indulged in support of State Liquor Department's findings, in liquor license revocation proceedings. West's Ann.Bus. & Prof.Code, § 24200.

14. Intoxicating Liquors ⇨108(5)

In view of fact that if bartender were to serve soft drinks when alcoholic beverages were ordered, licensee would have violated penal code provision which prohibits sale of article of drink different from one ordered, without informing purchaser of difference, there would be disputable presumption that drinks served were what were ordered, in liquor license revocation proceedings involving violation of rule prohibiting liquor licensee from permitting waitresses to accept alcoholic drinks purchased for them by customers. West's Ann.Pen.Code, § 382; West's Ann.Bus. & Prof.Code, §§ 24200, 25176, 25177; West's Ann.Code Civ.Proc., § 1963, subds. 1, 33.

15. Intoxicating Liquors ⇨108(5)

In proceeding before State Department of Alcoholic Beverage Control upon accusation that liquor licensee had violated rule by permitting waitresses to accept alcoholic

drinks purchased for them by customers, in view of fact that in all instances in which department officers had purchased drinks for girls, drinks had been poured from either whisky or vodka bottles evidence sustained finding that drinks purchased by state officers for waitresses were alcoholic. West's Ann.Pen.Code, § 382; West's Ann.Bus. & Prof.Code, §§ 24200, 25176, 25177; West's Ann.Code Civ.Proc., § 1963, subds. 1, 33.

16. Intoxicating Liquors ⇨108(5)

Where officer of State Department of Alcoholic Beverage Control testified to seizing drinks, pouring them into bottles, sealing bottles and pasting identifying slips on them, and that he then placed them in storage in Sacramento and later delivered them to State Department of Public Health at Berkeley for analysis, sufficient foundation was laid for introduction of bottles into evidence in proceedings before state department upon accusation that liquor licensee had violated rule by permitting waitresses to accept alcoholic drinks purchased for them by customers. West's Ann.Bus. & Prof.Code, § 24200.

17. Intoxicating Liquors ⇨108(5)

Letter, signed by an assistant Public Health Chemist of the Department of Public Health's Food and Drug Laboratory, giving analysis of alcoholic content of contents of bottles, though hearsay, would be admissible in evidence, to supplement other evidence, in proceedings before State Department of Alcoholic Beverage Control upon accusation that liquor licensee had violated rule by permitting waitresses to accept alcoholic drinks purchased for them by customers. West's Ann.Bus. & Prof.Code, § 24200; West's Ann.Gov.Code, § 11513(c).

18. Trial ⇨395(6)

Method of making findings, whereby court referred to every paragraph of petition for writ of mandate and answer thereto, and found that each paragraph was either true or untrue in its allegations, was not improper.

19. Trial ☞392(1)

Failure of court to find specifically on each item of evidence of case, in nature of review of decision of State Department of Alcoholic Beverage Control in liquor license revocation proceedings, was not error in absence of request for such specific findings, where issue was whether evidence supported findings, to effect that licensees had permitted their waitresses to accept drinks purchased by customers, and court additionally found that findings were not only supported by substantial evidence but by weight of evidence and that evidence constituted good cause for revocation of license. West's Ann.Bus. & Prof.Code, § 24200.

20. Trial ☞397(2)

Where, though findings contained the insufficient catch-all finding to effect that all allegations of answer to petition were true except as far as same were inconsistent with findings, other findings were sufficient to support judgment, error was not material.

George C. Carmody, Pittsburg, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondents.

BRAY, Justice.

Appellants, owners of an on-sale liquor license at "Murphy's Club," Pittsburg, were accused and found guilty by the State Board of Equalization of violating subdivisions (a) and (b) of section 24200, Business and Professions Code, rule 143 of the board, and article XX, section 22, Constitution, in that they permitted female employees to accept alcoholic beverages purchased on the premises.¹

On a review by the superior court of the proceedings before the board the court found that the decision of the Department

of Alcoholic Beverage Control² was supported by the weight of the evidence and denied the writ of mandate petitioned for. The petitioners appeal.

Questions Presented.

1. Do the board findings support the decision? (a) Must a proprietor *knowingly* permit violations? (b) Did the board find that appellants' actions were contrary to public welfare and morals?

2. Is rule 143 unconstitutional?

3. Was there proof that the drinks were alcoholic?

4. Was the analysis of the contents of certain drinks admissible?

5. Are the trial court's findings sufficient?

Facts.

[1] Four board officers testified that each on two separate occasions respectively purchased drinks at appellants' premises for one or more cocktail waitresses admittedly employed there. There were three separate dates involved, and on two of them appellant Joseph Mercurio was on the premises. If the drinks were alcoholic there is ample evidence in spite of Mercurio's testimony that he had instructed the waitresses not to drink while working and had never seen them doing so, to justify the finding that appellants permitted the waitresses to accept alcoholic beverages from the customers.

1. Board Findings. (a) Knowledge.

[2] The accusation charged appellants with *knowingly* permitting the waitresses to accept alcoholic beverages. The findings merely found that appellants permitted such to be done, omitting the word "knowingly." Appellants contend that this omission is fatal and that a liquor license may not be revoked unless the owner knowingly permitted the violation charged. As findings upon immaterial issues are not required,

1. They were also charged with the operation of a stud poker game but the hearing officer found in their favor on this charge and it was dismissed.

2. The Board of Equalization after its decision was succeeded by the Department of Alcoholic Beverage Control. For convenience we will refer to the "board's" action.

Renfer v. Skaggs, 96 Cal.App.2d 380, 383, 215 P.2d 487, it becomes necessary to determine whether "knowingly" is a necessary element of "permitting" in this case.

Section 25750, Business and Professions Code, authorized the board to "make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the Constitution * * *." Pursuant to that authority the board adopted rule 143.³ Section 24200, Business and Professions Code, makes violating by a licensee or permitting the violation of any rule of the board adopted pursuant to section 25750 and other provisions of law, grounds for suspension or revocation of a license.

In neither rule 143 nor section 24200 is there any requirement that the "permitting" be "knowingly" done. In *Swegle v. State Board of Equalization*, 125 Cal.App.2d 432, 270 P.2d 518, in upholding the revocation of a liquor license on a charge that the owner permitted the premises to be used as a disorderly house, the court held that the permission did not have to be a "knowing" one. The case dealt with section 58 of the then Alcoholic Beverage Control Act, and the court stated that the word "permits" therein included "an unknowing consent" and that a licensee can be held to have permitted acts constituting a violation by a showing that the acts themselves took place. In our case, one of the licensees was present when most of the acts took place. The language of the *Swegle* case is particularly appropriate here, 125 Cal.App.2d at page 438, 270 P.2d at page 522: "Appellant's agents were always present in the bar. It was said in *Mantzoros v. State Board of Equalization*, 87 Cal.App.2d 140, 144, 196 P.2d 657, 660, that 'The licensee, if he elects to operate his business through employees must be responsible to the licensing author-

ity for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature. Even in the case of criminal statutes vicarious liability for the acts of employees is not unknown.' Therefore, whatever is permitted by appellant's agents must be attributed to her."

[3, 4] *Keane v. Reilly*, 130 Cal.App.2d 407, 279 P.2d 152, cited by appellants, is not opposed to this rule. There this court held that the alleged violation by the bartender had not been proved. The question of knowledge by the licensee was not involved. Nor is *Tatsuko Okuda Endo v. State Board of Equalization*, 143 Cal.App.2d 395, 300 P.2d 366, in point. There the court was dealing with section 24200.5 (a), Business and Professions Code, which expressly requires that the licensees "permitting" the illegal sale of narcotics must be "knowingly" done. The very fact that rules and laws providing for violations for which disciplinary action may be taken, provide that some violations must be "knowingly" done and as to others the word "knowingly" is omitted, indicates that in the latter cases there is no requirement that the violations be knowing ones. "Knowingly" not being required in either Rule 143 or section 24200, the use of that word in the accusation was immaterial and is not necessary to be found. The board's finding that appellants permitted the violation was sufficient.

(b) Contrary to Public Welfare and Morals.

[5] The board made no finding in so many words that appellants' acts or the vio-

3. "No on-sale retail licensee shall permit any female employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any alcoholic beverage, any part of which is for, or intended for, the consumption or use of such female employee, or to permit any

female employee of such licensee to accept, in or upon the licensed premises, any alcoholic beverage which has been purchased or sold there, any part of which beverage is for, or intended for, the consumption or use of any female employee."

lations were contrary to public welfare and morals.⁴ The board found that appellants "violated Rule 143 issued in pursuance of Section 22 of Article XX of the Constitution of California and of the Alcoholic Beverage Control Act."⁵ This, in effect, is a finding that the acts of appellants were contrary to public welfare and morals because by specifically adopting rule 143, the board was articulating the acts specified therein as being ones which the board felt were contrary to public welfare and morals. The rule was adopted to enable the board to exercise the powers conferred upon it by the Constitution. Moreover, it requires no argument to prove that permitting women employees of an on-sale liquor premises to accept alcoholic drinks purchased by patrons is contrary to the public welfare and morals.

2. Constitutionality of Rule 143.

[6] Appellants attack its constitutionality on the ground that the rule is too broad, covering, as they claim, a situation where, the premises being closed, a waitress accepts a drink from the licensee, or the waitresses at such time buy each other drinks. They contend that in considering the reasonableness of a statute, the manner in which it *might be* construed is to be considered, not merely the way it *is* construed. (Apparently appellants are contending that if one can conjure up some hypothetical situation as to which the rule might be unreasonable, the rule must be held unconstitutional in every case of facts actually before the court. They cite no authority to this effect.) That is not the rule. As said in *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 468, 55 P.2d 177, 187: "Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course,

that a statute may be invalid as applied to one set of facts, yet valid as applied to another. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239. The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court." We fail to see, and counsel has not pointed out, any respect in which rule 143 as applied to the facts of this case is either unreasonable or arbitrary. On the contrary, on the face of it, it is a very reasonable and necessary rule if taverns and the like are to be decently conducted.

[7,8] Appellants further contend that because the Legislature enacted sections 25657 and 24200.5(b), Business and Professions Code, it covered the field and that the board, even under the powers granted by section 22 of article XX, Constitution, and by section 25750, Business and Professions Code, could not prohibit actions of the licensee not prohibited by those sections. Section 25657 prohibits the employment or paying of hostesses or entertainers to procure or encourage the purchase of alcoholic beverages on the licensed premises or to employ or permit anyone to loiter in or about the premises to beg or solicit anyone to purchase any alcoholic beverage for the solicitor. The section was probably adopted to meet the B-girl situation. Section 24200.5(b), Business and Professions Code, provides for revocation if licensee has employed anyone to solicit or encourage others to buy drinks. We find nothing in the law limiting the board's powers of termination of a license to the precise statutory grounds. It is clear from an examination of the Constitution and of section 25750 that the board has the broad power to determine what shall

4. Article XX, section 22, of the Constitution provided that the board "shall have the power * * * to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

5. Appellants contend that the board actually found that they did not violate the Constitution section. However, a reading of the findings clearly shows that such finding dealt only with the charge of operating a stud poker game.

be "contrary to public welfare or morals" and to prohibit a licensee from doing or permitting on his premises any such acts.

[9] The rule has a reasonable relation to the legitimate ends for which the board was created; i. e., to have "exclusive power" to deny or revoke liquor licenses. It is in harmony with the purposes of the Alcoholic Beverage Control Act as declared by Business and Professions Code section 23001, "for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of * * * unlawful * * * selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages." As to the question of arbitrariness of the rule insofar as it discriminates against female employees, the following statement in *People v. Jemnez*, 1942, 49 Cal.App.2d Supp. 739, 743, 121 P.2d 543, 544, is persuasive: "The argument that the section forbidding women employees to mix drinks abridges the privileges and immunities of citizens and denies equal protection of the laws to those whose employment is prohibited, overlooks two fundamental propositions: (1) that the business here involved is one of privilege and not of right; and (2) that the classification of women with respect to mixing drinks is reasonable. When these two propositions are established * * * the force of the argument vanishes."

The classification in rule 143 is reasonable in view of the harms that can result from the acts prohibited therein. In California females have been discriminated against in other situations relating to liquor: *Ex parte Hayes*, 1893, 98 Cal. 555, 33 P. 337, 20 L.R.A. 701 prohibited sale of liquor in dance halls and theatres where women are to be present; *Foster v. Board of Police Commissioners*, 102 Cal. 483, 37 P. 763, prohibited saloon license if females are employed; *People v. King*, 115 Cal.App.2d Supp. 875, 252 P.2d 78, municipal ordinance prohibited female employee in an on-sale liquor establishment from drinking, dancing

or mingling with patrons. See also Alcoholic Beverage Control Act §§ 25655, 25656, 25657.

[10] In 1954 article XX, section 22, was amended by adding to *the then provision* authorizing the board to revoke a license "if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals," the following: "or that a person * * holding a license has violated any law prohibiting conduct involving moral turpitude." This amendment, argue appellants, indicates that the only violation for which a license could be revoked contemplated by the Constitution, is a violation of a law and not of a board rule. We fail to see the logic in this contention. It is obvious that, as amended, the Constitution provides for revocation if the continuance of the license would be contrary to public welfare or morals, which includes violations of board rules as well as laws dealing with liquor establishments, and for violations of any laws prohibiting conduct involving moral turpitude. The latter would include laws not expressly dealing with liquor establishments. That the board is not restricted as contended, see *Moore v. State Board of Equalization*, 76 Cal.App.2d 758, 765, 174 P.2d 323.

[11] Rule 143 is constitutional and valid.
3. Alcoholic Drinks.

Appellants contend that the evidence fails to show that the drinks consumed by the waitresses were alcoholic. While none of the officers tasted the drinks consumed by the girls, in each case an alcoholic drink (whiskey or vodka) was ordered either by the girl herself or by the officer, and a fifty cent charge was made for each drink. In some instances the girl's drink was poured out of the same bottle as the officer's drink. In other instances, the officer noted that the bottle from which the girl's drink was poured had on it a whiskey brand label, or that the drinks were poured from what appeared to be whiskey or vodka bottles. In some instances the officer testified that the girl got an alcoholic drink, for example, "She

got a whiskey highball." In other instances, the testimony was that the drink was poured from a bottle having a federal strip stamp on it and appeared to be whiskey or vodka (whichever was ordered). In one instance the officer checked all the bottles "in the well" from one of which the girl's drink was poured and found that they all contained alcohol.

[12-15] Of course, in the instances where the officer's and the girl's drinks were poured out of the same bottle, and the officer testified that the liquor was whiskey, no question could possibly arise that a finding that the girl's drink was whiskey is not supported. In all instances the drinks were poured from either whiskey or vodka bottles. This raises a presumption that the bottles contained what they purported to contain. Sections 25176 and 25177, Business and Professions Code, prohibit refilling a distilled spirits bottle or selling such spirits from a refilled bottle. There is a presumption that the law has been obeyed, Code Civ.Proc. § 1963, subd. 33, and that the person is innocent of crime or wrong. Code Civ.Proc. § 1963, subd. 1. "In a liquor case, the presumption that liquor is served when requested is not overcome by the presumption of innocence." *Griswold v. Department of Alcoholic Beverage Control*, 141 Cal.App.2d 807, 297 P.2d 762, 764.⁶ If the bartender were to serve soft drinks when alcoholic beverages were called for, then there would be a violation of section 382, Penal Code, which prohibits the sale of any article of drink, different from the one called for, without informing the purchaser of the difference. Thus, there is a disputable presumption that the drinks served were what were ordered. See *Griswold v. Department of Alcoholic Beverage Control*, supra, 141 Cal.App.2d 807, 297 P.2d 762. It is interesting to note that there is no denial in the evidence that the drinks served the girls were alcoholic. Moreover,

6. All legitimate and reasonable inferences must be indulged in support of the board's findings. *Marcucci v. Board of Equaliza-*
301 P.2d—31

appellant Joseph Mercurio testified that when he found out through this accusation that these girls had been drinking on the job, he fired them. He apparently fired the bartender for the same reason. The evidence amply supports the finding on this subject.

4. Analysis of Drinks.

[16] Bottles containing three of the drinks sold waitresses were admitted in evidence over appellants' objections that the foundation was not laid. Officer Cowan testified to seizing the drinks, pouring them into bottles, sealing the bottles and pasting identifying slips on them. He then placed them in storage in Sacramento and later delivered them to the State Department of Public Health at Berkeley for analysis. The foundation was sufficiently laid.

[17] Among the exhibits is the board's exhibit 4, which is a letter signed by an assistant Public Health Chemist of the Department of Public Health's Food and Drug Laboratory, and giving the analysis as to alcoholic content of the contents of the bottles above mentioned. We fail to find in the reporter's transcript any reference to this letter being offered or received in evidence. Apparently it was considered by the hearing officer, as it bears an exhibit number. Although hearsay it could have been admitted in evidence under the rule set forth in Government Code section 11513(c): "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The letter could have been used to supplement the other evidence in the case. Disregarding it entirely, there is still ample evidence to support the board's findings.

5. Trial Court's Findings.

[18] The court referred to every paragraph of the petition for writ of mandate

tion, 138 Cal.App.2d 605, 608, 292 P.2d 264.

and the answer thereto, and found that each paragraph was either true or untrue in its allegations. Appellants challenge this method. They cite, however, no authority holding that this method is improper. "Usually the court adopted separate findings with respect to designated paragraphs of each particular count of the amended complaint declaring that all of the allegations therein contained 'are true'. In a similar manner the court also referred to designated paragraphs of the answer, finding that the statements therein contained which are in conflict with the allegations of the complaint 'are untrue'. This form of adopting general findings has been held to be sufficient. [Citations.]" *Vaughan v. Roberts*, 45 Cal. App.2d 246, 258, 113 P.2d 884, 892; see also *Kennedy & Shaw Lumber Co. v. S. S. Const. Co.*, 123 Cal. 584, 56 P. 457, and *Biurun v. Elizalde*, 75 Cal.App. 44, 55, 242 P. 109.

[19, 20] They further contend that the court should have found specifically on each item of evidence in the case. For example, was the drink bought for girl "A" by officer "B" on July 22nd alcoholic? No request for such detailed findings was made. The pleadings did not raise an issue as to each of the eight instances in which an officer testified that he purchased a waitress a drink. The issue was as to whether the evidence supported the findings to the effect that appellants permitted their waitresses to accept alcoholic beverages purchased on the premises. The court in addition to finding that each allegation of the petition and the answer thereto was either true or untrue, specifically found that the findings of the board were not only supported by substantial evidence but by the weight of the evidence, and that the evidence constituted good cause for revocation of the license.⁷ We know of no requirement that in the absence of a request for a finding on a specific

bit of evidence, the court is required to make any further findings than those made here.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



CONTRACTORS SAFETY ASSOCIATION,
a California corporation, Plaintiff
and Appellant,

v.

CALIFORNIA COMPENSATION INSURANCE COMPANY, a corporation,
Defendant and Respondent.*

Civ. 21487.

District Court of Appeal, Second District,
Division 3, California.

Sept. 20, 1956.

Hearing Granted Nov. 14, 1956.

Association of insureds brought action against insurer to recover dividends under policies of workmen's compensation, on ground that insurer had agreed to payment of dividends from surplus premiums. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment adverse to the association, and the association appealed. The District Court of Appeal, Shinn, P. J., held that first cause of action of complaint alleging that insurer offered in its advertising and literature to pay dividends to insureds according to certain schedule calculated on ratio of losses to premiums, and that such offer was accepted by the insureds, not only in writing, but by insuring with insurer in reliance on such offer, and that before insurer

was held in *Krug v. F. A. Lux Brewing Co.*, 129 Cal. 322, 61 P. 1125, to be insufficient. Eliminating it entirely, the other findings are sufficient to support the judgment.

* Opinion vacated 307 P.2d 626.

7. Additionally, the findings contain a catch-all to the effect that all the allegations of the answer to the petition are true except as far as the same are inconsistent with the findings. This type of finding

ance was taken out insurer informed association by letter that insurer's board of directors had authorized an increase of five percent of schedule dividends, alleged a cause of action.

Judgment reversed.

1. Pleading ⇨428(4)

An oral motion to exclude evidence is tantamount to a general demurrer.

2. Appeal and Error ⇨863

Where defendant interposed an oral motion to exclude evidence, which was tantamount to a general demurrer, and the motion was sustained by the superior court, the review by the District Court of Appeal on appeal by plaintiff was limited to sole question whether, under facts pleaded, the complaint stated the substance of a cause of action on any theory.

3. Pleading ⇨34(1)

A complaint should be given a liberal construction. West's Ann.Code Civ.Proc., § 452.

4. Workmen's Compensation ⇨1063

In action against insurer by association of insureds to recover dividends under policies of workmen's compensation insurance, first cause of action of complaint alleging that insurer offered in its advertising and literature to pay dividends to insureds according to certain schedule calculated on ratio of losses to premiums, and that such offer was accepted by the insureds, not only in writing, but by insuring with insurer in reliance on such offer, and that before insurance was taken out insurer informed association by letter that insurer's board of directors had authorized an increase of five per cent of scheduled dividends, alleged a cause of action. West's Ann.Code Civ.Proc., § 452; West's Ann.Civ.Code, § 1649; West's Ann.Insurance Code, §§ 751, 11738.

5. Insurance ⇨59

If interpretation by association of insureds of advertising and literature of insurer as agreeing to pay dividends to insureds was a reasonable interpretation, it

should prevail over an intention on part of insurer, not expressed in the writings, that insurer might or might not pay dividends in accordance with schedule.

6. Contracts ⇨155

If there is uncertainty in the language of a contract, it should be interpreted most strongly against one who caused uncertainty to exist. West's Ann.Civ.Code, § 1653.

7. Workmen's Compensation ⇨1063

Alleged contract by insurer to pay dividends to insureds securing workmen's compensation insurance from insurer was not invalid, since the law permits refunds to holders of workmen's compensation policies in the nature of dividends. West's Ann. Insurance Code, § 11738.

8. Evidence ⇨441(1)

General rule that all negotiations, by way of proposals and arrangements made or entered into in contemplation of a written agreement relating to the subject of the negotiations, are deemed to be merged in the agreement, may be applicable to contracts of insurance, but it has no application to engagements entered into with respect to a subject matter which is not expected to be and is not within scope of written agreement subsequently executed.

9. Evidence ⇨442(1)

Rule that when parties have not incorporated into an instrument all of the terms of their contracts, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, is applicable to insurance policies.

10. Evidence ⇨442(1)

Where insurer by advertising and literature allegedly represented to prospective insureds that insurer would pay dividends on workmen's compensation insurance, but no such agreement was incorporated in policies of workmen's compensation thereafter issued, rule that when parties have not incorporated into an instrument all of the terms of their contract, evidence is admis-

sible to prove existence of a separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, was applicable.

11. Pleading ⚡246(2)

In action by association of insureds against insurer to recover dividends under workmen's compensation policies, wherein insurer objected that it did not appear that association had capacity to sue on behalf of the insureds, association should have been permitted to amend complaint to allege that policies of insureds were to be combined for purposes of dividend computation, and that it was agreed that any dividend should be paid by insurer in one check issued to the association.

12. Dismissal and Nonsuit ⚡56

The proper procedure where all necessary parties have not been joined is to bring in all necessary parties and not to dismiss the action because they are not present. West's Ann.Code Civ.Proc., § 389.

13. Parties ⚡80(1), 84(1)

Mere uncertainty whether new parties should be brought in did not warrant a summary disposition of the cause without trial on the merits. West's Ann.Code Civ.Proc., § 389.

14. Fraud ⚡42

In action by association of insureds against insurer to recover punitive damages because of alleged fraud on part of insurer in failing to pay dividends under policies of workmen's compensation insurance as allegedly promised, complaint, which did not allege that promise was made by insurer without intention to perform it, failed to state facts sufficient to constitute a cause of action for fraud.

15. Workmen's Compensation ⚡1063

In action by association of insureds against insurer to recover dividends under policies of workmen's compensation, on ground that insurer agreed to pay dividends out of surplus accumulated from premiums on policies of workmen's compensation, complaint alleging that insurer was engaged in business of issuing contracts of

workmen's compensation and employer's liability insurance and that insurer had an earned surplus in excess of \$850,000, out of which dividends due insureds could lawfully be paid, was not insufficient on ground that complaint did not allege that surplus of \$850,000 came from premiums on workmen's compensation policy. West's Ann.Insurance Code, § 11738.

Simon Miller, Harry E. Ehrlich and Blau, Shaw & Miller, Beverly Hills, for appellant.

Betts, Ely & Loomis, Los Angeles, for respondent.

SHINN, Presiding Justice.

[1,2] The present action came on for trial on plaintiff's complaint, copiously amended, to be referred to as the complaint. Defendant interposed an oral "demurrer to the introduction of any evidence," which was sustained by the court. Leave to amend further was denied, and plaintiff appeals from the ensuing judgment. Inasmuch as an oral motion to exclude evidence is tantamount to a general demurrer, our review of the judgment is limited to the sole question whether, under the facts pleaded, the complaint states the substance of a cause of action on any theory. *Bice v. Stevens*, 136 Cal.App.2d 368, 289 P.2d 95; *Miller v. McLaglen*, 82 Cal.App.2d 219, 186 P.2d 48 and cases therein collected.

The complaint is in three counts, and in view of the rather evasive manner of pleading adopted by plaintiff, it will be necessary to set forth the allegations at some length.

Count I is as follows: Defendant is engaged in the business of issuing contracts of workmen's compensation and employer's liability insurance. Plaintiff is a non-profit corporation and (we infer) an association of employers. During 1950, defendant "offered to the public generally by means of form letters and other written advertising material, that any group insureds securing their workmen's compensation insurance through defendant would receive dividends

in the event that the combined loss experience under all policies issued to members of any group for the insured period should be less than 65% of the total premiums paid by the group as a whole for that period, provided that defendant had an earned surplus sufficient to pay such dividends." (A schedule of dividends showing the percentage of paid premiums refundable as dividends for groups of insureds whose total combined premiums were in excess of \$25,000 per year is next pleaded in full.) It is alleged that defendant "offered and advertised" dividends as stated in the schedule. Plaintiff received defendant's "form letters and advertising material" and relied thereon in its subsequent dealings with defendant. On August 25, 1950, defendant wrote plaintiff to the effect that defendant's board of directors had authorized an increase of 5 per cent in its schedule of dividends payable to any groups of workmen's compensation insureds whose percentage loss ratio for the insured period was under 50%. As "the group of insureds constituting the plaintiff association" had been insured for workmen's compensation by defendant since October 1, 1948, defendant knew that its letter of August 25, 1950 would be interpreted by plaintiff as an offer to provide such insurance with dividend benefits of 5% in addition to those listed in the above-mentioned schedule, and the letter was so interpreted by plaintiff.

During late August 1950, "plaintiff, both orally and in writing, informed defendant that plaintiff accepted defendant's offer to insure plaintiff against workmen's compensation liability on the terms stated above; * * * on or about October 11, 1950, defendant issued its standard workmen's compensation and employer's liability policy of insurance to plaintiff covering the period of October 1, 1950 to October 1, 1951, and issued individual policies to the members of plaintiff association indicating by endorsement on each of said policies that they were issued as a part of a group plan of insurance." The premium paid to defendant "by the insureds" for the year begin-

ning October 1, 1950 totaled \$387,003. Between October 1, 1950 and about August 1, 1952, when plaintiff's dividend was computed, the actual losses paid by defendant on account of workmen's compensation insurance "for plaintiff's members" for the year beginning October 1, 1950 came to about \$75,000. Prior to the computation of plaintiff's dividend, defendant established a reserve of about \$111,000 to provide for unsettled claims with respect to workmen's compensation insurance for the year beginning October 1, 1950. According to the above-mentioned schedule of dividends, the amount of paid premiums which should have been refunded to plaintiff was \$77,400, or 20% of such premiums. Defendant arbitrarily and without plaintiff's consent reduced its dividend to one-fourth of the scheduled rate, and tendered plaintiff three checks totaling \$13,959, in full settlement of dividend rights for the year beginning October 1, 1950. The parties later agreed that plaintiff might cash those checks without prejudice to plaintiff's claim for additional dividends for the year in question. There follows an allegation that at all times from October 1, 1950 to date, defendant had an earned surplus of over \$850,000 from which dividends due plaintiff could lawfully be paid.

Count II is a common count for money had and received, alleging that within two years last past defendant became indebted to plaintiff in the amount of \$77,400, of which only \$13,959 had been paid, leaving a balance due of \$63,441.

Count III repeats the allegations contained in Count I. It alleges that defendant made oral and written representations to plaintiff prior to October 1, 1950, to the effect that defendant would pay dividends to plaintiff according to the above-mentioned schedule and that defendant's board of directors had authorized the 5 per cent increase in its dividend schedule. There follow allegations that those representations were made to plaintiff with the intention that plaintiff rely on them and be induced thereby to take out workmen's compensa-

tion insurance with defendant, that plaintiff believed the representations to be true, relied on them and was, in fact, induced thereby to accept defendant's offer to insure plaintiff. Plaintiff also alleges that before defendant's representations were made to plaintiff, defendant's board of directors adopted a resolution providing that no dividend under participating workmen's compensation insurance policies (such as plaintiff's policy) would be due, owing or payable unless and until the board of directors specifically authorized the payment of dividends on policies issued in a particular month of a particular year. This resolution was allegedly adopted in order to give defendant technical grounds on which to justify "arbitrary and discriminatory dividend action"; plaintiff had no knowledge of it; its existence was fraudulently concealed from plaintiff because defendant knew plaintiff would not have purchased insurance from defendant had plaintiff known of the resolution. There follow allegations that because plaintiff discontinued doing business with defendant on August 1, 1951 and placed its insurance with one of defendant's competitors, defendant has used every pretext possible to deprive plaintiff of its dividend. Plaintiff also alleges intentional discrimination against it in that other employers' groups insured with defendant under the same circumstances received dividends computed on a substantially higher basis than the basis on which plaintiff's dividend was computed. Because of this allegedly malicious and oppressive conduct on the part of defendant, plaintiff seeks \$50,000 punitive damages in addition to the recovery sought under Counts I and II.

[3] The complaint should be given a liberal construction. Code Civ.Proc. § 452; *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867; *County of Los Angeles v. Security First Nat. Bank*, 84 Cal. App.2d 575, 191 P.2d 78; *Ryan v. Jacques*, 103 Cal. 280, 37 P. 186; *Hunter v. Freeman*, 105 Cal.App.2d 129, 133, 233 P.2d 65.

[4] Although the complaint leaves much to be desired as a clear and concise statement of the facts constituting the cause of action and is subject to criticism for uncertainty, we are of the opinion that the first cause of action is sufficient, as against defendant's motion.

It appears from the cases, and, we believe, is commonly known, that it is the practice of insurance companies to issue literature and other advertising, stating the returns and advantages a policyholder may expect to receive. When stated as estimates they presumably are based on past experience, which, indeed, is the foundation upon which the business of insurance is built. The general rule with respect to such representations and statements made by an insurer in the solicitation of business is stated in 44 C.J.S., Insurance, § 299a, p. 1202, as follows: "Representations made in a prospectus, circular, or other papers issued by insurer or its agent are generally construed not to be a part of the contract evidenced by a policy, especially where the prospectus or paper, containing the representations is not referred to, or attached to, the policy, or where, although attached, there is no reference in either the policy or the paper to the other * * *." See also 29 Am.Jur. 195; 13 Appleton on Insurance Law and Practice 281-6, § 7534; *Blos v. Bankers Life Co.*, 133 Cal.App.2d 147, 283 P.2d 744; *Toth v. Metropolitan Life Ins. Co.*, 123 Cal.App. 185, 188, 11 P.2d 94; *American Can Co. v. Agricultural Ins. Co.*, 12 Cal.App. 133, 135, 106 P. 720; *Herman v. Mutual Life Ins. Co. of New York*, 3 Cir., 108 F.2d 678, 127 A.L.R. 1458.

The rule has been applied in many cases. See 29 Am.Jur. 195; 44 C.J.S., Insurance, § 299, p. 1202; *Maddox v. Mutual Life Ins. Co.*, 193 Ky. 38, 234 S.W. 949, 22 A.L.R. 1284; 127 A.L.R. 1464. The question has arisen frequently because the prospective investor must depend upon statements of the company for information concerning the cost of insurance and the returns to be expected, whether they be of sums fixed and certain, or only additional benefits which,

although they may be received by the policyholder, the company does not undertake to pay as a part of the insurance contract or by separate agreement. The question whether a statement of the company amounts to an offer susceptible of acceptance or a mere prediction or estimate can be answered only from the facts of the individual case. A typical case is *Blos v. Bankers Life Co.*, supra, 133 Cal.App.2d 147, 283 P.2d 744, 745, which is relied upon by defendant. *Blos*, one of a group of insureds, was relying upon a bulletin of defendant with respect to the conditions or time when a policy would become effective, which stated "This bulletin is merely a description of benefits provided and is not a contract." *Blos* contended that he became insured when, according to the bulletin, the policy became effective. The policy fixed a later date and this was held to be controlling, although it excluded *Blos* from coverage. Defendant may upon a trial develop facts similar to those in *Blos'* case but they are not to be found in the allegations of the complaint.

Neither party pleaded the terms of the policy. So far as the pleadings disclose, defendant's obligations under its policy were only those which pertained to liability under workmen's compensation laws. It therefore does not appear from the pleadings that the policy purported to state defendant's obligation with respect to dividends, although as we shall presently point out, the company recognized that there was some obligation to pay them. The action purports to be upon a collateral agreement entered into by defendant and plaintiff, as agent for its members. Defendant's offer to pay dividends is alleged to have been an inducement to plaintiff to take out insurance with defendant and it is alleged that plaintiff acted in reliance upon that offer. It is not alleged that the offer was conditional, except that the dividends were to be paid out of surplus and it was sufficiently alleged that a surplus existed which was applicable to the payment of the dividends that might become due. It is not alleged that the offer of defendant was couched in

terms which reserved to defendant the discretion to pay or withhold payment of dividends, nor that it was a mere representation or prediction that dividends might be paid. The offer as alleged in the complaint was to pay dividends according to a certain schedule calculated upon the ratio of losses to premiums and the allegation of the complaint is that it was accepted unconditionally, not only in writing but by insuring with defendant in reliance upon the offer. Moreover, it was alleged that before the insurance was taken out defendant informed plaintiff by letter that defendant's board of directors had authorized an increase of 5 per cent of the scheduled dividends and "that defendant knew * * * that said letter of August 25, 1950, would be interpreted by plaintiff as an offer by defendant to provide workmen's compensation insurance with dividend benefits of 5% in addition to the percentages listed in the schedule set forth in paragraph III herein, provided that plaintiff's percentage loss ratio would be under 60%; that said letter was so interpreted by plaintiff."

It is sufficiently alleged that plaintiff understood that defendant's "form letters and other written advertising material" and its letter last referred to constituted an offer to pay dividends according to the schedule and that defendant had knowledge of plaintiff's understanding and reliance thereon. Findings to this effect would have been within the scope of the complaint.

Defendant merely asserts that it issued only "advertising letters and circulars," which, it says, "cannot be the basis of a claim against an insurance company." Since the letters and circulars were not copied and the complaint pleaded only their legal effect, there is nothing in the record to support this argument. Even if it be assumed that defendant intended its representations to be understood as holding out only a hope of dividends, that intention would not be controlling if plaintiff reasonably interpreted them as a promise. It will be for the trial court to determine whether plaintiff reasonably gave them that interpretation and whether defendant believed

they would be so interpreted. The allegations of the complaint bring into play the rule of section 1649 Civil Code: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." See *Granger v. New Jersey Ins. Co.*, 108 Cal.App. 290, 291 P. 698.

[5] If plaintiff's interpretation was a reasonable one, it should prevail over an intention on the part of defendant, not expressed in the writings, that it might or might not pay dividends in accordance with the schedule. The Restatement, Contracts, Section 71, Comment (a), states the rule as follows: "If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning."

[6] Another rule is that if there is uncertainty in the language of a contract it should be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, § 1653.

These canons of interpretation aid in construing the allegations of the complaint. They will also assist the trial court in determining from the evidence whether defendant's advertising and other efforts to sell its policies would reasonably appear to its prospects as a promise of tangible benefits or only as a mirage.

[7] We know of no reason why a contract, such as the one alleged, if valid, may not be enforced. The contract as alleged is not invalid. The law permits refunds to holders of workmen's compensation policies in the nature of dividends. Ins.Code § 11738;¹ *State Compensation Ins. Fund v. Industrial Acc. Comm.*, 56 Cal.App.2d 443, 132 P.2d 890. If there was any ground of illegality not appearing on the face of the complaint it was a matter of defense. Defendant does not question the validity of promises to pay dividends under participating policies but contends that under section 751² of the Insurance Code such promises are unlawful and void unless provided for in the policy. But section 11738 of the Insurance Code governs with respect to participating workmen's compensation policies and it contains no such provision. And defendant did pay dividends.

[8-10] The general rule that all negotiations by way of proposals and arrangements made or entered into in contemplation of a written agreement relating to the subject of the negotiations are deemed to be merged in the agreement is frequently applied to contracts of insurance (see cases cited above), but it has no application to engagements entered into with respect to subject matter which is not expected to be and is not within the scope of the written agreement that is subsequently executed. "It has long been the rule that when the parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and

1. "Participating policies: Right of insurer to issue: Refunds to be made from surplus. Nothing in this article shall affect the right of any insurer to issue compensation participating policies. A refund by reason of a participating provision in a compensation policy shall not be made to policyholders by any insurer except from surplus accumulated from premiums on workmen's compensation policies issued pursuant to laws of this State governing workmen's compensation insurance."

2. "Consideration not specified in policy or application. An insurer, or an insurance agent, broker, or solicitor, personally or otherwise, shall not offer or pay, directly or indirectly, as an inducement to enter into an insurance contract, any valuable consideration which is not clearly specified, promised or provided for in the policy, or application for the insurance, and any such consideration not appearing in the policy is an unlawful rebate."

which is not inconsistent with its terms. [Citing cases.]” American Ind. Sales Corp. v. Airscope, Inc., 44 Cal.2d 393, 397, 282 P.2d 504, 507. The rule is applicable to insurance policies as well as to other contracts unless such collateral contracts of insurance are prohibited by statute. We are of the opinion that the contract pleaded falls within the rule respecting separate, independent agreements.

It is unfortunate that the trial court did not have before it the written contract of the parties. It may be that one of the grounds for the court’s ruling was the supposition that the policy had to contain the entire agreement of the parties with respect to the payment of dividends and that it was not alleged that it contained any promise to pay them. This is one of the arguments of defendant on the appeal. It is an untenable argument. The complaint was silent as to the terms of the policy, but if it was deemed uncertain in this respect it could have been amended by incorporating the policy. There was no demurrer to the complaint and if it is uncertain because of the omission to plead the policy defendant cannot justify the judgment upon that ground. Uncertainty would not be a good reason for excluding evidence, nor would any defect be a sufficient reason unless it clearly appeared that the complaint could not be amended to cure the defect. We must look to the substance of the cause of action attempted to be stated. We are of the opinion that if plaintiff should succeed in proving the allegations of its complaint it would have established a valid agreement for the payment of dividends in excess of those already paid.

[11-13] Defendant argues that it does not appear that plaintiff has capacity to sue on behalf of its several members who were insured, although they would be the ones entitled to the dividends. The complaint was subject to this objection, but plaintiff sought leave to amend by alleging that defendant executed a rider which was attached to plaintiff’s policy and which read as follows: “It is understood and agreed that the earned premium and loss experience policy [sic]

to which this endorsement is attached shall be combined for the purposes of dividend computation with all policies bearing this endorsement issued to members of the Contractors Safety Association, Inc.; it is further understood and agreed that any dividend occurring [sic] under the policy is to be paid by the California Compensation Insurance Company in one check issued to the Contractors Safety Association, Inc., and the endorsement of the Contractors Safety Association, Inc. upon such check shall be as to each member insured a full and complete relief [sic] of the company’s obligation to such insured for the insured’s share of the dividend.” Defendant objected to the amendment upon the ground that plaintiff had not pleaded the entire policy and should not be allowed to plead only a part of it. The objection was sustained. It was not a good objection. Plaintiff was suing on defendant’s alleged special contract to pay dividends. The proposed writing related only to that agreement and since the writing purported to make plaintiff payee of the dividends it was, so far as alleged in the complaint, collateral to the insurance obligations, whether it was attached to or separate from the policy. The amendment should have been allowed and we must give effect to it as if it had been allowed. It would have obviated the objection of defendant that plaintiff had no authority to sue for the dividends since it would have established a right in plaintiff to collect and receive as the agent of its members, any and all sums that might become payable to them as dividends. As between plaintiff and defendant, plaintiff was a trustee for its members to whom the dividends might become due and as such it would have the right to enforce payment by suit. Moreover the complaint alleged and the answer admitted that defendant did pay to plaintiff, as dividends, the sum of \$13,939.31.—If, notwithstanding its agreement to pay the dividends to plaintiff, defendant was in doubt as to plaintiff’s authority to represent its members in the matter and whether a judgment would be binding upon them, the point could have been raised on demurrer,

or the court could have ordered that they be brought in as parties to the action. Code Civ.Proc. § 389. The proper procedure is to bring in all necessary parties, not to dismiss the action because they are not present. *Toomey v. Toomey*, 13 Cal.2d 317, 89 P.2d 634; *De Olazabal v. Mix*, 24 Cal. App.2d 258, 74 P.2d 787. Moreover, mere uncertainty whether new parties should be brought in, which is the present case, did not warrant a summary disposition of the cause without a trial on the merits. It was error to sustain defendant's motion as to the first cause of action.

We are of the opinion that the second cause of action stated sufficient facts inasmuch as the allegation of the receipt of money by defendant for plaintiff's use and benefit is predicated upon the facts alleged in the first cause of action.

[14] The third cause of action may be disposed of summarily. It does not state sufficient facts to constitute a cause of action for fraud. It alleges the promise to pay dividends but does not allege that the promise was made without intention to perform it. It alleges that defendant's directors adopted a resolution that dividends would only be paid as ordered by the board but it does not allege that in adopting the resolution, or otherwise, defendant had an intention not to pay the dividends that might be earned. Since defendant did pay dividends in a lesser sum than was claimed by plaintiff, the facts alleged do not show deceit or the making of false promises but merely a disagreement as to the amount of dividends that were due.

[15] Defendant argues further that dividends are payable only out of "surplus accumulated from premiums on workmen's compensation policies issued pursuant to laws of this State governing workmen's compensation insurance", section 11738, Insurance Code, and that the complaint did not allege that the alleged surplus of \$850,000 came from that source. It is alleged that defendant is engaged "in the business of issuing contracts of workmen's compensation and employer's liability insurance,

etc." and that defendant had "an earned surplus" in excess of \$850,000 out of which the dividends due plaintiff could lawfully be paid. This was sufficient as against defendant's motion.

The judgment is reversed.

PARKER WOOD and VALLÉE JJ.,
concur.



144 Cal.App.2d 647

**Raymond MARGRAF, Plaintiff and
Respondent,**

v.

**COUNTY OF LOS ANGELES, a Body Politic,
H. L. Byram, as Tax Collector of the
County of Los Angeles, State of California,
Defendants and Appellants.**

Civ. 21615.

**District Court of Appeal, Second District,
Division 2, California.**

Sept. 25, 1956.

Suit for declaratory and injunctive relief by serviceman against county and county tax collector under Soldiers' and Sailors' Civil Relief Act of 1940. The Superior Court of Los Angeles County, Arnold Praeger, J., granted temporary injunction and defendants appealed. The District Court of Appeal, Ashburn, J., held that in view of provision of federal statute that any part of period of military service which occurs after October 6, 1942, shall not be included in computing period of redemption of realty sold or forfeited to enforce any obligation, tax, or assessment, under California statutes affording indefinite right to redeem after deed to state and prior to disposal of property by state, county tax collector could not order sale of property, right of redemption to which was held by serviceman who had acquired such right prior to entry into service in 1942.

Order affirmed.

1. Taxation ⇨615

Matter of resale by state of land deeded to state for nonpayment of taxes is governed by the statute in effect at that time. West's Ann.Rev. & Tax.Code, § 3707.

2. Armed Services ⇨34.11(2)

Effect of provision of Soldiers' and Sailors' Civil Relief Act of 1940 that any part of period of military service, which occurs after October 6, 1942, shall not be included in computing period of redemption of realty sold or forfeited to enforce any obligation, tax, or assessment, is to preclude termination of an existing right of redemption so long as holder is in armed service, and to modify that portion of California statute which provides that sale from state may be made at any time after deed to state, and that such sale, whenever made, effects termination of right of redemption. Soldiers' and Sailors' Civil Relief Act of 1940, § 205 as amended 50 U.S.C.A.Appendix, § 525; West's Ann.Rev. & Tax.Code, §§ 3691, 3694, 3696, 3697, 3707, 3712.

3. Armed Services ⇨34.10

Provision of Soldiers' and Sailors' Civil Relief Act precluding termination of right of redemption when property owner is in armed service also prohibits sale by state of property deeded to state for nonpayment of taxes, where state's sale is specifically designated as event whereby such right is terminated, notwithstanding contention that sale might proceed but that it would not actually terminate redemption period. Soldiers' and Sailors' Civil Relief Act of 1940, § 205 as amended 50 U.S.C.A.Appendix, § 525; West's Ann.Rev. & Tax.Code, §§ 3707, 3710, 3711.

4. Armed Services ⇨34.10

Provision of Soldiers' and Sailors' Civil Relief Act of 1940 protecting servicemen from sale for nonpayment of taxes on premises occupied for dwelling, professional, business or agricultural purposes, does not apply to serviceman who had acquired right of redemption to realty prior to entry into service in 1942, where

he had never occupied land for any such purpose. Soldiers' and Sailors' Civil Relief Act of 1940, § 500 as amended 50 U.S.C.A.Appendix, § 560.

5. Armed Services ⇨34.10

In view of provision of Soldiers' and Sailors' Civil Relief Act that any part of period of military service, which occurs after October 6, 1942, shall not be included in computing period of redemption of realty sold or forfeited to enforce any obligation, tax, or assessment, under California statute affording indefinite right to redeem after deed to state and prior to disposal of property by state, county tax collector could not order sale of property, right of redemption to which was held by serviceman who acquired such right prior to entry into service in 1942. West's Ann.Rev. & Tax.Code, §§ 3691, 3694, 3696, 3697, 3707, 3712, 4216-4226.

Harold W. Kennedy, County Counsel, Alfred Charles De Flon, Deputy County Counsel, Los Angeles, for appellants.

Benjamin Chipkin, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal from order granting temporary injunction against tax sale. The central question is the effect of § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 upon the period of redemption following a sale to the state for nonpayment of local taxes.

Said § 205, as amended in 1942, 50 U.S.C.A.Appendix, § 525, provides: "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court * * * whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and

Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

Plaintiff acquired on August 17, 1940, the right of redemption of one Ellen B. Crowder who was owner of the subject property at the time of sale of same to the state in 1933 for non-payment of local taxes for the year 1926-1927. Pol.Code, § 3771. Plaintiff also acquired title, or apparent title, through foreclosure of a street bond, the commissioner's deed being dated September 26, 1939. He entered the military service in 1942 and has remained in the army ever since that time with the exception of a period extending from May 25, 1946 to July 10, 1947. Plaintiff partially redeemed the property under the five year plan, §§ 4216-4226, Rev. & Tax. Code Ann., paying \$2,330.70 on March 16, 1946 and \$2,471.54 on August 10, 1948, but has been unable to completely redeem. Although he furnished to the County Tax Collector an affidavit showing his inability to pay the balance due because of his current military service that officer gave notice of sale and threatened and intended to sell the said property at public auction on March 28, 1955. His hand was stayed by this suit for declaratory relief and injunction and by the ensuing temporary injunction now under review.

At the time of the sale to the state in 1933 § 3771a, Political Code, provided for sale by the state, and § 3780 said: "A redemption of the property sold may be made by the owner, or any party in interest, within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state, in the manner provided by section three thou-

sand eight hundred and seventeen." Its successor is § 3707, Revenue and Taxation Code: "If not previously terminated, on completion of any sale under this chapter the right of redemption is terminated."

[1, 2] Both sides agree that the state statutes afford "an indefinite right to redeem after deed to the State and prior to disposal of the property by the State"; also that the paramount authority of the Federal enactment gives it the effect of an amendment to the local statute. Appellant says: "While the California state statutes provide that the right of termination [redemption] is terminated by sale by the state, such statutes are superseded by conflicting federal statutes. The whole statutory scheme is to be interpreted as if the federal laws were added to the state laws by amendment." The Florida Supreme Court, in *Burke v. O'Brien*, 47 So.2d 777, 778, said: "As regards the property rights of those persons within the protection of this statute, the state law must yield to the Federal and we should construe the two together just as much so as though the Federal statute were an amendment to the state law."¹ Accord: *Peace v. Bullock*, 252 Ala. 155, 40 So.2d 82, 83. We consider this to be the correct view. The effect of it is, first, to preclude a termination of an existing right of redemption so long as the holder thereof is in the armed service, and, second, to modify that portion of the local statute which provides that a sale from the state may be made at any time after deed to the state, Pol.Code, § 3817; Rev. & Tax. Code Ann. §§ 3691, 3694, 3696, 3697,² and that such sale, whenever made, effects termination of the right of redemption, Rev. & Tax. Code Ann. § 3707. The deed from the state "conveys title to the purchaser free of all encumbrances of any kind existing before the

1. This case is later than the Florida decision reviewed in *Le Maistre v. Leffers*, *infra*.

2. The matter of resale by the state is governed by the statute in effect at that

time. *Anglo Cal. Nat. Bank of San Francisco v. Leland*, 9 Cal.2d 347, 353, 70 P. 2d 937; *Mercury Herald Co. v. Moore*,³ 22 Cal.2d 269, 274, 138 P.2d 673, 147 A.L.R. 1111.

sale" except certain specified ones, § 3712, which are not pertinent here.

[3] Appellants contend that the sale may proceed but that it does not actually terminate the redemption period. We cannot adopt that view. It is wholly inconsistent to say that the right of redemption cannot be terminated when the property owner is in the armed service but that a sale, which is specifically designated as the event whereby same is terminated, may be held at any time. There is no statutory provision for a redemption after sale by the state. As a practical matter such a holding as that invoked by appellant would present numerous problems in effectuating a redemption after returning from the service, problems as to amount to be paid, rate of interest, etc. Moreover it would be calculated to mislead any purchaser at the collector's sale for the deed recites (per § 3710, Rev. & Tax. Code Ann.): "That the real property was duly sold and conveyed to the State for nonpayment of taxes which had been legally levied and were a lien on the property; * * *. That the property is therefore conveyed to the purchaser according to law." Section 3711: "Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." Such a sale and deed would inevitably precipitate future litigation. If appellants' view be adopted, a prospective purchaser cannot know, unless he makes a previous investigation of the status of all potential redemptioners, whether he will get the kind of title which the state's deed professes to convey. If the statute be construed to permit a sale but to defer the termination of the right of redemption indefinitely in the case of an active military redemptioner, the purchaser would be fortunate to obtain a title insurance policy or to otherwise clear his title without the necessity of a quiet title action.

The cited case of *Day v. Jones*, 112 Utah 286, 187 P.2d 181, is not opposed to the

foregoing views. Under the Utah statute the resale by the county is not the event which terminates the redemption period; it expires automatically before the resale can be had. Moreover, the court affirmed the judgment in favor of plaintiff, the service man, because the sale to defendant had been made before the redemption period, as extended by the Civil Relief Act, had terminated.

Both sides rely upon *Le Maistre v. Leffers*, 333 U.S. 1, 68 S.Ct. 371, 92 L.Ed. 429. Its holding is with respondent although some of its language is a bit obscure. It arose under the Florida statute which provided for public sale of tax delinquent land and issuance of a tax certificate to the purchaser (not the state); at any time after two years from the date of the certificate the holder had the right to apply for a tax deed, whereupon another public sale was had and tax deed issued. The owner had a right to redeem at any time after issuance of the certificate and before the tax deed had been issued. Pursuant to this statute a certificate was issued on August 5, 1940, after sale of *Le Maistre's* land. He entered the navy on August 18, 1942, and there remained until December 18, 1945, when he was discharged. The amendment to § 205 of the Federal Act (which covers the matter of enlarged redemption period) was made on October 6, 1942. Tax deed to petitioner's land issued on March 1, 1943 and suit to set aside the deed was filed by him on March 25, 1946. Under state law his right of redemption extended from August 5, 1940 (date of certificate) to March 1, 1943 (date of tax deed). The court held that petitioner *Le Maistre* became an immediate beneficiary of the federal statute when it became effective on October 6, 1942. Then it said, 333 U.S. on page 3, 68 S.Ct. on page 372: "That means that the running of the time granted him under Florida law to redeem was tolled as long as he was in the military service. Since he would have had from October 6, 1942, to March 1, 1943, to redeem, the effect of the Act was to give him the same

length of time after his discharge for that purpose. His present action being timely, there is thus no barrier to his recovery so far as the Act is concerned." The first sentence is clear and it squares with the statute; it recognizes a tolling, or addition to the redemption period, equal to the lapse of time between October 6, 1942 (effective date of statute) and December 18, 1945 (discharge from service). The second sentence of the quotation seems to limit the additional period to one equalling the elapsed time from October 6, 1942 to March 1, 1943 (date of the tax deed). This is difficult to understand, but, as the court found petitioner's action to be timely on that basis, it appears not to be of controlling significance. The state court, 159 Fla. 122, 31 So.2d 155, had dismissed Le Maistre's suit to set aside the tax deed and the Supreme Court of the United States reversed that ruling. That can spell only one thing, a void deed. It does not imply, as appellant's counsel contends, a recognition of a right to hold the second sale or to make the tax deed. The holding in the case requires an affirmance of the order involved in this appeal.

3. § 560. "(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this

[4] Arguments based upon § 500 of the Act, 50 U.S.C.A. Appendix, § 560,³ require but brief mention, for they are definitely covered by the Le Maistre case. Plaintiff at bar never occupied the land in question "for dwelling, professional, business, or agricultural purposes". The Le Maistre opinion says, 333 U.S. at page 5, 68 S.Ct. at page 373: "The two sections—205 and 500—supplement each other. Section 500, applicable to restricted types of real property, gives greater protection than § 205. It restrains the sale for taxes or assessments of specified types of real property except upon leave of court and prescribes for them a specified time within which the right to redeem may be exercised if the property is sold. Section 205 extends in terms to all land and only tolls the time for redemption for the period of military service. The other construction attributes to Congress a purpose to protect only certain classes of real property owned by those in the armed services. We cannot do that without drastically contracting the language of § 205 and closing our eyes to its beneficent purpose. But as we indicated on another occasion, the Act must

Act [sections 501-540 and 560-590 of this Appendix], for a period extending not more than six months after the termination of the period of military service of such person.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act [said sections] ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

be read with an eye friendly to those who dropped their affairs to answer their country's call."

[5] There was no error in granting the temporary injunction. Order affirmed.

MOORE, P. J., and FOX, J., concur.



144 Cal.App.2d 457

The AMERICAN DISTILLING COMPANY,
a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION,
Defendant and Appellant.

Civ. 16845.

District Court of Appeal, First District,
Division 2, California.
Sept. 17, 1956.

Action by distilling company for declaratory judgment on question of whether beverages manufactured from imported alcohol which was received in state in a condition unfit for human consumption, were distilled spirits originally distilled in state within meaning of Alcoholic Beverage Control Act authorizing sale of such distilled spirits to licensed dealers in state. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment in favor of distilling company declaring that such beverages distilled by company in state could be sold in the state and the Board of Equalization appealed. The District Court of Appeal, Kaufman, J., held that in view of fact the imported alcohol at time it was received in state was not a distilled spirit within meaning of Alcoholic Beverage Control Act and the original distillation of the beverages manufactured from the alcohol occurred in the state, beverages involved could be sold in the state to licensed dealers, but that judgment of trial court would be modified to

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authorize sale of such beverages "manufactured" in the state rather than "distilled" in the state.

Judgment as modified affirmed.

1. Intoxicating Liquors ⇨111

Under Alcoholic Beverage Control Act, a "rectifier" is one who processes distilled spirits which are already in existence and a "manufacturer" is one who produces such spirits. West's Ann.Bus. & Prof.Code, §§ 23015, 23016.

See publication Words and Phrases, for other judicial constructions and definitions of "Manufacturer" and "Rectifier".

2. Intoxicating Liquors ⇨111

Under Alcoholic Beverage Control Act, a "distilled spirit" must be a beverage having its origin in fermented agricultural products, but it does not necessarily become a beverage in the initial distillation of the agricultural products. West's Ann.Bus. & Prof.Code, § 23000 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Distilled Spirits".

3. Intoxicating Liquors ⇨124

Where distillery company manufactured beverages from imported alcohol which was received in the state by the company in a condition unfit for human consumption, such beverages were distilled spirits originally "manufactured" in state and consequently could be sold by company to licensed dealers in state as provided by statute authorizing such sale of beverages originally distilled in state. West's Ann. Bus. & Prof.Code, §§ 23005, 23363.

See publication Words and Phrases, for other judicial constructions and definitions of "Manufactured".

4. Intoxicating Liquors ⇨111

The economic welfare meant in Alcoholic Beverage Control Act section stating that purpose of the Act is to promote temperance in use and consumption of alcoholic beverages and involves in the highest degree the economic, social, and moral well-being and safety of the state and all

of its people, is that welfare which will be achieved by strict regulation and curtailment of use of liquor and the economic benefits resulting to the people from the promotion of temperance, rather than those resulting from the promotion of the liquor industry. West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 23001.

5. Declaratory Judgment ⇨346

In action for declaratory judgment on question of whether beverages manufactured from impure imported alcohol were distilled spirits originally distilled in state within meaning of Alcoholic Beverage Control Act section authorizing sale of such spirits to licensed dealers in state, evidence was insufficient to show that plaintiff's whiskey produced from a mixture of such alcohol and other whiskey, which might not have been distilled in the state, would be distilled spirits originally distilled in the state within meaning of the Act. West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 23363.

6. Intoxicating Liquors ⇨124

Under Alcoholic Beverage Control Act section providing that any licensed manufacturer of distilled spirits originally distilled in state may sell them to any dealer licensed to sell distilled spirits, whiskey to which imported alcohol is added in production of another whiskey must be whiskey produced in the state. West's Ann.Bus. & Prof.Code, §§ 23005, 23363.

7. Intoxicating Liquors ⇨15

Alcoholic Beverage Control Act section providing that any licensed manufacturer of distilled spirits originally distilled in state may sell them to any person holding license authorizing sale of distilled spirits, is not unconstitutional in that it favors a home production of distilled spirits over a foreign production in view of fact complete authority over such matters is granted to states by Twenty-first Amendment to United States Constitution. U.S.C.A.Const. Amend. 21; West's Ann.Bus. & Prof.Code, § 23363.

8. Constitutional Law ⇨43(2)

Where distilling company relied on Alcoholic Beverage Control Act section authorizing sale by manufacturer of distilled spirits originally distilled in state to dealers licensed to sell such spirits, for its asserted privilege to sell directly to retailers, such company could not at same time attack constitutionality of the section. West's Ann.Bus. & Prof.Code, § 23363.

9. Intoxicating Liquors ⇨124

Where Alcoholic Beverage Control Act section defined "distilled spirits" as a beverage obtained by distillation of fermented agricultural products, and there was nothing in the context of section of the Act providing that any manufacturer of distilled spirits originally distilled in the state can sell such spirits to licensed dealers requiring statutory definition to be disregarded and broader meaning of the term "distilled spirits" employed, statutory definition would control in the section authorizing sale of distilled spirits. West's Ann.Bus. & Prof.Code, §§ 23015, 23363.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for appellant.

Eisner & Titchell, Norman A. Eisner, Haskell Titchell, San Francisco, for respondent.

KAUFMAN, Justice.

The State Board of Equalization appeals from a judgment in favor of respondent American Distilling Company in a declaratory relief action concerned with the interpretation of a certain provision of the Alcoholic Beverage Control Act, Bus. & Prof. Code, § 23000 et seq.

The American Distilling Company, which holds a distilled spirits manufacturer's license issued by the State of California, operates a plant in Sausalito, in which it manufactures gin, vodka, and whiskey. In the manufacture of its products it uses neutral spirits or alcohol. A large part of the alcohol used is distilled from grain at the

Sausalito plant, but in some of its products, the company uses alcohol which it imports in tank cars from Illinois. This alcohol, derived from grain, is in an impure condition when received at the distillery and is unfit for human consumption. It is then distilled at the Sausalito plant, the impurities removed and the proof reduced to make it fit for beverage purposes.

Respondent pays a federal tax on the imported alcohol after it has been distilled in the Sausalito plant and placed in a bonded warehouse. The Federal government treats this alcohol for tax purposes the same as if it had been originally produced by respondent at its Sausalito distillery.

The sole issue on this appeal is whether the beverages manufactured from the imported alcohol are distilled spirits originally distilled in this state within the meaning of section 23363, Business and Professions Code. That section reads as follows: "Distilled spirits manufacturers; sales to licensees. Any licensed manufacturer of distilled spirits originally distilled in this State may sell them to any person holding a license authorizing the sale of distilled spirits."

The trial court held that respondent had the right under the above statute to sell the alcoholic beverages manufactured from the imported alcohol to retailers. It found that the alcohol is completely redistilled by the company at its distillery in Marin County in the same manner as any other raw material, that in manufacturing some of its products, additional materials are added to the alcohol at the time of the distillation to obtain the distilled spirits

After the distillation at respondent's plant, some of this alcohol is made into vodka by putting it in a tank and treating it with carbon for a certain length of time. Gin is produced by combining the purified alcohol with botanicals and distilling the combined materials. The reprocessed alcohol is also used in the making of whiskey by adding it to whiskey distilled at the plant, forming a new product.

[1] Appellant maintains that the processing performed by respondent at its Sausalito plant is a rectification rather than a distillation. The act defines a rectifier as "every person who colors, flavors, or otherwise processes distilled spirits by distillation, blending, percolating, or other processes." Bus. & Prof.Code, § 23016. A distilled spirits manufacturer is defined as "any person who produces distilled spirits from naturally fermented materials or in any other manner." Bus. & Prof.Code, § 23015. (Emphasis ours.) A rectifier, then, is one who processes distilled spirits which are already in existence; a manufacturer is one who produces such spirits. Both use the distillation process in accomplishing their objective. If the alcohol is a distilled spirit within the meaning of the act in the condition in which it is received in the tank cars, then appellant is correct in concluding that the distillation of the alcohol is merely rectification.

The basic question is, therefore, whether under the act the distilled spirits come into existence at respondent's plant, or are already in existence when the alcohol is received there. Appellant does not contend that the alcohol is merchantable as a beverage when it arrives at the plant. The distillation at Sausalito is necessary to convert the alcohol into a liquid fit for human consumption. The alcohol is subjected to the same distilling process that other raw materials are subjected to in making liquors.

Alcoholic beverage is defined by the act as including "alcohol, spirits, liquor, wine, beer, * * * and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances." Bus. & Prof.Code, § 23004. "Distilled spirits" are defined in the following section as "*an alcoholic beverage* obtained by the distillation of fermented agricultural products, and includes alcohol for beverage use, spirits of wine, whiskey, rum, brandy, and gin, including all dilutions and mixtures thereof." Bus. & Prof.Code, § 23005. (Emphasis ours.)

[2] The alcohol as received is clearly not an alcoholic beverage under section 23004, for it is not fit for drinking purposes as it is, or when diluted, mixed or combined with other substances. It has to be subjected to the distillation process before it is transformed into a consumable product. True, section 23005 states that distilled spirits is a beverage obtained by distillation of fermented agricultural products. This indicates the origin of such beverage, for section 23015 recognizes that distilled spirits may be manufactured from naturally fermented materials or in other ways. A "distilled spirit" under the act, therefore, must be a beverage having its origin in fermented agricultural products, but it does not necessarily become a beverage in the initial distillation of the agricultural products, otherwise the manufacture of such spirits "in any other manner" in section 23015 would appear to be contradictory.

[3] Since a "distilled spirit" apparently must be a beverage under the act, or a substance that can be used as such when diluted, combined or mixed with other substances, it would seem that the liquors manufactured from the impure alcohol in the respondent's distillery, are "distilled spirits" originally distilled in this state. The original distillation which creates the beverage occurs here. Appellant, arguing that this is mere rectification, sets forth the dictionary definition of distillation as "To subject to, or transform by, distillation; as to distill molasses, in making rum; to distill barley, rye, corn, etc." The distillation process is used in creating an alcoholic beverage as well as in rectifying it after it has been created. Hence, the definitions of distill and rectify are not particularly helpful here. Under the statutory definitions, respondent clearly was a manufacturer of the distilled spirits, and not a rectifier, the alcohol was transformed into a beverage at respondent's plant, and only then became "distilled spirits" under the statute.

Appellant cites *United States v. Tenbroek*, 2 Wheat. 248, 15 U.S. 248, 4 L.Ed.

231, wherein the distinction between distilling and rectifying was considered. Defendant was charged with distilling spirituous liquors without a license. He contended that he rectified the spirits in his distillery after they had been distilled from domestic materials, that he was but performing secondary distillations by purifying the spirits. The specific tax with which the court was there concerned was levied on stills producing spirituous liquors from domestic or foreign materials. The court stated that the distillation process consisted of a double process, the first producing low wines; the second, the distillation of spirits of first, second, third or fourth degree proof which were marketable. At this point, the court declared, the distillation process ended. Later distillations were considered part of the process of rectification. Respondent states that the above cited case found that the material processed by the defendant therein was at the time of such processing, a spirituous liquor ready for consumption. The opinion, however, only states that it was a marketable product, and it cannot be determined from this expression whether or not it was a consumable beverage without further processing; hence the case is not particularly helpful to either party herein.

Appellant argues that since one of the purposes of the Alcoholic Beverage Control Act is to promote the economic welfare of the state, the economic well-being of the people of this state would be greatly furthered if manufacturers distilled alcoholic beverages from grains produced locally. However, under appellant's interpretation of section 23363, the grain could be shipped in from other states or countries by respondent, and he would still be entitled to sell the product to retailers, for there could then be no doubt that the original distillation would take place in this state. It is, of course, true as appellant argues, that because of shipping costs, it would be more likely that local grain would be used, and that more local labor might be employed in distilling beverages from grain instead of from alcohol.

[4] Respondent takes the position that the act was designed as a regulatory measure. Section 23001, Bus. and Prof.Code, states that this division is an exercise of the police power for "the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages." That section goes on to state that the subject matter of this division "involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people." From the word "economic" in this last sentence appellant derives the intent to encourage agriculture and labor in this state by granting a profitable privilege to manufacturers who use California raw materials in their distilleries. When read in connection with the previous sentence the economic welfare of the people seems to be that achieved by strict regulation and curtailment of the use of liquor, the economic benefits resulting to the people from the promotion of temperance, rather than those resulting from the promotion of the liquor industry. In *Ainsworth v. Bryant*, 34 Cal.2d 465, 470, 211 P.2d 564, 567, it is said that the Alcoholic Beverage Control Act, designed to supersede earlier statutes relating to the control of the liquor traffic, "is generally regarded as a regulatory measure". (And, see, 3 Cal.Jur.2d 65, § 7.) The act is aimed at the control of distilled spirits as they are defined in the act.

It is true, as appellant argues, that even unrefined alcohol is usually defined as a "distilled spirit". See, *Commercial Solvents Corp. v. Riley*, 7 Cal.2d 731, 733, 62 P.2d 588. Such definition would control in the absence of a specific definition in the act itself. In this case the act contains the definition that is to be used in the interpretation of that term. Section 23002, Bus. and Prof.Code, states that "Unless the context otherwise requires, the definitions * * * set forth in this chapter govern the construction of this division." It must

be determined, then, whether there is anything in the context which requires that the statutory definition be disregarded, and the broader meaning of the term employed.

Appellant maintains that the history of the legislation supports the board's interpretation. Originally, the holder of a distilled spirits manufacturer's license was authorized to sell alcoholic beverages to a retail licensee under section 6(a) of the Alcoholic Beverage Control Act of 1935. Stats.1935, p. 1127. In 1937 the distilled spirits manufacturer's agent's license was created by adding subdivision (n) to section 6. Stats.1937, p. 2135. That license, issued to companies selling liquor in California, but operating distilleries *outside* the state, did not give such licensees the privilege of selling to retailers. An amendment to subdivision (a) of section 6, in 1937, restricted the privilege of a manufacturer to selling only to wholesalers, rectifiers and manufacturers, with the exception that "distilled spirits *produced* in this State" might be sold to retailers. (Emphasis ours.) Then in 1941, the same subdivision was amended to read "distilled spirits *originally* distilled in this State". Stats.1941, p. 2702. This change obviously grants the privilege of selling at retail only to those who create "distilled spirit" through a distillation process. Appellant contends that the change in phraseology from "produce" to "originally distilled" indicates an intention on the part of the Legislature to change the meaning to a more restricted interpretation. Undoubtedly this is true. Under the earlier law a liquor such as vodka, could be produced by treating imported beverage alcohol in a manner similar to that described in this record and the producer would have the privilege of selling it at retail, although no distillery was operated in this state by the producer. Whiskey could also be produced by simply mixing imported beverage alcohol with other imported distilled spirits. The intent to narrow the privilege is apparent from a comparison of the language of the amendment with that of the earlier statute. The Assembly Journal for 1941 reveals that this amendment had its origin in the Com-

mittee on Public Morals. (Assembly Journal 1941, p. 1195.)

The provisions of the act just preceding section 23363 allow the manufacturers of beer, wine and brandy, the privilege of selling their products to any person having a license authorizing the sale of such products. If a plan to promote agriculture was part of the purpose of this legislation, it would seem that it would have been made applicable to the beer manufacturers as well. Beer manufacturers, under the act, may import all their grains from neighboring states and still claim the privilege of selling to retailers.

There does appear to be an indication of a plan to prefer the local producer to the out of state producer of alcoholic beverages. This can be justified under the regulatory purpose of the act, for California can better protect the safety and health of its people in regard to such products when distilleries, breweries and wineries are subject to standards in force in this state. For such purpose, it would seem to be immaterial whether the manufacturer of distilled spirits uses as raw material, grains or crude alcohol, as long as the beverage is distilled in this state.

[5, 6] It is urged that the evidence does not support the implied finding that the blended whiskey produced from this alcohol and a mixture of other whiskey is "distilled spirits" originally distilled in this state. Appellant says that the evidence was to the effect that the whiskey with which this alcohol is mixed may or may not have been distilled at the Sausalito plant. The witness stated that the whiskey with which the alcohol is mixed does not have to be distilled at respondent's plant, that it can be, and that normally it is, as respondent uses principally all its own products. No doubt the court inferred from this evidence that respondent in the past used only locally distilled whiskey in producing the whiskey which is mixed with the distilled alcohol. Appellant contends that the judgment gives respondent blanket approval to mix this alcohol with other whiskeys regardless of their origin, and

sell the mixture to retailers as distilled spirits "originally distilled in this State." The judgment decrees that "plaintiff has the right to sell distilled spirits manufactured by it at its distillery * * * from alcohol transported under federal regulations from other distilleries to the holders of retail licenses for the sale of distilled spirits." We agree with appellant's contention in this connection. The whiskey to which the alcohol is added in the production of another whiskey must be California produced whiskey, otherwise, the final product would not meet the test of section 23363.

[7, 8] There appears to be no merit in respondent's argument that the application of section 23363 as contended for by appellant, would be unconstitutional. The Legislature undoubtedly had authority to limit the privilege of selling direct to retailers in accordance with certain prescribed conditions. *Tokaji v. State Board of Equalization*, 20 Cal.App.2d 612, 614, 67 P.2d 1082. And a favoring of home production over foreign production would not be unconstitutional, for complete authority is granted to the states under the 21st Amendment to the United States Constitution in this area. *State Board of Equalization of California v. Young's Market*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38; *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424. Furthermore, since respondent relies on section 23363 for the asserted privilege to sell directly to retailers, it cannot at the same time attack its constitutionality. *County of Sacramento v. City of Sacramento*, 75 Cal.App.2d 436, 447, 171 P.2d 477; *Hurley v. Commission of Fisheries*, 257 U.S. 223, 225, 42 S.Ct. 83, 66 L.Ed. 206; *St. Louis Malleable Casting Co. v. George C. Prendergast Construction Co.*, 260 U.S. 469, 43 S.Ct. 178, 67 L.Ed. 351.

[9] We conclude that the definition of distilled spirits used in the statute must control. The declaratory judgment is hereby modified by substituting the words "distilled by it" for "manufactured by it" in the paragraph declaring the future rights of respondent. This modification will prevent

the manufacture of liquors from beverage alcohol imported into this state which would require no distillation to convert it into "distilled spirits" under the statute.

Judgment affirmed as modified.

NOURSE, P. J., and DRAPER, Justice pro tem., concur.



144 Cal.App.2d 694.

Matter of the ESTATE of Katherine OLSON, also known as Mrs. V. E. Olson, Kate Olson, Kathryn Olson and Kate B. Olson, Deceased.

Phil E. HARDING, Petitioner and Appellant,

v.

Inez H. KEPPNER, Respondent.
Civ. 5420.

District Court of Appeal,
Fourth District, California.

Sept. 27, 1956.

Hearing Denied Nov. 21, 1956.

Proceeding in the matter of the estate of deceased testatrix. The Superior Court of San Diego County, Dean Sherry, J., entered judgment determining heirship, and son of testatrix appealed. The District Court of Appeal, Griffin, Acting P. J., held that the words "personal belongings" as used in holographic will providing that testatrix wanted her daughter to have all of her "personal belongings" and her son \$1, were susceptible of the meaning that testatrix intended to leave her daughter the remainder of her entire estate and intended to disinherit her son by leaving him only \$1.

Judgment affirmed.

1. Wills ⇐455

Court has duty to construe language of will so that it conforms to the testator's intention as disclosed by the will, rather

than to defeat such intention by strict adherence to the technical sense of particular words.

2. Wills ⇐466

The apparent meaning of particular words, phrases, or provisions in a will must be subordinated to the testamentary scheme, plan, or dominant purpose of the testator.

3. Wills ⇐455

In the construction of wills, language used must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator.

4. Wills ⇐449

The very fact that testatrix made a will raised a presumption that she intended to dispose of all of her property. West's Ann.Prob.Code, § 102.

5. Wills ⇐448, 449

Whenever a disputed word or phrase in a will may be reasonably given either of two meanings, that meaning should be given which prevents intestacy, either entire or partial. West's Ann.Prob.Code, § 102.

6. Wills ⇐583

The words "personal belongings" as used in holographic will providing that testatrix wanted her daughter to have all of her "personal belongings" and her son \$1, were susceptible of the meaning that testatrix intended to leave her daughter the remainder of her entire estate and intended to disinherit her son by leaving him only \$1. West's Ann.Prob.Code, § 102.

See publication Words and Phrases, for other judicial constructions and definitions of "Personal Belongings".

7. Wills ⇐455

Fact that holographic will was drawn by testatrix, who was unlearned in the law, could be considered in interpreting the meaning of the words used.

Dorman & Dorman, San Diego, for appellant.

Charles T. Bumer, Jr., San Diego, for respondent.

GRIFFIN, Presiding Justice.

Katherine Olson died testate on December 31, 1954, leaving a holographic will which was duly admitted to probate. It reads, in its entirety, as follows:

"March 30—48

"In case of my Death a very short Memorial Service at Benbough Mortuary. Every thing strictly private no flowers notify Mr & Mrs. Gustav Keppner, 1927 Grand ave Butte Montana I want Inez my Daughter to have all My Personal belongings that is Mrs. Keppner Phil Harding my son \$1 dollar—dont notify any one else my two Sisters are very old and Widows and unable to come

"Mrs. V. E. Olson

"San Ysidro Cal.

"No Hardings Please
my last wish"

The testatrix was survived by six heirs, all of whom filed written statements or petitions to determine heirship, namely, Inez Keppner, daughter, Phil E. Harding, son, and four sons and daughters of Ruth Zabel, predeceased daughter of the testatrix. The claim of each of the four grandchildren is for one-fourth of one-third of the property of the decedent. The claim of Inez H. Keppner is for two-thirds of the residue of the estate after payment of the \$1 legacy to Phil E. Harding. Harding claims one-third of the residue of the estate upon the theory that by the will he received only \$1; that only certain articles intimately associated with the person of the testatrix were bequeathed to his sister Inez; and that since no disposition was made of the residue of the estate he is entitled to his share as an heir at law in the bulk of her estate, which is alleged in several of the claims of interest and found by the court to be her "separate property only".

No extrinsic evidence was offered or received in the interpretation of the will.

The court found generally that the testatrix meant, by using the phrase "I want Inez my daughter to have all My Personal belongings" that said will makes effective distribution of the remainder of her entire estate, and accordingly the daughter is entitled to a two-thirds interest in it after payment of the \$1 bequest.

As opposed to this finding appellant cites some cases and authority to the effect that a court cannot, under the guise of construction, make a will for the testatrix in the place of the one she has made. He claims that the phrase "personal belongings" in the California cases has been given a restricted effect; that it does not apply to money, securities or real property, and must be limited to chattels susceptible of identification and manual delivery, citing such authority as *In re Estate of Spreckels*, 162 Cal. 559, 123 P. 371; *In re Estate of Koch*, 8 Cal.App. 90, 96 P. 100; *In re Estate of Carr*, 93 Cal.App.2d 750, 209 P.2d 956; *In re Estate of Klewer*, 124 Cal. App.2d 219, 268 P.2d 544, 41 A.L.R.2d 941; *In re Estate of Sorensen*, 46 Cal.App.2d 35, 115 P.2d 241; *In re Estate of Lovejoy*, 38 Cal.App.2d 69, 100 P.2d 547; and *In re Estate of Carroll*, 138 Cal.App.2d 363, 291 P.2d 976.

[1-3] It is a fundamental rule that it is the duty of the court to construe the language of a will so that it will conform to the testator's intention as disclosed by the will rather than to defeat such intention by strict adherence to the technical sense of particular words. *In re Estate of Kising*, 68 Cal.App.2d 163, 156 P.2d 57; *In re Estate of Akeley*, 35 Cal.2d 26, 215 P.2d 921, 17 A.L.R.2d 647. The apparent meaning of particular words, phrases or provisions must be subordinated to the testamentary scheme, plan or dominant purpose of the testator. *In re Estate of Kruger*, 55 Cal.App.2d 619, 131 P.2d 619; *In re Estate of Wilson*, 184 Cal. 63, 193 P. 581. In the construction of wills the language used must be liberally construed with a view to carrying into effect what the will as a whole shows was the real

intent of the testator. In re Estate of Hoytema, 180 Cal. 430, 181 P. 645.

[4,5] It is apparent from the instrument that the words of the testatrix specifically disinherited her son, and it was her desire and intent to avoid intestacy and leave her entire estate to her daughter by the words "all my Personal Belongings". The very fact that the testatrix made a will raises a presumption that she intended to dispose of all of her property. Sec. 102, Probate Code; In re Estate of Akeley, supra; In re Estate of Olsen, 9 Cal.App.2d 374, 50 P.2d 70. Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy, either entire or partial. In re Estate of Soulie, 72 Cal.App.2d 332, 164 P.2d 565.

[6] In examining the will by its four corners and in the light of these rules, it does appear that the words "all my Personal Belongings", as used in it, were susceptible of meaning "all of my own property".

In Re Estate of Kruger, 55 Cal.App.2d 619, 624, 131 P.2d 619, 622, in discussing a will where the word "belongings" was used, the court said:

"The word 'belongings' used by the testator with reference to the bequest to his wife, is generally understood as including the property that one owns, and it is not infrequently used in that broad sense; and in the instant case we feel that the word may reasonably be used to include all of the testator's remaining property when we consider how the word 'belongings' is ordinarily understood by the lay mind."

[7] In the instant case the will was drawn by the testatrix and from its appearance she was a person unlearned in the law. This fact may be considered in interpreting the meaning of the words used. In re Estate of Soulie, 72 Cal.App.2d

332, 164 P.2d 565; In re Estate of Henderson, 161 Cal. 353, 119 P. 496. Black's Law Dictionary defines "belongings" as follows: "That which belongs to one; property; possessions;—a term properly used to express ownership". Ballantine's Law Dictionary [Supp. 1954] in discussing the word "belongings" says:

"Although the word (belongings) as used in a will, has, on occasion, been restricted to such chattels as are peculiarly attached to the person, it has more frequently been construed broadly, under the language of the particular wills involved, to include personal property of every nature and even real estate."

In Re Estate of Olsen, 9 Cal.App.2d 374, 381, 50 P.2d 70, 73, the court interpreted the phrase "all my personal property" as meaning "'all my own property'" or "'all my property which I own personally'".

In the instant case, besides giving appellant only \$1 the testatrix indicates an express desire that she is only remembering her loved ones and that her son, a "Harding", should not take any other part of her property.

In Re Estate of Schuster, 137 Cal.App. 2d 125, 289 P.2d 847, it was held that although the primary meaning of the term "effects" is personal property, it is a very general term and, when used in a will, may include realty, where that appears to be the testator's intent; that whether the word "effects", as used in a will, includes realty depends on the context and the surrounding circumstances; that in the absence of controlling language in a will to the contrary, it is presumed that the testator intended to dispose of his entire property; and that if the trial court's interpretation of a will is reasonable and consistent with testatrix' intention, the reviewing court will not substitute another interpretation, even if it may seem equally tenable. In Re Estate of Carroll, 138 Cal. App.2d 363, 291 P.2d 976, it was held that

a construction of a will which leaves no intestacy as to any part of the estate is preferred.

The authorities relied upon by appellant are factually distinguishable. It appears to us that the finding of the trial court is reasonable and that from the will itself the intent of the testatrix was sufficient to show that the testatrix intended to disinherit the son by leaving him only \$1, and to leave the daughter the remainder of her entire estate.

Judgment affirmed.

MUSSELL, J., and BURCH, J. pro tem.,
concur.



144 Cal.App.2d 584

Leona LEGG, Plaintiff and Appellant,

v.

Charles TENEYCKE and Francis Teneycke,
Defendants and Respondents.

Civ. 21578, 21579.

District Court of Appeal, Second District,
Division 1, California.

Sept. 24, 1956.

Hearing Denied Nov. 21, 1956.

Two actions against plaintiff's landlords to recover damages for alleged breakings into plaintiff's leased apartment, attacks on her and attempts to rape her by one of two defendants. From judgments of the Superior Court of Los Angeles County, Leon T. David, J., on a jury's verdicts for defendants, an "order of procedure of legal process," "certain proceedings had in the Superior Court," and an order denying plaintiff's motion for new trial, she appealed. The District Court of Appeal, Fourn, J., held that contention in appellant's brief that "the trial judge on its own initiative compelling an election between the various causes of action at the close of the trial was 'an error in law oc-

curring at the trial', for which the court could properly grant a new trial," presented nothing for review, where briefs did not point out wherein judge so ordered or ruled and record failed to show that he compelled plaintiff to elect which cause of action to proceed with.

Judgments affirmed, and appeals from orders dismissed.

1. Appeal and Error ☞758(3)

On appeals from judgments on jury's verdicts for defendants in two tort actions and orders denying plaintiff's motions for new trials, contention in appellant's brief that "the trial judge on its own initiative compelling an election between the various causes of action at the close of the trial was 'an error in law occurring at the trial' for which the court could properly grant new trial," presented nothing for review, where briefs did not point out wherein trial judge so ordered or ruled and record failed to show that he compelled plaintiff to elect which cause of action to proceed with.

2. Appeal and Error ☞758(3)

On plaintiff's appeal from judgments on jury's verdicts for defendants in two tort actions, question in appellant's brief, "Is the right to privacy entranced within the absolute right of personal security and personal liberty?" presents nothing for review, as District Court of Appeal cannot determine therefrom point appellant desires to make.

3. Appeal and Error ☞758(3)

A question in appellant's brief, "Should the trial judge give an instruction that is not justified by the evidence?" presented nothing for review, where no particular instruction was mentioned or referred to by appellant and no given instruction was improper under circumstances.

4. Appeal and Error ☞758(3)

On plaintiff's appeals from judgments on jury's verdicts for defendants in two tort actions, contention in appellant's brief

that "it appears that constitutional rights have become instinct in State of California, in that it appears that we no longer have a right to a juror's verdict without coercion," presented no question for review, where all of trial court's instructions to jury were proper under circumstances and record disclosed no coercion of any juror.

5. Trial \Rightarrow 318

In jury trial, fact findings are not required.

6. Appeal and Error \Rightarrow 95, 110

Purported appeals from orders denying plaintiff's motions for new trial after judgments on jury's verdicts for defendants and from "orders of procedure of legal process" and "proceedings had in the Superior Court" were dismissed.

Leona Legg, in pro. per.

Martin J. Kirwan, Los Angeles, for respondents.

FOURTH, Justice.

These appeals are from the judgments on the verdicts in favor of the defendants and against the plaintiff.

Plaintiff brought two actions, the first numbered 596,228, and the second numbered 597,392. In the first case, in the third amended complaint, the plaintiff sued for general and special damages in the sum of \$25,900, alleging, among other things, that the defendants were the landlords of an apartment house; that she was a tenant therein; that the defendant Charles Teneycke had broken into her apartment, attacked her and attempted to rape her, all on February 27, 1951, March 9, 1951 and March 13, 1951.

In the second case, in the second amended complaint (erroneously designated the third amended complaint) the plaintiff sued for damages, general and special, in the sum of \$26,050, alleging generally the same sort of matters as are set forth in the first case, and setting forth that the various episodes

complained of occurred on March 27, 1951, and March 28, 1951.

Upon the plaintiff's motion, the cases were consolidated for trial, and upon her motion this court granted leave to file combined briefs to the end that the causes could be disposed of in a single appeal.

In each of plaintiff's notices of appeal, it is set forth that she appeals from (1) "'Order of Procedure of Legal Process' rendered and entered in the above entitled court and cause"; (2) "that certain 'Judgment' herein rendered and entered in the above entitled court and cause on or about July 7th., and 8th. 1955"; (3) "that certain 'Proceedings had in the Superior Court'", and (4) "certain 'Order denying plaintiff's motion for a New Trial', made and entered in the minutes of said court, on or about August 5, 1955."

The plaintiff has submitted briefs in this matter which are extremely ambiguous and difficult to decipher or understand; they are not in conformity with the Rules on Appeal, rule 13 et seq., excepting as to the size of the paper used, and are for the most part completely lacking in sense and reason. We have, however, carefully reviewed all of the record and have seen fit to disregard the defects, and have considered the briefs as if they were properly prepared.

The facts of the cases are substantially as follows. The defendants were the operators of an apartment house at 912 South Figueroa Street in Los Angeles. The plaintiff rented a single unit apartment under a month-to-month tenancy. In about March, 1951, Charles Teneycke brought an action in the Municipal Court of Los Angeles Judicial District to have the plaintiff ejected. Judgment in that case was in favor of Charles Teneycke and against the plaintiff here. In the instant cases the appellant alleged and testified, among other things, that she was assaulted and struck by Charles Teneycke on several occasions, naming the dates, and further that she was raped by Charles Teneycke. The respondents alleged and testified in substance that

there were no assaults committed by Charles Teneycke; that no blows were struck; that Charles Teneycke did not rape the plaintiff and no attempt whatsoever at rape was made.

[1] As heretofore indicated, the jury found in favor of the defendants and our review of the record in these cases convinces us that their determination was wholly proper and correct. As well as we can gather, it is appellant's first contention that, "The trial judge on its own initiative compelling an election between the various causes of action at the close of the trial was '*an error in law occurring at the trial*' for which the court could properly grant a new trial".

At no place is it pointed out in the briefs wherein the judge so ordered or ruled, and our search of the record fails to show that there is anything to indicate that the judge in anywise, at any time, compelled the plaintiff to elect as to which cause she could or should proceed with. The court was extremely liberal with and helpful to the plaintiff, as most judges are with persons who are unskilled and untrained in the law, and who appear in propria persona. Our review indicates that the judge did nothing which we can criticize.

[2] Plaintiff's next contention is titled: "Is the right to privacy entranced within the absolute right of personal security and personal liberty?" This is but a typical example of the matters contained in the brief and we are unable to determine the point which appellant desires to make.

[3] Apparently, appellant's next contention is, "Should the trial judge give an instruction that is not justified by the evidence?" The answer obviously is "no"; however, no particular instruction is mentioned or referred to by appellant, and we are unable to find any instruction which was given which was improper under the circumstances.

Appellant's next contention is: "Can a judge place himself in an attitude of hostility to law or to a party?"

"The dominating factor in this present case seems to have been the trial judge, was imbued with bias and prejudice against any female who dare to bring action *action* against a male charged with the offence of rape."

A reading of the transcript belies the statement made by appellant.

[4] Apparently appellant's next contention is: "The judicial abuse of discretion in this instant case is one which should be considered in the light of facts and *fractual* matters. Manifestly, it appears that constitutional rights have become *instinct* in the State of California, in that it appears that we no longer have a right to a juror's verdict without coercion."

In this connection we assume that perhaps appellant refers to an instruction or instructions given by the court, and if so, we have gone over the instructions and are of the opinion that all of them were perfectly proper under the circumstances. Certain it is that the record does not disclose any coercion of any juror.

[5] Appellant further contends that no findings of fact were made. The complete answer to that is that this was a jury trial and findings were not required.

In our opinion the causes were fairly and properly tried; the jury was correctly instructed; the verdicts were amply supported by the evidence and the court rightly denied the motion for a new trial.

[6] The judgments are, and each is, affirmed. The purported appeals from the orders denying plaintiff's motion for new trial, from "orders of procedure of legal process" and "proceedings had in the Superior Court" are, and each is, dismissed.

WHITE, P. J., and DORAN, J., concur.

144 Cal.App.2d 526

Josephine WOOLF, Plaintiff and Appellant,
v.

Albert H. JACOBS, etc., et al., Defendants
and Respondents.

Civ. 16955.

District Court of Appeal, First District,
Division 2, California.

Sept. 20, 1956.

Action against estate of decedent to recover compensation for services rendered to decedent during his lifetime. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., entered judgment in favor of defendant executor, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held that evidence was sufficient to show that decedent did not enter into any agreement with plaintiff to pay for services rendered, and that decedent did fulfill any and all agreements, if any, made with plaintiff.

Judgment affirmed.

1. Executors and Administrators ⇨221(5)

In action against decedent's estate to recover compensation for services rendered to decedent during his lifetime, evidence was sufficient to rebut presumption that plaintiff had rendered services to decedent in expectation of remuneration.

2. Executors and Administrators ⇨221(5)

In action against decedent's estate to recover compensation for services rendered to decedent during his lifetime, evidence was sufficient to support findings that decedent did not enter into an agreement with plaintiff to pay for services rendered, and that decedent did fulfill any and all agreements, if any, made between plaintiff and decedent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendant executor in a suit for monies, brought after rejection of appellant's claim filed in the estate of Joseph Harrison Thompson, deceased.

Plaintiff, a single woman, sought to recover against the estate of deceased, compensation for services rendered to him during his lifetime. The first count of the complaint alleged that decedent had become indebted to appellant in the sum of \$31,200 for the reasonable and agreed value of professional services rendered as a registered and practical nurse and housekeeper. The second count alleged that on or about August 30, 1935, appellant entered into an oral agreement with decedent whereby it was agreed that appellant would render certain services in the capacities of nurse and housekeeper, and that decedent would either compensate appellant during her lifetime for such services, or if such services terminated during his lifetime, he would deduct from such compensation only the reasonable cost of claimant's board and lodging, or in the absence of such compensation, he agreed to make and keep in effect a last will and testament providing for full compensation for the services rendered by claimant. It was further alleged that the reasonable value of the services rendered less board and lodging was the sum of \$31,200; that decedent did not fulfill his part of the agreement; and that if appellant had not relied upon said agreement that decedent would leave her all of his estate up to and including the reasonable value of her services, she would not have continued to perform said services.

There was testimony that appellant, a nurse, had lived at the residence of decedent, a chiropractor, since some time in 1934, and that she had rendered housekeeping services and some nursing services, during periods when decedent was in poor health. There was testimony that on a few occasions during those years he had told witnesses that he would do right by her, that she would be taken care of; that she was more than a daughter to him.

J. A. Pardini, Elda Granelli, F. Campagnoli, San Francisco, for appellant.

J. Clark Benson, Simeon E. Sheffey, San Francisco, for respondents.

On January 2, 1950, Joseph Harrison Thompson died leaving a will providing for appellant as follows:

"All legal bills shall be paid by the appointed attorney. He shall pay to Josephine Woolf a faithful and kind friend to me—the sum of Five Hundred (\$500.00) dollars. She shall also be given all household belongings to dispose of as she desires. She shall continue at my apartment for one additional month, the Estate paying such rent-gas-electricity and telephone. No other allowances will be paid her because during the years of her kindness our understanding and agreement I have faithfully carried out for services she rendered me."

There was no testimony in regard to any agreement, nor was there any testimony to show that appellant had not been compensated for her services. The trial court found that it was not true that decedent had become indebted to appellant in the sum of \$31,200 or any other sum within the two years last past and/or at all for the reasonable value of professional services; and that it was not true that on or about August 30, 1934, an agreement had been entered into as alleged in the complaint. It was further found that it was not true that any agreement was entered into for the payment of appellant's services and that it was not true that decedent did not fulfill any and all agreements, if any, made between him and appellant.

Appellant contends that the trial court erred in finding that appellant did not perform services for decedent under such conditions that a promise to pay must be implied. The evidence is uncontradicted that appellant and deceased lived in the same apartment for many years. Appellant was constantly his companion at social affairs and performed housekeeping duties. There was also evidence that she insisted on him regularly taking the medication prescribed for his heart condition, and that she gave him nursing care following a period of hospitalization at one time several years before his death. Deceased was in poor

health for some time prior to his death. Appellant administered shots and other medication to him. According to witnesses who occasionally visited them, deceased was quite dependent on appellant during this latter period of his life, although he apparently was ambulatory to within a few days before his death.

There was testimony by one witness who owned a convalescent home that she charged \$200 per month including board to patients in her home, but could not give them such service as appellant had rendered to decedent and that such services were of greater value than the price which she charged her patients.

The record herein is completely devoid of any evidence that an express contract was made between appellant and deceased. But appellant maintains that the evidence is sufficient to support a claim for the reasonable value of the services rendered. In *Leoni v. Delany*, 83 Cal.App.2d 303, 310, 188 P.2d 765, 769, 189 P.2d 517, it was said that "all that is needed is to establish the rendition of services and their reasonable value." In *Moore v. Spremo*, 72 Cal.App. 2d 324, 331, 164 P.2d 540, 545, the court declared that in proving a contract in this type of case that the intention to pay and the expectation of compensation may be inferred from conduct as well as from communications of the parties, that expectation of compensation may co-exist with motives prompted by affection or a sense of duty, and that "To warrant the finding of such contract, the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist" but that such elements may be inferred from the relation of the parties, the nature of the services or other circumstances.

In the cited case, decedent was a tenant at a rooming house owned by plaintiff. He had been permitted to stay on during the depression without paying his rent. He admitted to a friend that he owed plaintiff a great deal of money, but that if she did not get paid his will would take care of her. Again he admitted that when he settled

with her she would be able to buy two houses similar to one owned by the witness. Decedent underwent major surgery, and for a period of four months preceding his death required constant nursing service night and day, which plaintiff rendered. It was argued that the services were rendered gratuitously by plaintiff, but the court held that the determination as to whether the services were gratuitously rendered was a factual question for the trial court which had decided the issue contrary to defendant's theory.

In the above cited case there was abundant evidence that deceased intended to pay for the food and lodging furnished to him, and from the nature of the business carried on by plaintiff, it could certainly be inferred that she expected payment. In the present case there is an admission in the pleadings that decedent furnished appellant with her room and board during all the years that she made her home with him, for her claim is for the reasonable value of her services less the cost of board and lodging in the home of decedent. In the first years of this living arrangement, there was testimony that deceased was still a practicing chiropractor, but that he owned no property, had very limited means and would have been unable to pay appellant anything. If the testimony of these witnesses is believed, then it may be said that appellant very probably entered upon this arrangement without expectation or payment other than her support. It is true that the trial court might have inferred from the conduct of the parties that there was an implied agreement to pay for services in addition to appellant's support, but the evidence certainly does not compel that inference as a matter of law.

[1] Appellant urges that where services are rendered by one person from which another receives a benefit, there is a presumption of law that the person enjoying the benefit is bound to pay what they are reasonably worth. See, *Lloyd v. Kleefisch*, 48 Cal.App.2d 408, 120 P.2d 97; *Lundberg v. Katz*, 44 Cal.App.2d 38, 111 P.2d 917; *Long v. Rumsey*, 12 Cal.2d 334, 84 P.2d

146; *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84. This presumption is rebuttable, however, and we hold there was sufficient foundation in the testimony regarding the conduct of the parties herein, which would rebut the inference that appellant rendered the services in expectation of the remuneration sought in this action.

The trial court made a finding that "It is not true that the said work, labor and services rendered and performed by Plaintiff herein, after deducting therefrom the cost of food and lodging, was the sum of \$40.00 per week, or any other sum, or a total of \$31,200.00, or any other sum." The trial court was not bound to accept the value placed on appellant's services by the witnesses herein, but could conclude that appellant had been adequately compensated in receiving her support during all these years, or that she had rendered all services gratuitously.

[2] Two of the witnesses testified to discussions with decedent in which they urged him to do right by appellant and marry her. One of these witnesses testified that decedent had said he was going to do right by her, and the other stated that he said that appellant would be provided for. These expressions on his part of an intent to do something for appellant in the future, do not compel the inference that any agreement had been made between him and appellant. They are as subject to an inference that decedent would do something for appellant in appreciation of her gratuitous service to him. The trial court further found that "it is not true that Plaintiff and Decedent entered into any agreement for the payment of Plaintiff's services, and it is not true that Decedent did not fulfill any and all agreements, if any, made between Plaintiff and Decedent." Appellant introduced evidence of the provision made for her in decedent's will, which was quoted above. This declared that during the years of their understanding and agreement decedent had faithfully carried out his part for the services which appellant had rendered. Hence he left her only the household furnishings

and \$500. This evidence supports the above findings.

The trial court made no finding in regard to the statute of limitations which was pleaded by respondent and which he urges would in any event bar appellant's claim. In view of the fact that the findings above discussed are supported by the record, it is unnecessary to discuss this contention.

This was purely a factual matter for the trial court. In view of the fact that the judgment finds ample support in the record before us, the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DRAPER, Justice pro tem., concur.



144 Cal.App.2d 575

The PEOPLE of the State of California, acting by and through the CITY OF SOUTH SAN FRANCISCO, a municipal corporation, Plaintiff and Respondent,

v.

Ricardo VASQUEZ, also known as Ricardo Basquez, Ricardo Vasques, Ricardo Basques, and Richard Vasquez, Defendant and Appellant.

Civ. 16915.

District Court of Appeal, First District,
Division 2, California.

Sept. 24, 1956.

Action by city against owner of apartment building for abatement as a public nuisance. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment for city and owner appealed. The District Court of Appeal held that where building was dangerous to public health and safety and offensive to senses and constituted an extreme fire hazard to premises

and all surrounding property, city was entitled to abatement.

Affirmed.

1. Municipal Corporations ☞623(4)

In action by city against owner of apartment building to abate a public nuisance, evidence sustained finding that defects in building were dangerous to public health and safety and were offensive to senses and constituted an extreme fire hazard to premises and surrounding property.

2. Municipal Corporations ☞623(1)

Where apartment building was dangerous to public health and safety and offensive to the senses and constituted an extreme fire hazard to premises and surrounding property, city was entitled to abatement of building as a public nuisance.

3. Appeal and Error ☞1071(5)

When findings responsive to allegations in pleadings and supported by evidence fully support judgments, it is immaterial whether other findings also are supported by evidence.

Coffey & Velasquez, San Francisco, for appellant.

Richard P. Lyons, City Atty. of the City of South San Francisco, South San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment ordering the abatement as a public nuisance of a building owned and operated by appellant and consisting of a group of apartments used for human habitation. It is contended that the evidence does not support the finding that said building was a public nuisance, that respondent cannot complain of defects for the correction of which a permission was denied, and that the retroactive application of requirements of a Building Code to appellant's building which predates said Code violates appellant's vested constitutional right to own

property, Art. 1, § 1 of the State Constitution. We have found these contentions without merit.

The evidence shows in part that the building, known as 503 Bayshore Boulevard or Airport Boulevard in the City of South San Francisco, was a dilapidated frame construction without any concrete foundation, that the floors were rotting and sagging, that the walls were from two to three inches out of plumb and were decayed and structurally unsound, that there were large cracks and holes between the window sashes and the walls, in some places big enough to put a finger through, that there were no fire stops in the attic, that the electrical circuits were inadequate and overloaded, that the wiring entered the rooms through a hole drilled in the ceiling, without any outlet boxes, that from said wire, which was too light for its purpose, not only lights but also appliances were run, there being no floor outlets; that the building stood only thirty-one inches from an adjacent frame structure, and that all these conditions caused the building to be a very serious fire hazard for its surroundings, which hazard, according to the testimony of the witness Brauns, Assistant Fire Chief, could only be eliminated by rebuilding the building. (It may be noted in this respect that Braun testified that the decayed walls were a fire hazard, because fire would progress through them much quicker than would normally be expected.) The fire danger was moreover increased by the fact that the backyard was littered with old mattresses, cardboard boxes, old furniture and that at the side of the building was an open shed containing the same kind of refuse and also lumber. There was also evidence as to conditions detrimental to the health of the occupants and dangerous to the public health: infestation with rodents, earwigs and flies, insufficient sanitation facilities, (for the occupants of nine apartments there were only two toilets, one for the men, one for the women, accessible from the outside only, and only one shower located in the same

room as the women's toilet) inadequate protection against the elements because of ill-fitting doors and windows etc. There had been repeated complaints about the building, and since 1948 repeated notices of defects had been given to defendant; nevertheless, the conditions were still as stated on the day before that of the trial, November 9, 1954, except that the rodents had left when the building became unoccupied. The above evidence was uncontradicted and it was conceded by defendant's attorney that the charges were true. There is then no doubt that the building, as a public fire and health hazard, was a public nuisance subject to abatement, irrespective of whether or not it violated any applicable Building Code or Ordinance. *People v. Foerst*, 10 Cal.App.2d 274, 51 P.2d 455; *People v. United Capital Corp.*, 26 Cal.App.2d 297, 79 P.2d 186; *People v. Oliver*, 86 Cal.App.2d 885, 195 P.2d 926.

Considering the uncontradicted evidence of Chief Brauns that no repair but only total rebuilding could prevent the building from being a serious fire hazard to the City of South San Francisco, appellant cannot complain that abatement was ordered without giving prior opportunity to repair. There is no evidence of any effective manner of repair proposed by plaintiff. The only evidence on which appellant relies in respect to refusal of permit for repair is that about three years before the trial he came to the building department of the City of South San Francisco and inquired what could be done to fix the building. He was then told that "the building was in pretty bad condition and it would take more than fifty per cent of the actual cost of the building to bring it up to a minimum standard and he would have to tear the building down to bring it up to any standards." No plans were thereafter submitted by appellant or permits asked.

[1-3] Although evidence was received without objection as to different respects in which the building violated building legis-

lation and ordinances, the decision that the building is a public nuisance is not based on findings that it violates any such legislation or ordinances but on the ground that the defects of the building "are dangerous to the public health and safety and are offensive to the senses and constitute an extreme fire hazard to said premises and all the surrounding property." As the undisputed fire and health hazards sufficiently justify the decision, we need not consider whether retroactive application of certain legislation or ordinances to the required changes would be legal or not—also considering the extent of said required changes—or whether the finding that the building is offensive to the senses is sufficiently supported by the evidence. When findings responsive to allegations in the pleadings and supported by the evidence fully support the judgment, it is immaterial whether other findings also are supported by the evidence. *Sands v. Eagle Oil & Refining Co.*, 83 Cal. App.2d 312, 321, 188 P.2d 782, and cases there cited.

Judgment affirmed.



144 Cal.App.2d 673

Arthur E. PRINCE, Plaintiff and Respondent,
v.

Irene Prince VARONA, formerly Irene S. Prince, Defendant and Appellant.
Civ. 5427.

District Court of Appeal, Fourth District,
California.

Sept. 26, 1956.

Rehearing Denied Oct. 23, 1956.

Hearing Denied Nov. 21, 1956.

Former husband's action to quiet title to realty against former wife. The Superior Court, Imperial County, L. J. Mouser, J., entered judgment quieting title and former wife appealed. The District Court of Appeal, Burch, J. pro tem., held

that where subsequent to decree of divorce that had no provision of property settlement in it, parties orally agreed on division of property including two parcels of real estate and husband fully performed his part of agreement but wife refused to execute deed of her interest in realty which was agreed to belong to the husband alone, wife could not set up bar of statute of frauds.

Affirmed.

1. Appeal and Error ☞989, 996

In reviewing evidence, appellate court must resolve all conflicts in favor of respondent and when two or more inferences can be reasonably deduced from the facts, court is without power to substitute its deductions for those of the trial court.

2. Appeal and Error ☞991

In former husband's action to quiet his title to real estate against former wife based upon fact that husband had fully executed his part of oral agreement, made with wife subsequent to divorce decree, respecting division of property, it was for trier of fact to determine whether or not a contract had been proven from the facts and circumstances in evidence including the conversations between the parties.

3. Husband and Wife ☞48(1)

Where subsequent to divorce decree containing no provision for property settlement, parties orally agreed to a division of both their separate and community properties, transfer to husband of separate property of wife was for full and fair consideration.

4. Frauds, Statute of ☞68

Where subsequent to divorce decree containing no provision of property settlement, parties orally agreed as to a division of both their separate and community properties including real estate, agreement was controlled by statute of frauds and required to be in writing. West's Ann.Civ.Code, §§ 1091, 1624, subds. 3, 4, 6.

5. Frauds, Statute of ☞139(5)

Where subsequent to divorce decree containing no provision for property settle-

ment, parties orally agreed to a division of both their separate and community properties including real estate, and husband fully performed his part of agreement but wife refused to execute deed, wife could not set up bar of statute of frauds. West's Ann.Civ.Code, §§ 1091, 1624, subds. 3, 4, 6.

Herbert W. Simmons, Jr., Los Angeles, for appellant.

George R. Kirk, El Centro, for respondent.

BURCH, Justice pro tem.

Defendant appeals from a decree quieting title in plaintiff to certain real property in the city of El Centro, County of Imperial, State of California, described as follows:

"The South 60 feet of the West 160 feet of Lot 10, Block 6, Second Addition to the City of El Centro, excepting therefrom the South 10 feet of the West 20 feet thereof."

By a cross-complaint defendant sought a decree of partition, an accounting and for general relief.

The record indicates that the parties were married in 1924 and that a decree of divorce was granted defendant September 6, 1944, in Las Vegas, Nevada. On that date the parties owned the described property as tenants in common. The plaintiff has been in possession since the parties were divorced. At the time of the divorce there was no property settlement agreement or division of property in the decree. The parties also had owned real property in Pasadena, California, which was under contract of sale for \$2,400 upon which there was an encumbrance of \$660. The purchaser had paid down \$500. The El Centro real property they valued at \$2,300. There was a chevrolet automobile, 1940 model, valued at \$800. There was household furniture valued roughly at \$800.

After the divorce the parties met in Pasadena and orally agreed to divide the property as follows: To the wife the con-

tract of sale of the Pasadena property and the furniture, the wife to have the \$500 down payment on the contract of sale and the husband to pay off an existing encumbrance of \$660. The husband to have the El Centro real property and the automobile. The husband fully performed his part of this agreement. The wife refused, upon request, to deed her interest in the El Centro property to plaintiff.

There is some conflict upon the question of the oral agreement dividing the property and upon the values of the several pieces of property set off to each. However the court found that the division of community and separate property in the oral agreement was fair and executed except that defendant refused to deed the legal title of the El Centro property to plaintiff. A decree was entered quieting plaintiff's title to the El Centro real estate against any and all claims of the defendant.

[1-4] The sufficiency of the evidence to support the conclusion reached by the trial court is under attack. "In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent * * *. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184. Under this rule it was for the trier of fact to determine whether or not a contract was proven from the facts and circumstances in evidence, "including, of course, the conversations between the parties". *Treadwell v. Nickel*, 194 Cal. 243, 261, 262, 228 P. 25, 33. In this case we have an executed oral agreement which transmuted the separate property of the wife to the husband upon a full and fair consideration. In *Woods v. Security First National Bank*, 46 Cal.2d 697, 299 P.2d 657, an antenuptial oral agreement to transmute the wife's separate property into community property became executed by the subsequent acts and conduct in confirmation of the agreement. The agreement in question there

was like the agreement here controlled by the statute of frauds and was required to be in writing. Civil Code, Sec. 1624, subds. 3, 4, 6; Civil Code, Sec. 1091. As in the instant case, no transfers or instruments of conveyance were executed, but unlike the instant case, there was no delivery of possession. The court held that because the agreement was executed, the prohibitions of the above statutes did not control. "This is a clear case", says the court, "of an executed agreement which transmuted the property." 46 Cal.2d at page 701, 299 P.2d at page 659. In the Woods case, supra, it was held that the mutual consent of the spouses furnished the consideration. In the present case the marriage was terminated at the time of the agreement and admittedly, the practice of informality in property dealings between spouses is not available to plaintiff. Nevertheless, the facts and circumstances bring this case within the rule of an executed oral agreement accompanied by delivery of possession which continued uninterrupted and uncontested for a period of some nine years. The agreement was fully supported by consideration and all that remained to be done was to execute a deed to clear the record title.

The case of *Husheon v. Kelley*, 162 Cal. 656, at page 662, 124 P. 231, at page 234, cited by plaintiff, supports the judgment. In that case there was an oral agreement transferring real property and the court there said:

"But we think the findings, if construed, as they should be, in support of the judgment, do not set forth a

case of an executory contract which has to be enforced, but rather one of an oral present transfer of a life interest, in consideration of certain promises upon the part of the grantee. * *

"Where the conveyance is oral, instead of written, the case is not different, if there has been such part performance as to take the case out of the operation of section 1971 of the Code of Civil Procedure. There can be no doubt that the taking of possession by Kelley and the performance by him and his successors of the obligations of payment and improvement of the land were sufficient to overcome the want of a written transfer. * *"

It is said in 23 Cal.Jur.2d *Frauds*, Statute of, p. 399, sec. 129: "An oral contract which has been fully executed is not affected by the provisions of the statute of frauds. * * * The rule applies even when full performance has been rendered by only one of the parties." See *Flint v. Giguere*, 50 Cal.App. 314, 320, 195 P. 85; *Nicolds v. Storch*, 67 Cal.App.2d 8, 17, 18, 153 P.2d 561, and cases there cited.

[5] The court found the contract on sufficient evidence and that plaintiff fully performed his obligation thereon. It would, under the facts and circumstances of the case, be inequitable to allow the defendant, fully compensated under a fair agreement, to set up the bar of the statute of frauds.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

47 Cal.2d 55

In re John ALLEN and Louis F. Smith
on Habeas Corpus.

Cr. 5731.

Supreme Court of California.

In Bank.

Sept. 28, 1956.

Original habeas corpus proceeding by prisoners convicted of murdering fellow convict and violating statute making it a crime for a person serving a life sentence to assault another with a deadly weapon. A referee was appointed to hear evidence relating to prisoners' charges. The Supreme Court, Gibson, C. J., held that findings of referee that convictions were not obtained by perjured testimony although witness later repudiated his testimony given at trial, that confessions of guilt of other prisoners were not entitled to be believed, and that no evidence was suppressed by authorities, were sustained by evidence.

Petition denied.

1. Habeas Corpus ⇨90

Where reference is made by Supreme Court in habeas corpus proceeding, referee's findings of fact are not binding on the Supreme Court, but are entitled to great weight, since he had an opportunity to observe the demeanor of the witnesses when they testified.

2. Habeas Corpus ⇨85(1)

In habeas corpus proceeding to set aside conviction on ground that same was procured by perjured testimony, petitioners have burden of not only showing that they were convicted by perjured testimony, but also that prosecuting officials suffered testimony to be introduced knowing that it was perjured. West's Ann.Pen.Code, §§ 118, 125.

3. Habeas Corpus ⇨85(1)

In habeas corpus proceedings by prisoners convicted of murdering fellow convict and violating statute making it a crime for a person serving a life sentence to

assault another with a deadly weapon, evidence supported referee's findings that convictions were not obtained by perjured testimony although witness later repudiated his testimony at trial, that confessions of guilt by other prisoners were not entitled to be believed, and that authorities suppressed no evidence favorable to prisoners. West's Ann.Pen.Code, §§ 118, 125, 4500.

Valentine C. Hammack, San Francisco,
and Sidney Feinberg, San Francisco, for
appellants.

Edmund G. Brown, Atty. Gen., Clarence
A. Linn, Chief Asst. Atty. Gen., Arlo E.
Smith and William M. Bennett, Deputy
Attys. Gen., for respondent.

GIBSON, Chief Justice.

In 1950, petitioners Louis F. Smith and John Allen, inmates of Folsom prison, were convicted of murdering a fellow prisoner named Borton and of violating Penal Code section 4500, which makes it a crime for a person serving a life sentence to assault another with a deadly weapon. They were sentenced to death for each offense, and the judgments of conviction and orders denying a new trial were affirmed by this court. *People v. Smith*, 36 Cal.2d 444, 224 P.2d 719. Petitioners seek a writ of habeas corpus on the theory that they were denied due process of law.

The petition charges that a prisoner named Biersdorff testified falsely in response to promises of release made by Warden Heinze of Folsom Prison, that he was coached in his false testimony by a deputy district attorney, that as a result of deliberate fraud, or because of the persuasive influence, amounting to duress, of these officials, Biersdorff testified falsely at the trial in identifying petitioners, and that the jury, the court and defense attorneys were thereby misled into believing that petitioners had committed the assault. The petition also alleges that, because of false information given by Biersdorff, the state officials did not make a full investigation and failed to discover the actual

perpetrators of the assault, convicts Patterson and Mullen, who confessed to the crime after petitioners had been convicted.

An order to show cause was issued, and Honorable John P. McMurray, judge of the Superior Court of Inyo County, was appointed referee to hear evidence relating to petitioners' charges.¹ Hearings were held at which several witnesses, including petitioners, appeared and testified. Among the documents received in evidence were an affidavit by Biersdorff, the witness who assertedly committed perjury, and confessions by convicts Mullen and Patterson. It was stipulated that the referee might consider the transcripts and exhibits from the prior trial. On the basis of this record the referee made findings of fact to the effect that no witness who testified at the trial committed perjury, that, there being no perjury committed, no representative of the state suffered any testimony to be introduced knowing it was perjured and that no representative suppressed any evidence which would have been favorable to petitioners' defense.² Petitioners have excepted to these findings.

[1] While not binding on this court, the findings of fact made by the referee are entitled to great weight since he had an opportunity to observe the demeanor of

the witnesses when they testified. In *re De La Roi*, 27 Cal.2d 354, 364, 164 P.2d 10; In *re Mitchell*, 35 Cal.2d 849, 855, 221 P.2d 689. After a review of the record, we have concluded that the referee's decision is correct and that the evidence fully supports his findings.

A recital of some of the evidence in support of the judgment of conviction will make it easier to understand the evidence before the referee and to pass upon petitioners' contentions. The only eyewitness presented by the People at the trial was Biersdorff, who testified that, on the morning of October 11, 1949, he heard someone shout, "Help, they're killing me," and, looking in a window of the prison barber-shop, he saw petitioners attacking Borton. He said that Allen hit Borton on the head several times with a hatchet, knocking him down, and that, while Allen was striking Borton with a hatchet, Smith was stabbing him with a knife. Biersdorff backed away from the window and saw petitioners leave the barbershop and go to an area at the rear of the shop where there were facilities for washing. Borton then staggered out of the building with a knife in his back.

Prison officers testified at the trial that they examined petitioners shortly after the crime and found that Smith had

1. The questions submitted to the referee were:

1. Did any witness who testified against Louis Franklin Smith and John Allen in the trial which led to their conviction on the charges for which they were sentenced to death, commit perjury under sections 118 and 125 of the Penal Code of the State of California, that is, did any such witness willfully state as true any material matter which he knew to be false, or willfully make an unqualified statement of any material matter which he did not know to be true?

2. In the event that such witness or witnesses did commit perjury, did the representatives of the State of California, the district attorney, or any of his deputies or assistants, cause or suffer such testimony to be introduced knowing that such testimony as given was perjured?

3. Did the representatives of the State of California, the district attorney, or any of his deputies or assistants, deliberately, willfully, knowingly, or at all, suppress or

prevent the introduction of any evidence which, had it been given, would have been favorable to the defense of said Louis Franklin Smith and John Allen?

2. The referee made the following general findings of fact:

"(1) No witness who testified against Louis Franklin Smith and John Allen in the trial which led to their conviction on the charges for which they were sentenced to death committed perjury. * *

(2) That there being no perjury committed at the time of the trial, no representative of the State of California caused or suffered any testimony to be introduced, knowing that such testimony as given was perjured. (3) No representative of the State of California, the district attorney or any of his deputies * * suppressed or prevented the introduction of any evidence which, had it been given, would have been favorable to the defense of said Louis Franklin Smith and John Allen."

blood spots on his arm and Allen had a fresh cut on his hand. They had blood on their clothing of group A, which was Barton's blood type. A hatchet with blood on it was found in the barbershop, and a search revealed that a leg was missing from a low table in Smith's cell. A criminologist testified that in his opinion the hatchet handle was made from the missing leg, basing his conclusion on similarities between the handle and the remaining table legs as to length, paint layering and arrangement of mortices. The hatchet handle and the handle of the knife found in Barton's back were wrapped with the same kind of paper-backed Scotch masking tape and the torn ends matched, that is the outside end of the tape applied to the hatchet handle matched the inside end of the tape applied to the knife. There was also other evidence tending to connect petitioners with the crime.

Biersdorff's affidavit, which was executed after petitioners were convicted, was set forth as newly discovered evidence in connection with their motions for a new trial. He stated therein, "I want my testimony thrown out of Court. I was made a lot of promises that were never kept * * *. When Mr. McDonald³ [sic] came to the prison to question me, I was shown all of the pictures that were taken after William Barton [sic] was killed. At that time suggestions were made to me, concerning these pictures. Things that if I hadn't been shown I wouldn't of testified to in Court. * * * I did not want to testify because I told Mr. Heinze that I wasn't sure about the two men that I saw in the barber shop. He told me, 'them are the men including Fitzgerald.' Without the coaching I could not have positively identified Allen and Smith."

In our opinion in *People v. Smith*, 36 Cal.2d at page 449, 224 P.2d 719, we pointed out that Biersdorff did not state that on retrial he would retract any of his testimony, or that he did in fact testify falsely, or that any officer suggested to him that he

tell anything about the case that was not the truth.

At the referee's hearing, Biersdorff denied the truth of the material parts of the affidavit, repeated substantially the same testimony he gave at the trial and insisted that at no place in his affidavit did he state that his testimony had been untrue. He claimed that before, during and after the trial he was subjected to threats and physical abuse by his fellow prisoners and that he made the affidavit because he was in fear of his life.

Deputy District Attorney McDonell testified that after the trial Biersdorff complained that he was being intimidated and that he, McDonell, became concerned as to whether Biersdorff had told the truth about what had occurred at the time of the killing. McDonell said that he questioned Biersdorff at length but never discovered anything which appeared "to be a lie, as far as his testimony was concerned." At McDonell's request, Dr. Toler, a psychiatrist, examined Biersdorff for about three hours and Dr. Toler concluded that the "probabilities are that he is telling the truth." Before argument on the motion for a new trial, McDonell advised the district attorney, the defense attorneys and the trial judge of his concern as to whether Biersdorff had told the truth at the trial. As a result, the district attorney interviewed Biersdorff, stating that he was going to argue the motion for a new trial, that he wanted to be sure that Biersdorff's testimony was true and that, if there was any question as to its truth, he would so inform the court. He told Biersdorff that all he wanted was the truth and that he would not prosecute him for perjury. Biersdorff replied that he had told the absolute truth at the trial.

[2,3] The apprehensions of McDonell, of course, did not establish the existence of perjury, and after a review of the record we are convinced, as was the referee, that, while Biersdorff was somewhat unstable, there was a lack of substantial, credible

3. The reference is to Deputy District Attorney McDonell who tried the case.

evidence of perjury. But even if we were to assume, as petitioners contend, that Biersdorff did testify falsely, there has been a failure to prove sufficient facts to warrant relief in a habeas corpus proceeding. Petitioners have the burden of showing, not only that they were convicted by perjured testimony, but also that the prosecuting officials suffered the testimony to be introduced knowing that it was perjured. In *re Mitchell*, 35 Cal.2d 849, 856, 221 P.2d 689; In *re Lindley*, 29 Cal.2d 709, 722, 177 P.2d 918; In *re De La Roi*, 28 Cal.2d 264, 269, 169 P.2d 363; In *re Mooney*, 10 Cal.2d 1, 15, 73 P.2d 554. Here there is a complete lack of evidence that the prosecuting officials knew that the testimony was false. Their conduct, instead of indicating collusion on their part, clearly shows that they made every effort to determine if there was perjured testimony and were unable to find any.

The statements of Mullen and Patterson, in their affidavits which were made about eleven months after the murder and more than six months after the trial, may be summarized as follows: On the morning of October 11, 1949, in response to a request by Borton, they went to the barbershop where they had an argument with Borton over \$180. Borton threw a tool box at them and then pulled a hatchet from under a counter. Patterson "got the hatchet some way" and started whacking at Borton, and Mullen then stabbed Borton with a knife. In the midst of the attack, Smith and Allen entered the barbershop and got blood on their clothes while trying to separate the combatants. At no time did Smith or Allen strike a blow. After the fight, Patterson and Mullen went to the chaplain's office where they changed to clean clothes.

At the referee's hearing both Mullen and Patterson testified that their confessions were in all respects truthful, but their testimony does not warrant belief in the light of their prior statements and other evidence.

The "confessions" of Mullen and Patterson are in direct conflict with statements they made when they were questioned

by prison authorities on the day of the murder. At that time they both claimed to have been about 100 feet from the barbershop talking to fellow inmates when the killing took place.

When Patterson was interviewed by an investigator for the attorney general's office some months after his confession he said the knife was about 15 inches long with a curve on the end of it "like a butter knife" and that it was made by cutting a piece of metal from the blade of a shovel. Mullen testified that the knife had a long slender curved blade which was sharpened on one side. As a matter of fact, the knife was made of metal far thicker than a shovel and it did not turn up at the end but was a straight bayonet-shaped knife. Patterson testified at the hearing that he had been told the location of the knife and had relayed this information to Mullen, who dug the knife out of the middle of the yard at Folsom. Mullen told an investigator that he had had the knife for quite a while and in his statement to the associate warden at the time he made his confession he said he did not remember how he got it, but he testified at the hearing that he received the knife from another convict when he entered the barbershop and that he had not seen it before. When confronted with the statement he had made to the investigator he said "Well I probably had the knife the night before."

There was also inconsistency with reference to the hatchet used to strike Borton. Patterson stated in his confession that he took the hatchet from Borton who got it from under a counter in the barbershop. When interviewed by an investigator Patterson stated that he had made the handle from a leg of a table in Smith's cell and that he had the hatchet with him when he went into the barbershop. Later he told the investigator that he got the hatchet after he entered the shop, and at the referee's hearing he testified that he was unable to describe the hatchet because he had only had it in his possession for a few minutes.

The statements of Patterson and Mullen in their confessions, repeated in their tes-

timony at the hearing, that petitioners tried to break up the fight in the barbershop, are contrary to the testimony given by petitioners at the trial, not since repudiated, that they were in another part of the prison yard when the murder was committed and that they did not arrive at the scene until a crowd had gathered around Borton. If, as Mullen and Patterson testified, petitioners did not commit the crime but tried to break up the fight in the barbershop, they would have seen Mullen and Patterson committing the crime and they could and should have brought this out at their trial.

The referee was amply justified in finding that the confessions and testimony of Mullen and Patterson were not entitled to belief and that no evidence was suppressed by the authorities.

The order to show cause is discharged, and the petition is denied.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 97

Harley O. TEETS, as Warden of the State Prison at San Quentin, California, The People of the State of California, Petitioners,
v.

The SUPERIOR COURT of the State of California, In and for the COUNTY OF MARIN, The Honorable Carlos R. Freitas, Judge thereof, Respondents.

Lawrence Gene Dotson, the Real Party
In Interest.
S. F. 19537.

Supreme Court of California.
In Bank.
Oct. 5, 1956.

Proceedings on petition for writ of prohibition. The Supreme Court, Shenk, J., held that question as to whether habeas

corpus proceeding could be maintained by defendant whose appeal in criminal case was pending became moot upon determination of appeal in criminal action, and that accordingly prohibition proceeding in which such question was urged must be dismissed.

Prohibition proceeding dismissed.

Opinion, reported at 295 P.2d 140, vacated.

1. Prohibition ☞13

Question as to whether habeas corpus proceeding could be maintained by defendant whose appeal in criminal case was pending became moot upon determination of appeal in criminal action, and accordingly prohibition proceeding in which such question was urged would be dismissed.

2. Habeas Corpus ☞113(5)

Where contentions advanced by petitioner in habeas corpus have been determined adversely to him by Supreme Court on appeal from judgment of conviction in criminal case, order discharging such petitioner will be subject to appeal by people. West's Ann.Pen.Code, § 1506.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for petitioners.

No appearance for respondents.

Donald D. Connors, Jr., and J. Stewart Harrison, San Francisco, for real party in interest.

SHENK, Justice.

This is a petition by the Attorney General for a writ of prohibition to restrain the respondent Superior Court from entertaining a proceeding in habeas corpus sought by Lawrence Gene Dotson, the real party in interest, pending his appeal from a judgment of conviction of first degree murder, burglary and robbery.

The factual background and events resulting in Dotson's conviction are set forth in the opinion of this court in *People v.*

Dotson, 46 Cal.2d 891, 299 P.2d 875. As to the present proceeding in prohibition it appears that on October 27, 1955, while his appeal from the judgment of conviction in the criminal case was pending in the District Court of Appeal, Dotson filed a petition for the writ of habeas corpus in the Superior Court alleging that he was in the custody of Harley O. Teets, the warden of the state prison at San Quentin, and that his restraint was unlawful for numerous reasons. The Superior Court issued an order directing the warden to appear on January 20 and show cause if any he had why the writ of habeas corpus should not issue. On January 18 the Attorney General sought a writ of prohibition in the District Court of Appeal in which the appeal was then pending, and an alternative writ was issued staying further proceedings in the habeas corpus matter. The cause was transferred to this court after that court had ordered a peremptory writ. *Teets v. Superior Court*, Cal.App., 295 P.2d 140.

All of the contentions urged in the habeas corpus proceeding were assigned as grounds for reversal on the appeal in the criminal case and have now been decided adversely to the appellant therein who is the petitioner in the habeas corpus proceeding. The Attorney General contends that further proceedings on the petition in the Superior Court for the writ of habeas corpus should be stayed for the reason that such a proceeding may not be employed as an alternative to the pending appeal, and that such is the purpose of that proceeding. See *In re McIntruff*, 37 Cal.2d 876, 880, 236 P.2d 574; *In re Seeley*, 29 Cal.2d 294, 296, 176 P.2d 24; *In re Connor*, 16 Cal.2d 701, 108 P.2d 10; *France v. Superior Court*, 201 Cal. 122, 131, 255 P. 815, 52 A.L.R. 869; *In re Guitierrez*, 1 Cal.App.2d 281, 36 P.2d 712.

[1,2] It is obvious that the question raised by the Attorney General became moot upon the determination of the appeal by this court in the criminal action. It is also true that the contentions advanced by the petitioner in habeas corpus have been

determined by this court on the appeal from the judgment of conviction. It would therefore serve no useful purpose to continue the prosecution of either the habeas corpus proceeding or the proceeding in prohibition. However, if the trial court should assume, under these circumstances, to discharge the petitioner in the habeas corpus proceeding its order would be subject to appeal by the People as provided in section 1506 of the Penal Code.

The present proceeding in prohibition is dismissed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.



47 Cal.2d 112

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James REESE, Defendant and Appellant.

Cr. 5923.

Supreme Court of California,

In Bank.

Oct. 5, 1956.

Defendant was convicted of two murders of the first degree, three burglaries of the first degree, assault with intent to murder, and rape. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered judgment, and the case was brought to Supreme Court by automatic appeal from the judgment and order denying a new trial. The Supreme Court held, *inter alia*, that statement by district attorney in argument to jury that one sentenced to penitentiary for life becomes eligible for parole after seven years or, "perhaps, a couple of years more", and instruction that defendant, though given a life sentence, would be eligible for parole after serving a minimum term of nine

years did not have the effect of improperly bringing prior felony conviction of defendant to attention of jury.

Judgment and order affirmed.

1. Criminal Law Ⓒ1202(4)

Where defendant does not testify and admits prior conviction, it is improper to bring such prior conviction to the attention of jury. West's Ann.Pen.Code, § 1025.

2. Criminal Law Ⓒ1202(4)

In prosecution for first degree murder and other offenses, wherein defendant admitted prior felony conviction and did not testify, statement by district attorney in argument to jury that one sentenced to the penitentiary for life becomes eligible for parole after seven years or, "perhaps, a couple of years more", and instruction that, even though given a life sentence, defendant would become eligible for parole after serving a minimum term of nine years, did not have the effect of improperly bringing prior conviction to attention of jury. Pen.Code, §§ 1025, 3046.

3. Criminal Law Ⓒ1172(9)

Where defense counsel in prosecution for first degree murder and other offenses argued to jury that defendant would never be paroled if given a life sentence, instruction that, even though given a life sentence, defendant would be eligible for parole after serving minimum term of nine years, was not prejudicial to defendant, even if statute prescribing minimum term of sentence and imprisonment of ten years for a person previously convicted of a felony and armed with a deadly weapon was applicable, since under statute dealing with paroles he would be eligible for parole after expiration of one-third of such minimum term. West's Ann.Pen.Code, §§ 3020, 3024 and (e), 3040-3065, 3046, 3049.

4. Homicide Ⓒ174(2), 264

Relevant evidence of the condition of victim's body is admissible in prosecution for murder, though it may be gruesome and possibly inflammatory, and cumulative evidence on the subject may be proper.

5. Homicide Ⓒ264

In prosecution for first-degree murder, testimony of physicians and police officers that after death of victim her breasts had been amputated and abdomen cut from vagina to navel was admissible as relevant to intent, motive and circumstances of the killing, even though condition of victim's body was shown by photographs and other evidence.

6. Criminal Law Ⓒ1165(1)

Record on appeal from convictions for two murders of the first degree, three burglaries of the first degree, assault with intent to murder, and rape disclosed no error prejudicial to rights of defendant.

Edward T. Mancuso, Public Defender, and Robert Nicco, Deputy Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

Thomas C. Lynch, Dist. Atty., and Cecil F. Poole, Asst. Dist. Atty., San Francisco, amici curiae on behalf of respondent.

PER CURIAM.

Defendant was indicted on seven counts for the murder of Georgia Barrett, on December 26, 1955, and of Elizabeth Simpson on December 28, 1955, assault with intent to murder Betty Luke on December 26, 1955, burglary of Luke's apartment, Barrett's apartment and Simpson's apartment, and the rape of Elizabeth Simpson on December 28, 1955. By amendment he was also charged with a prior felony conviction, which he admitted. He pleaded not guilty and not guilty by reason of insanity to the seven counts and the jury found him sane and guilty on all counts, specifying the murders and burglaries as of first degree and making no recommendation as to the penalty for the murders. Judgment was accordingly entered imposing the death penalties for each of the murders and that prescribed by law for the other counts. The case is here by auto-

matic appeal from the judgment and order denying a motion for a new trial. No contention is made that the evidence does not support the judgment. Defendant did not testify.

The evidence shows that about midnight on December 25, 1955, an intruder entered Mrs. Luke's apartment at 950 Eddy Street in San Francisco. A struggle ensued and the intruder demanded, "Your money or your life." Mrs. Luke was hit on the head with a chair and cut with a knife. The intruder fled. His general description fit that of defendant and the latter left a button from his coat on the floor. The intruder took a knife from the Luke's kitchen. Blood of the type of Mrs. Luke's and defendant's was found in the apartment.

On December 26, 1955, at about 6:00 a. m., a short distance from the Luke's place, Georgia Barrett was slain by a stab in the neck causing her to bleed to death. Before she died, Georgia gave a description of her assailant which was generally that of defendant. In her room was a great deal of blood and the knife that had been taken from the Luke's apartment. Defendant's clothes had blood on them of the type of Georgia's.

About 2:30 a. m. on December 28, 1955, defendant returned to his room at an apartment building at 1230 O'Farrell Street, which was on the same floor as that on which Elizabeth Simpson, a 13-year-old girl, lived with her mother. Elizabeth's mother awakened and finding Elizabeth gone from her bed and blood on the bed, notified the police who, when they came, roused all the tenants but could get no response at defendant's room. They forced an entrance, defendant having

pushed a refrigerator against the door, and there found Elizabeth's body. A knife was lying on top of it. Defendant had fled through his window and down the fire escape when he saw the police cars in the street. A short time later he was arrested at the Pacific Greyhound bus depot where he told the police, in reply to why he did it, that he guessed it was the wine; it made him crazy. Elizabeth died from stab wounds in her neck. There was spermatozoa in her vagina. Her body was mutilated in that her breasts were amputated and abdomen slashed. Defendant's ring was found in Elizabeth's room and a trail of blood ran from there to defendant's room.

Defendant contends that he was deprived of a fair trial in violation of his constitutional rights to not testify because his prior conviction of a felony was improperly brought to the jury's attention. He asserts that he was entitled to desist from taking the witness stand; that inasmuch as he admitted the prior conviction and did not testify, there was no basis for injecting the prior conviction into the trial and that he was prejudiced by its presentation to the jury. He cites section 1025 of the Penal Code¹ and *People v. Beal*, 108 Cal.App.2d 200, 239 P.2d 84, and *People v. Cordero*, 92 Cal.App.2d 196, 206 P.2d 665.

[1,2] Inasmuch as defendant did not testify and admitted the prior conviction, it was not proper to bring it to the attention of the jury, but defendant has not established such a situation here. He did admit the prior conviction and did not testify, nor was there any attempt to compel him to testify. He refers to the district attorney's argument to the jury,² and the instruction offered by the prosecution

1. "In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

2. The district attorney stated: "Do you say 'Send him over to the penitentiary with a life sentence?' Ladies and gentlemen, a life sentence in California is not a

life sentence. A man who goes to the penitentiary with a natural life sentence in California, becomes eligible for parole after a period of seven years, or, in some cases, perhaps, a couple of years more. We have men on the streets now who have been in San Quentin for life, and are walking the streets again. Pray God that none of them ever repeats the crime, but it has happened in these courts

and given to the jury,³ and the fact that the jury had been sitting as such in other cases (what kind does not appear) and had had experience. From these things he argues that the jury was in effect told that defendant had suffered a prior conviction, otherwise there would be no occasion to the reference to seven years by the district attorney and nine years in the instruction.

We do not so interpret the record. Nothing was said about a prior conviction and to give defendant's argument force would require the jury to know more law than is to be supposed. It is too remote a possibility that the jury would infer that defendant suffered a prior conviction from the circumstances that they were told of the possibility of parole involved in a life sentence. Defendant agrees that it is proper for the jury to be advised of the possibility of parole in a life sentence where the punishment, life imprisonment or death, is left to the jury. We said in *People v. Barclay*, 40 Cal.2d 146, 158, 252 P.2d 321, 327: "[T]he jury is not allowed to weigh the possibility of parole or pardon *in determining the guilt of the defendant*, and it is therefore error to give an instruction that allows the jury to take into consideration the consequences of a recommendation of life imprisonment in arriving at that determination. * * * To aid the jury in fixing the punishment of the defendant, however, the court may instruct the jury as to the consequences of the different pen-

alties that may be imposed so that an intelligent decision may be made. *People v. Chessman*, 38 Cal.2d 166, 189-190, 238 P.2d 1001; *People v. Osborn*, 37 Cal.2d 380, 384-385, 231 P.2d 850; *People v. Caetano*, 29 Cal.2d 616, 619, 177 P.2d 1; *People v. La Verne*, 212 Cal. 29, 31, 297 P. 561; *People v. Hall*, 199 Cal. 451, 459, 249 P. 859; *People v. Hong Ah Duck*, 61 Cal. 387, 393. In the *Osborn* case, the court informed the jury that a recommendation of life imprisonment without possibility of parole would not be binding, thus impliedly answering in the affirmative the question of the jury whether a person sentenced to life imprisonment might be paroled. We stated: 'It is understandable that jurors, who are charged with the duty of fixing the penalty in the event that they find a defendant guilty of first degree murder, should be interested in knowing the nature and effect of the penalties which they may impose; and neither reason nor authority indicates that the trial court should be prohibited from enlightening the jurors when questions are asked upon that subject.' 37 Cal.2d at page 385, 231 P.2d [850] at page 853. Recently, in *People v. Chessman*, supra, it was held that there was no error in informing a jury that when a person is sentenced to life imprisonment without possibility of parole there nevertheless remains the chance that the defendant will be freed by pardon, commutation, or action of the Legislature. The recent decisions of this court thus establish that a jury may

within the last two years, that the same thing has happened. * * *" (Emphasis added.)

3. "If, however, after deliberation and consideration of all the evidence as viewed in the light of the Court's instructions, and if, without considering penalty or punishment, you do find the defendant guilty of murder in the first degree, you must then determine which of the two penalties—death or confinement in the State Prison—shall be imposed by you. In this respect, and without in any way attempting to influence your determination of the punishment, it is proper for you to know that *even though the defendant should be sentenced to confinement in*

the State Prison for life, he will become, under our law, eligible to go on parole outside the prison walls and enclosures when he shall have served a minimum term of nine years. Although a jury may fix the punishment as confinement in the State Prison for life, the legal effect is not necessarily that the prisoner will not become eligible for parole. Whether or not a parole is granted to him is within the discretion of the Board known as the Adult Authority, which meets regularly to determine and re-determine what length of time such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State." (Emphasis added.)

consider the consequences of a recommendation of life imprisonment in determining the punishment of the defendant, although it may not consider the possible penalties in determining the guilt of the defendant." (Emphasis added.) See, also, *People v. Byrd*, 42 Cal.2d 200, 266 P.2d 505.

In this same connection defendant urges that the prosecution intended to bring the prior conviction to the jury's attention in that the jury instruction heretofore quoted as offered by the prosecution contained the words "seven years" or, in the case of one who has been convicted of a felony, perhaps a longer period. The instruction was given as heretofore quoted, however, and we fail to see how the prosecution's intention is important.

[3] As a further attack on the quoted instruction defendant claims that the time would be at least 10 years instead of the nine years under section 3024⁴ of the Penal

Code. The prosecution cited sections 3020, 3040 and 3046 of the Penal Code as authority for the instruction. Section 3046 provides: "No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years. The board shall, in considering a parole for such prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.1, or in response to notices given under Sections 3022 and 3042, and recommendations of other persons interested in the granting or denying of such parole. The board shall enter on its order granting or denying parole to such prisoners, the fact that such statements and recommendations have been considered by the board. Such statements and recommendations shall, however, be and remain confidential." The prosecution claims that section 3024, *supra*, is not applicable because under paragraph (e) there-

4. "The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence:

"(a) For a person previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years;

"(b) For a person previously convicted of a felony either in this State or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, 10 years;

"(c) For a person previously convicted of a felony either in this State or elsewhere, but not armed with a deadly weapon at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years;

"(d) For a person convicted at one trial of more than one felony, and upon whom are imposed cumulative or consecutive sentences the aggregate of the minimum terms of which exceed 10 years, 10 years;

"(e) Such minimum penalties shall apply only when such possession of a deadly weapon or previous conviction of a felony as above specified has been charged and admitted or found to be true in the manner provided by law and the minimum

terms specified in paragraphs (a) and (b) shall not apply in those cases wherein the property stolen or sought to be stolen is an animal or animals and the manner in which such property is taken or attempted to be taken constitutes the crime of theft and the weapon used during the commission thereof is not used or intended to be used against a person or to resist arrest.

"(f) The words 'deadly weapon' as used in this section are hereby defined to include any instrument or weapon of the kind commonly known as a blackjack, slung shot, billy, sandclub, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than five inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club.

"(g) For the purpose of determining whether or not a conviction for a public offense in another jurisdiction is a previous felony conviction under this section, the word 'felony' is defined as a public offense which, if committed in this State, could have been punished as a felony under the laws of this State. Where such an offense is punishable in this State either as a felony or as a misdemeanor, it may be deemed a felony for the purposes of this section." Pen. Code, § 3024.

of there must have been a charge that defendant was armed with a deadly weapon and such charge must be found true, and no such charge was made here. They also urge that section 3046 is controlling as it specially deals with parole of one imprisoned for life. This last argument appears meritorious for section 3024 is in a portion of the Penal Code dealing with the length of sentences and the fixing thereof while section 3046 is in the group of sections dealing with paroles. The latter group of sections covers all situations in regard to when and how parole may be granted. Pen.Code, §§ 3040-3065. In that group appears section 3049 providing: "In all other cases not heretofore provided for, no prisoner may be paroled until he has served the minimum term of imprisonment provided by law for the offense of which he was convicted * * * provided, that any prisoner, received on or after January 1, 1948, at any state prison or institution under the jurisdiction of the Director of Corrections, whose minimum term of imprisonment is more than one year, may be paroled at any time after the expiration of one-third of the minimum term. In all other cases he may be paroled at any time after he has served the minimum term prescribed by law." Thus even if section 3024 applies, parole may be granted after one-third of the minimum term in section 3024 has expired. Moreover the matter of one or two years is not of such importance as to prejudice defendant. The main thing is that he would have been subject to parole in the event of a life sentence and defendant had argued to the jury that defendant would never be paroled if he were given a life rather than a death sentence.

Defendant claims that evidence of the mutilation of the body of Elizabeth Simpson was given which served to inflame the jury. He points to the testimony of Drs. Warrens, Turkel and Moon and police officers Nelder and Higgins that her breasts were amputated and abdomen cut from the vagina to the navel. This was done after Miss Simpson was dead from a stab wound in the neck. Defendant objected to this

testimony but in other instances it was admitted without objection by him, which may be explained by the clear indication by the court that it would not sustain his objection. His main complaint is that photographs and other evidence showed the condition of Miss Simpson's body and the additional evidence adverted to by him served no purpose except to inflame the jury.

It is said in *People v. Burns*, 109 Cal. App.2d 524, 541, 241 P.2d 308, 319, 242 P.2d 9, cited by defendant: "In California it has been held that photographs of this kind are admissible even though they show marks of the incisions for the autopsy, *People v. Gomez*, 209 Cal. 296, 286 P. 998, and even though they might inflame the minds of the jurors against the defendant. *People v. Burkhardt*, 211 Cal. 726, 297 P. 11. However, in every case in which they were admitted, with the possible exception of the *Burkhardt* case, *supra*, where the evidence points positively and unmistakably to the defendant as the perpetrator of the homicide', 211 Cal. at page 730, 297 P. [11] at page 13, there was some necessity for exhibiting the wound or wounds to the jury. In *People v. Elmore*, 167 Cal. 205, 212, 138 P. 989, the court pointed out that photographs should not be offered or admitted for any purpose other than to help the jury. The admission of photographs of this type is within the sound discretion of the trial court. Surely, there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors. That line was crossed in this case." But in that case the photographs were particularly horrible because of the incisions by the autopsy physician rather than that caused by defendant.

[4, 5] Relevant evidence of the condition of deceased's body is admissible although it may be gruesome and possibly inflammatory. *People v. Isby*, 30 Cal.2d 879, 186 P.2d 405; *People v. Guldbrandsen*, 35 Cal.2d 514, 218 P.2d 977; *People v.*

Dunn, 29 Cal.2d 654, 177 P.2d 553; People v. Burwell, 44 Cal.2d 16, 279 P.2d 744; People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53; People v. Sutic, 41 Cal.2d 483, 261 P.2d 241. And cumulative evidence on the subject may be proper, People v. Dunn, supra, 29 Cal.2d 654, 659, 177 P.2d 553; People v. Reed, 38 Cal.2d 423, 240 P.2d 590. Here the evidence was clearly relevant to intent, motive and the circumstances of the killing and we cannot say that it added appreciably to the other evidence to the same effect.

[6] We have examined the entire record in this case. It discloses a career of crime almost unparalleled in the history of this state. It also discloses that defendant was accorded a fair and impartial trial before a jury presided over by an able and experienced trial judge. He was ably defended by the public defender who was zealous in seeking to protect and safeguard all of defendant's rights. We find no error prejudicial to the rights of the defendant. The evidence of guilt of each and all of the crimes charged is overwhelming.

The judgment and order denying a new trial are affirmed.



144 Cal.App.2d 750

The PEOPLE of the State of California,
Plaintiff and Appellant,
v.

Maurice E. TICE, Defendant and
Respondent.

Cr. 1210.

District Court of Appeal, Fourth District,
California.

Sept. 28, 1956.

Hearing Denied Oct. 24, 1956.

Prosecution of defendant, marshal of judicial district, for wilful misconduct in office. Following a jury verdict of guilty

on certain specifications, the Superior Court of Kern County, Charles E. Blackstock, J., entered order granting defendant a new trial, and State appealed. The District Court of Appeal, Burch, J., pro tem., held that under evidence showing that bookkeeping function of office was almost entirely handled by employee, there was enough to indicate reasonable doubt of defendant's guilt in connection with issuance of checks without sufficient funds to make the granting of a new trial within the discretion of the trial court.

Affirmed.

1. Officers ⇐121

Phrase "misconduct in office" is broad enough to include any wilful malfeasance, misfeasance or nonfeasance in office.

See publication Words and Phrases, for other judicial constructions and definitions of "Misconduct in Office".

2. Officers ⇐66

The misconduct for which a public officer may be removed from office on accusation by a grand jury may be either wilful or corrupt, and in this connection, "wilfully" implies simply a purpose of willingness to commit the act or make the omission referred to and does not require an intent to violate law, injure another or to acquire any advantage.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilfully".

3. Criminal Law ⇐935(1)

In determining sufficiency of evidence on a motion for new trial, trial judge is not bound by rules as to conflicts in evidence but may disregard such evidence as he believes to be untrue and draw inferences therefrom at variance from those drawn by the jury.

4. Criminal Law ⇐935(1)

Rule that court will not disturb findings based on conflicting evidence applies only to the appellate court and has no application to a judge in passing on a motion for new trial.

5. Criminal Law §935(1)

Where defendant in criminal case moves for a new trial, he is entitled to a decision on the evidence by the trial court even though the jury has brought in a verdict against him.

6. Criminal Law §935(1)

In prosecution of marshal of judicial district for misconduct in office, under evidence showing that bookkeeping function of office was almost entirely handled by an employee, there was enough to indicate reasonable doubt of marshal's guilt in connection with issuance of checks without sufficient funds so that granting of a new trial was within discretion of trial court.

7. Criminal Law §1156(1)

Where it is within the discretion of the trial court to grant a motion for new trial, appellate court may not overrule that discretion.

Joe Wooldridge, Dist. Atty., of Kern County, and Marvin E. Ferguson, Asst. Dist. Atty., Bakersfield, for appellant.

W. C. Dorris, of Dorris, Fleharty, Phillips & Underhill, Bakersfield, for respondent.

BURCH, Justice pro tem.

This is an appeal by the people from an order granting a motion for a new trial following a trial in which the jury found defendant guilty of misconduct in office. The defendant is the Marshal of the Kern County Bakersfield Judicial District, an office which he has occupied since the institution of that Judicial District in 1952.

On November 17, 1955, an accusation was presented by the Kern County Grand Jury accusing the defendant of twenty-one specifications of wilful misconduct in office as Marshal of the Municipal Court in said district. Eight of the twenty-one specifications were dismissed on motion before trial. After the jury returned a verdict of guilty on specifications 3 to 7 inclusive the remainder of the twenty-one were dismissed by the court.

The five specifications upon which the jury found the defendant guilty alleged that on the several dates of March 29, March 30, April 1, April 5 and April 7, respectively, the defendant issued checks upon a bank deposit of public funds under his official control as Marshal, which checks were drawn upon insufficient funds.

The defendant moved for a new trial alleging that the verdicts were contrary to the law and the evidence, and that the trial judge erred in admitting evidence of conduct that occurred in a term of office prior to the term he was serving when charged with misconduct. The motion was granted on both grounds.

Defendant's office was administered by him with an assistant and deputy marshals providing bailiff service for the Municipal Court and the service and execution of legal process. With respect to the latter function the defendant was provided receipt forms furnished by the County.

Defendant's records and accounts, including funds on hand in the office, on deposit in banks authorized to receive county funds, and deposits made into the County Treasury were audited annually and no irregularities thereby were shown in evidence. The latest audit of that character was in January, 1955. A special audit thereafter revealed the overdrafts involved here. The defendant had deposited moneys in his control in a bank as a depository of public funds, subject to remittance monthly to the County Treasury. It was proved that on the dates of March 29th and 30th, and April 1st, 5th and 7th, the bank funds on deposit were insufficient to meet checks drawn thereon on those dates. The fact that checks were issued and outstanding with insufficient funds in the depository went to the jury as a stipulated fact binding upon the defendant.

The question on appeal is whether this fact, supported by evidence that the defendant was informed of the failure of his office, on other occasions, to correctly and lawfully handle the public moneys in his charge, made the granting of a new trial

by the trial judge an abuse of judicial discretion. The record discloses that the public moneys in defendant's charge were handled with something less than the care which would protect their unwarranted and unlawful uses by office personnel who might prove untrustworthy. There was, for instance, evidence that money received was sometimes kept in a cash box, in desks, files and envelopes, and that checks were found which were delayed in deposit. At times checks were drawn but not delivered.

Defendant testified in his own behalf, stating the nature of his work as Marshal, in general, and the administrative methods he employed in his office, including the duties assigned to office personnel, process servers and bailiffs under the control of the Marshal and Assistant Marshal. He was questioned about the bookkeeping system, and said:

"Mr. Mansfield was the administrator for the County of Kern at that time, and he came in and assisted us in ordering all types of forms and systems * * * he was over there from the time we opened * * * maybe most of the whole month * *. He instructed me and Miss Camp at that time was in the office—taking care of the office, the money and systems to be carried out, and he instructed her and I together."

He testified that Miss Camp had worked for defendant since 1947, when he was a constable in Bakersfield. Defendant and Miss Camp were instructed as to funds by Mr. Mansfield.

"Well, when we went out and brought in any money * * * for services * * * or money that belonged to the plaintiffs * * * or attorneys on executions or attachments, we didn't always get the money on attachments because the employer or the bank held that money until the execution, but whenever we did get the money, it was put in our checking account which was opened up, and en-

dorsed by him in the Anglo Bank; and then it was checked out what money was to be paid over to the County that was held pending a judgment, called trust money, and then at the end of the month all the County fees were made up and the amount reached and a check issued from that account to the County Treasurer; and any individual that had any money coming on execution * * *. That was the instructions given to Miss Camp in the office."

He said Miss Camp had been his trusted employee handling the funds when he was a constable, and had theretofore proved trustworthy.

"Q. Now who had charge of the money after you were Marshal? A. Well, Miss Camp had charge of all of the making out of the papers and all the banking and all the issues of checks * * * under my instructions that was her duty."

"Now did you ever know that Miss Camp was not following out your instruction? I did not * * * Miss Camp was given the power to sign the checks by me."

"Q. And did you ever sign any checks? I believe during the whole course of time I might have signed a half dozen * * * that would only be in her absence. * * *"

"My office was audited once a year and as late as January, 1955. * * * No complaints was ever made to me by the auditors that anything was wrong in my office."

The attorney for the people makes the point that the defendant knew or should have known of the stipulated overdrafts of specifications 2 to 7 inclusive. The following testimony of defendant bears upon the point:

"Miss Campbell from the County Counsel's office was little anxious sometimes to get her papers back, and the girls were piled up with quite a bit of work; * * * she called up

and wanted to know why she couldn't get her papers back, and I told her that I would see to it that she got them back in a short time, and I did; and they were sent back. That's the only time that I had ever had any complaint, and I did find that they were overstacked with work, and there were other papers to get out before hers that came in * * *.

"Did anybody ever complain to you any time about any shortage? They did not."

All the checks were honored by the bank, without informing defendant of the overdraft.

If, as appears to us, we have extracted from almost a thousand pages of transcript, enough to indicate a reasonable doubt of guilt projected upon the trained mind of the trial judge, it is unnecessary to lengthen the statement of the evidence.

[1-4] It is true the phrase "misconduct in office" is broad enough to include any wilful malfeasance, misfeasance or nonfeasance in office. As pointed out in *People v. Elliott*, 115 Cal.App.2d 410, 252 P.2d 661, 666, misconduct for which a public officer may be removed from office on accusation by a Grand Jury may be either wilful or corrupt. "Wilfully", in this connection, "implies simply a purpose of willingness to commit the act, or make the omission referred to. It does not require an intent to violate law, or to injure another, or to acquire any advantage." However, "knowingly" requires "knowledge that the facts exist which constitute the transgression." See *People v. Elliott*, supra, 115 Cal.App.2d at page 419, 252 P.2d at page 667.

"It is elementary that, in determining the sufficiency of the evidence on a motion for a new trial, the trial judge is not bound by the rule as to conflicts in the evidence. He may disregard such evidence as he believes to be untrue and may draw inferences therefrom at variance from those

drawn by the jury. The rule that the court will not disturb findings based on conflicting evidence applies only to the appellate court. It has no application to a trial judge in passing on a motion for a new trial. *People v. Harband*, 99 Cal.App. 32, 277 P. 1102." *People v. Megladdery*, 40 Cal. App.2d 748, 768, 106 P.2d 84, 95.

An extensive quotation from *People v. Canfield*, 173 Cal. 309, 311, 159 P. 1046, set out in the *Megladdery* opinion, 40 Cal. App.2d at pages 768-769, 106 P.2d at pages 94-95, spells out the sharp line of distinction between the duties of the trial and reviewing courts in cases of this character.

[5] The defendant is entitled to a decision on the evidence by the trial court even though the jury has brought in a verdict against him.

"While the solemn verdict of a jury should not lightly be vacated the responsibility nevertheless rests with the court again to review the cause and only after such review to decide the application for a new trial. *Olinger v. Pacific Greyhound Lines*, 7 Cal.App. 2d 484 [46 P.2d 774]." *People v. Megladdery*, supra, 40 Cal.App.2d at page 770, 106 P.2d at page 96.

[6,7] In the instant case the stipulated overdrafts are not conclusive of wilful misconduct in office on the part of the Marshal. The specifications charged the defendant "did wilfully and unlawfully know or should have known" of the several overdrafts. Upon the record there is ample reason to support the conclusion by the trial court that defendant did not know of the irregularities, and beyond that his failure of awareness might impress the court as more a mistake of judgment than a purposeful disregard of the care and diligence which would have avoided the overdrafts. If this be true and the trial court so believed it was his duty under the authorities above cited to grant the motion for a new trial. "That is a matter solely within his power. This court is not per-

mitted to overrule that discretion." People v. Megladdery, supra, 40 Cal.App.2d at page 785, 106 P.2d at page 103.

The order appealed from is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.



144 Cal.App.2d 830

Lois HINES et al., Plaintiffs, Cross-Defendants and Appellants,

v.

Joseph H. HUBBLE et al., Defendants, Cross-Complainants and Respondents.

Civ. 5431.

District Court of Appeal, Fourth District, California.

Oct. 5, 1956.

Action to quiet title to mining claims. The Superior Court, San Diego County, William A. Glen, J., entered judgment adverse to all but one of the plaintiffs and plaintiffs adversely affected appealed. The District Court of Appeal, Griffin, J., held that although plaintiffs had not signed a lease which had been signed by defendants as lessors and under which plaintiffs had gone into possession of mining claims, plaintiffs were estopped from claiming mining claims in their own name.

Affirmed.

1. Mines and Minerals ☞38(15)

In action to quiet title to mining claims, evidence was sufficient to show that lease which was signed by defendants as lessors but which was not signed by plaintiffs was in effect and that plaintiffs were in possession under such lease during time plaintiffs attempted to establish their own title by filing their own location notices.

2. Frauds, Statute of ☞129(4)

Mines and Minerals ☞38(15)

Although plaintiffs in action to quiet title to mining claims had not signed lease which had been signed by defendants as lessors and under which plaintiffs had gone into possession of mining claims, such lease was binding on plaintiffs and was admissible in evidence. West's Ann.Civ.Code, § 1624.

3. Mines and Minerals ☞60

Although plaintiffs in action to quiet title to mining claims had not signed lease which had been signed by defendants as lessors and under which plaintiffs had gone into possession of mining claims, plaintiffs were estopped from claiming mining claims in their own name.

4. Mines and Minerals ☞38(2, 14)

In action to quiet title to mining claims, burden rested upon plaintiffs to show that their title was superior to that of defendants and plaintiffs must recover upon strength of their own title and not upon weakness of defendants' title.

Sankary, Sankary & Weathers, by Morris Sankary, San Diego, for appellants.

Linley & Doerr, by F. Joseph Doerr, El Cajon, for respondents.

GRIFFIN, Justice.

Plaintiffs Lois Hines, individually and as administratrix of the estate of Kenneth J. Hines, deceased, Fred Wuertz, Pauline Wuertz, and Mina I. Johnson brought this action against defendant Joseph H. Hubble, Lucille Hubble, Chemical Plant Food Corporation, et al., for declaratory relief, to quiet title to certain mining claims in Jacumba Mining District in San Diego County, known as Vermiculite No. 1, No. 2, No. 3, No. 4A, and 5A, alleging that the Hines were owners in common and of record, and were in possession of said claims for a long time; that they and the Wuertzs were such owners in common of the Vermiculite No. 4 claim; that plaintiff Mina I. Johnson was such owner of

Ceresite-Muscovite No. 2 claim, and that all of them had performed all the acts as required under the Public Resources Code of the State of California and the Federal Laws to perfect their claims to said mining locations; that defendants claim some estate or interest in them adverse to plaintiffs. Judgment is sought declaring their respective rights.

Defendants, by way of answer, deny plaintiffs' claims and by way of cross-complaint allege that they own certain designated claims in that district described as Mountain View No. 1, No. 2, Center View, Center View No. 2, End View, End View No. 2, Poodle Dog, and Terminal, covering the same property and described as "Circle Group" claims; that defendants are the owners thereof; that on June 3, 1952, defendant Hubble, Dan Nolan, L. E. Watt and F. S. Kearney signed and executed a mining lease of said property to Wilbur C. Kinney and Kenneth J. Hines for a period of 20 years beginning June 3, 1952, but that said lease was abandoned by the lessees about December, 1952; that Nolan, Watt and Kearney have no interest in said property; that the interest of Nolan and Kearney terminated by virtue of their failure to contribute the labor and improvement from 1942 to 1954, which was necessary to hold said claims; that notice of forfeiture under section 2324 of the Revised Statutes of the United States, 30 U.S.C.A. § 28, was served on them on August 6, 1954; that L. E. Watt never had an interest in said mine; that Kinney claims no interest in said lease; that plaintiffs refused to quitclaim the interest of Hines in said mines covered by said lease; that on March 10, 1955, defendants demanded such a deed, and that the claims of the plaintiffs are frivolous. Judgment is sought against plaintiffs for damages for failure of plaintiffs to execute such a deed. Defendants ask for judgment quieting their title to such claims. The trial court found that plaintiff Mina I. Johnson's title to the claim should be quieted against defendants but found in favor of defendants against

the claimed title of the other plaintiffs to the property alleged. The latter appealed from the portion of the judgment denying them relief under their complaint. They also claim that the order denying their motion to vacate that portion of the judgment and to grant them a new trial should be reversed.

The record comes to us on a settled statement of facts. Between 1938 and 1943, Hubble, Nolan and others filed lode mining claims upon the lands which are the subject of this controversy. About June, 1952, Kenneth J. Hines, now deceased, sought out Hubble and expressed an interest in leasing certain of the claims which Hubble and his associates had filed on, for the purpose of mining them. Conversations ensued between Hines and the prospective lessors, Hubble, Nolan, Watt and Kearney. On June 3, 1952, a document was drawn by the prospective lessors entitled "Mine Lease", describing the subject claims and setting forth a lease for 20 years with certain considerations going to the lessors. The lessees named were Kenneth J. Hines and one Wilbur C. Kinney. This document was signed by Hubble, Nolan, Watt and Kearney, as lessors. It was never signed by Hines nor Kinney. Hines and Kinney went upon the ground and started exploratory and development work. A controversy came up afterwards as to the validity of the lessors' ownership or right in the subject claims. Nolan and Kearney testified that after going upon the ground Hines had gone to the Hubble group and stated to them that he had come to the conclusion that their claims were not good in that they required discovery work, and annual labor had never been done upon the claims; that he was not willing to sign a lease to the claims as he did not believe that they had the right to lease them; that he regarded the ground as open for location and he proposed that he and the Hubble group cooperate in relocating and proving the claims; that if they would not agree to such proposal he proposed to locate the claims in his own name.

Nolan, a co-locator with Hubble as to three of the six subject claims, testified that he had been one of the parties along with Hubble and others, in locating the said three claims during the years 1938 to 1943; that he had difficulty in remembering but as to work done "we made a cut on the top of a hill, probably six feet deep * * * we were just prospecting"; that the work done by Hines was the first work he had seen done upon the ground; and that he did not know what Hubble had done. Nolan further testified that he had participated in the leasing discussion between Hines and Hubble; that Hines came to him and told him that he did not believe their claims upon the ground were good for lack of the necessary discovery and assessment work; that he (Hines) would not sign a lease to the claims for that reason; that he believed the ground to be open for location; that he (Hines) would cooperate with Hubble, Nolan, et al., in relocating the claims, and if not, he planned to file upon the claims in his own right; that following this conversation with Hines he gave to Hines his quitclaim deed to his rights in the claims in return for Hines' promise to associate him in the Hines' development of the claims. Kearney, one of the lessors, testified in the same vein as Nolan.

Plaintiffs offered evidence that Hines, between September 22, 1952, and April 30, 1954, filed the six claims upon which plaintiffs' appeal is based; that during this time he was actively working upon the ground and had expended considerable money in development work; that during this same period of time Mina I. Johnson, who does not appeal, filed her claim upon the ground adjoining the Hines claims which, in its entirety, overlays a portion of the ground claimed by the Hubble group under one or more of the six claims alleged. Plaintiffs offered their proof of discovery, location and assessment work. The Wuertzs acquired their interest in the claims by way of conveyance from the plaintiffs Hines. Plaintiffs offered evidence that they had

remained in peaceful possession of the subject claims from the dates of their filings until June 1, 1954, at which time Hubble served upon them his notice that they vacate said claims immediately.

By way of defense, Hubble sought to show that Kenneth J. Hines had gone into possession of the claims which Hines and Wuertz now claim, under a lease from Joseph H. Hubble, et al., and that therefore plaintiffs were estopped to prove their title under the familiar rule that a tenant is estopped to deny the title of his landlord, and by the familiar rule that a person who knows that a mining claim is in the possession of another, and that it has been located by him, cannot, in good faith, make a claim of location thereon. Defendants offered in evidence the written document of lease, previously described, which had been drawn up and signed by the parties indicated, excepting the signatures of the Hines and Kinney.

Plaintiffs objected to the reception of this document in evidence, relying on the Statute of Frauds, Civ.Code, Sec. 1624. It was received in evidence and the court held that the lease was taken out of the Statute of Frauds by part performance on the part of plaintiffs, i. e., Hines and Kinney going into possession of the ground plus payments made by Kinney to Hubble which are hereafter described; and that it also bore on the question of good faith of the plaintiffs.

Hubble testified in some detail that the discovery and location work had been done on the ground as to each of the claims in dispute; that he had recorded the necessary notices of proof of annual labor and that annual labor had been performed upon some portion of the claims in each required year in an amount that would suffice to preserve his rights in all of the claims; that the claims were grouped for the purpose of annual labor and that much of the work was in the construction of roads of access to the claims; that Hines did not ever state to him that he would not sign

the lease nor that he did not believe that the Hubble group had a valid claim to the ground nor that he considered the ground open for location nor that he proposed an association of all the parties in relocating and developing the claims nor that, if the group could not work together he (Hines) planned to file upon the claims in his own right, until after he had, in fact, filed on said claims; and that the persons, other than himself, named in the lease agreement, were so named only as promoters.

Kinney testified that he and Hines had an oral agreement that they would work the subject ground as equal partners under the purported lease; that he did not participate in any discussion of leasing with the lessors; that he was never asked to sign the lease but had had it in his possession "until recently" and believed it had been delivered to him by Mr. Hines; that he first went upon the ground within a month of June 3, 1952 (the date of the instrument); that he was, at various times, working upon the ground during the period between the latter part of June and sometime in September, 1952; that he had from one to three men working there at different times; that under the rental agreement he and Hines were to pay either one hundred or two hundred dollars per month; that he paid that amount of rental himself "for a couple of months" and that Hines was to reimburse him as to one-half of the rent, but that Hines never did; that later the rent was reduced to fifty dollars a month and then finally to twenty-five dollars a month; that Hines never did contribute either financially or physically at any time to their operation; that he had notice from Hines at one time that Hines was terminating their working agreement; and that their agreement then "just more or less died a natural death".

Copies of original notices of location, duly recorded, were introduced in evidence on behalf of the defendants. Proof of annual labor bearing recordation marks for the years 1938 through 1954 were intro-

duced into evidence, excepting the years 1939, 1940 and 1941, and in certain instances moratorium affidavits were recorded in lieu of the proofs of annual labor in the years in which the same was permissible.

On May 12, 1954, Hines entered into a contract with defendant Chemical Plant Food Corporation wherein said defendant undertook to take certain ores from the claims on a royalty basis. On July 25, 1954, Mr. Hines died. In August, 1954, Hubble padlocked the existing way of travel leading into the area in which the claims lie. On February 3, 1955, performance under the Hines Chemical Plant Food Corporation contract having been terminated, Mrs. Hines, the widow, filed her complaint in this action as indicated.

The court filed a written memorandum opinion indicating that Kenneth J. Hines entered upon the mining claims in question pursuant to a lease with defendants and others which lease, although not signed by Hines or his associate Kinney, was nevertheless partially performed on his part by the payment of rent to Hubble pursuant to the terms of the lease; that his successors in interest were therefore estopped to deny Hubble's title, citing *Storrs v. Belmont Gold Mining & Milling Co.*, 24 Cal. App.2d 551, 76 P.2d 197; and *Pease v. Johnson*, 106 Cal.App.2d 449, 235 P.2d 229. It further found that the defendants failed to comply with the mining statute in respect to the discovery and annual assessment work in all respects, and therefore their claims were open for location by plaintiff Johnson and, she not being estopped, was entitled to locate a valid claim. Judgment was entered as indicated. More formal findings were entered in which the same conclusion was reached. Judgment was entered accordingly.

Plaintiffs claim that the trial court's ruling that plaintiffs were estopped to assert the Statute of Frauds, Sec. 1624, Civ.Code, against defendants' evidence of a contract for the lease of real property not

evidenced by a writing signed by the party to be charged was erroneous. That section provides that an agreement for the leasing for a longer period than one year is invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged. Plaintiffs rely on such cases as *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88; *Mason v. Home Ins. Co. of New York*, 10 Cal. App.2d 696, 52 P.2d 491; and *Monarco v. Lo Greco*, 35 Cal.2d 621, 623, 220 P.2d 737, as establishing the rule of equitable estoppel to rely on the Statute of Frauds. It was there held that before the doctrine would apply it must appear the plaintiff had been placed in such a changed position that to allow defendants to assert the statutory defense would be to work an unjust and unconscionable loss upon plaintiffs. The claim here is that there was no writing signed by plaintiffs and no showing of a change of position by defendants in reliance upon the lease, no unconscionable loss to defendants or unjust enrichment to plaintiffs, and that to estop plaintiffs to assert the statutory defense is to aid the defendant Joseph H. Hubble in the perpetration of a fraud, i. e., leasing the real property in which he did not have the interest he professed to have.

Although in dispute, there is evidence that the written lease, signed by the lessors, was accepted by Hines and Kinney, the lessees, and they went into possession under it, paid rent under its terms and later, under an oral agreement, paid a reduced amount. The lease agreement was manually delivered to lessors and was retained in their possession. They went into possession of the property on the date of the lease agreement.

[1,2] Similar facts were considered in *Munford v. Humphreys*, 68 Cal.App. 530, 535, 229 P. 860, where it was held that it is not essential to the validity of a lease for the purpose of binding the lessee that it be signed by him provided he accepts the lease and acts thereunder, which exception is generally shown by taking possession or

by the payment of rent; that a lease must be signed by the lessor, but need not, as a general rule, be signed by the lessee if accepted by him, as his acceptance of the lease not only binds him but the lessor as well and obviates the unilateral character of the instrument; and that to accept a written lease is to consent to the terms thereof, and the physical taking possession or retention of the instrument is merely evidence of such acceptance or consent. There is sufficient evidence to show that the lease was in effect and plaintiffs were in possession of the property under it during the time the Hines attempted to establish their own title thereto by filing their own location notices. The lease was properly received in evidence.

[3] Under the circumstances related there is sufficient evidence to support the finding that the Hines were estopped from claiming these mining claims in their own name, *Brown v. Murphy*, 36 Cal.App.2d 171, 97 P.2d 281; *Pease v. Johnson*, 106 Cal.App.2d 449, 452, 235 P.2d 229.

[4] There was a conflict in the evidence as to whether the necessary work was or was not done upon the claims by Hubble. Defendants offered exhibits and testimony showing that discovery, location, and annual work had been completed. The burden of proof rested upon the plaintiffs to show that their title was superior to that of the defendants and they must recover upon the strength of their own title and not upon the weakness of the defendants' title. *Pease v. Johnson*, *supra*.

Plaintiffs concede the basic rule of law that a tenant may not deny the title of his landlord but contend that under the facts of this case an exception to that rule arises, citing *Kearney Investment Co. v. Golden Gate Ferry Co.*, 198 Cal. 560, 246 P. 322; and *Yuba River Sand Co. v. City of Marysville*, 78 Cal.App.2d 421, 177 P.2d 642.

In the instant case there is no direct finding of fraud on the part of the lessors' or other reasons which would bring plaintiffs within the exception. These appealing

plaintiffs, upon whom the burden rested, did not show superior title in themselves. The motion for a new trial and to vacate the judgment was properly denied.

The portion of the judgment from which this appeal was perfected is affirmed.

BARNARD, P. J., concurs.



144 Cal.App.2d 714

Bruno GIOMI, Plaintiff and Respondent,
v.

Raynold VIOTTI and Eva Viotti, his wife,
Defendants and Appellants.

No. 16769.

District Court of Appeal, First District,
Division 2, California.

Sept. 28, 1956.

Action by buyer of an interest in a partnership against sellers for rescission of contract of sale. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered judgment for buyer and sellers appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence sustained finding that for purpose of inducing buyer to purchase a partnership interest sellers falsely and with fraudulent intent misrepresented to buyer the value of the business, its monthly net income, and that all debts had been paid when in fact the business was in debt.

Judgment affirmed.

1. Appeal and Error ☞110

An order denying a motion for a new trial is non-appealable.

2. Sales ☞40

Representation of the value of a business to a prospective buyer generally is a mere expression of opinion and not actionable, but where the representation of value

is coupled with statements of extrinsic facts materially affecting the value of such representation, if untrue, it may amount to fraud and be actionable.

3. Sales ☞40

Misrepresentations of material facts bearing upon a question of value or condition of assets or past earnings to a prospective buyer of a business may amount to fraud.

4. Sales ☞38(7)

Negligence on the part of a buyer in failing to discover the falsity of a statement of the seller is no defense when the misrepresentation is intentional rather than negligent.

5. Sales ☞52(7)

In action by buyer of an interest in a partnership against sellers for rescission of contract of sale, evidence sustained finding that, for the purpose of inducing buyer to purchase a partnership interest, the sellers falsely and with fraudulent intent misrepresented to buyer the value of the business, its monthly net income, and that all indebtedness had been paid when in fact the business was in debt.

6. Trial ☞66

A trial judge may properly refuse to reopen a case for the introduction of further testimony where there is no showing of due diligence.

7. Trial ☞66

Where sellers, in an action by buyer for rescission of a contract for sale of an interest in a partnership, sought to reopen the case based on their discovery of a material witness, but failed to show that such witness could not have been discovered before the trial by an exercise of due diligence, trial court did not abuse its discretion in not reopening the case.

8. Appeal and Error ☞970(4)

Trial ☞66

Trial courts are vested with a broad discretion in permitting parties to reopen a case for the purpose of introducing further proof, and a trial court's ruling upon a request to reopen a case will be dis-

turbed on appeal only where there has been a clear abuse of discretion to the prejudice of the party complaining.

James Martin MacInnis, Harry P. Glassman, San Francisco, for appellants.

Edmund J. Holl, San Francisco, for respondent.

AGEE, Justice pro tem.

[1] Defendants, husband and wife, appeal from a judgment recovered against them by plaintiff in an action brought to rescind a contract of sale of a partnership interest in a bakery. The purported appeal from an order denying defendants' motion for a new trial is dismissed, such order being nonappealable.

In April, 1945, defendants and one Picenti bought the bakery for \$4,400. In November, 1945, defendants returned to Picenti the \$2,200 which he had put up and they thereupon became the sole owners.

In November, 1946, plaintiff contacted defendants. He told them that he knew nothing about the bakery business but he was interested in investing in some type of business in which he could be employed. Defendants told him that they had just sold a one-tenth interest to one Bortolazzo for \$2,000 but that they would sell him one-half of the remaining nine-tenths interest for \$9,000 and give him a job driving a delivery truck on one of the routes. The sale was closed on December 12, 1946, at which time the plaintiff paid \$1,000. The balance of \$8,000 was paid on December 19, 1946. Less than a year later the business was in bankruptcy.

Plaintiff alleged, and the trial court found, that for the purpose of inducing him to buy said partnership interest the defendants falsely and with fraudulent intent represented to him that the value of the business as a whole was \$20,000, that the monthly net income therefrom was \$1,500, and that all of the debts of the business had been paid.

[2, 3] Defendants contend that the representation of the value of the business was a mere expression of opinion and not actionable. This is the general rule. 23 Cal.Jur.2d p. 38. However, an exception to this rule is well recognized where the representation of value is coupled with statements of extrinsic facts materially affecting the value. 23 Cal.Jur.2d p. 40. Here, defendants represented to plaintiff that the business was making net profits of \$1,500 per month; in fact, the business was losing money. (Defendant Viotti testified that the "profits" were eaten up by the payment of wages of \$61.50 per week to himself and Bortolazzo.) Defendants represented that all indebtedness had been paid when, in fact, the business owed thousands of dollars. Defendants represented that the business owned five trucks when, in fact, it owned only two trucks, one of which was not usable. (The other three trucks were leased.) Defendants told plaintiff that his \$9,000 would be used for capital improvement but not one cent of it was put into the business. In *Conner v. Butler*, 113 Cal.App. 502, at page 511, 298 P. 546, at page 550, the court said: "Misrepresentations of material facts bearing upon the question of value or condition of the assets or past earnings of a business may amount to fraud." And in *Stumpf v. Lawrence*, 4 Cal.App.2d 373, at page 376, 40 P.2d 920, at page 921, it was said: "The statement of the owner of property with respect to its value is usually considered the expression of a mere opinion on his part which may not become the basis of a suit for damages for fraud on that account. But when a positive statement of the value of property is made by the owner, coupled with other asserted facts or circumstances like a false representation of past income therefrom, it may constitute competent evidence in proof of the alleged fraudulent representations upon which a judgment for damages may be supported." See also: *Russell v. Roscoe*, 106 Cal.App. 293, 298, 289 P. 185; *Willson v. Municipal Bond Co.*, 7 Cal.2d 144, 150, 59 P.2d 974;

McElligott v. Freeland, 139 Cal.App. 143, 150, 33 P.2d 430; Yeoman v. Sherry, 10 Cal.App.2d 567, 572, 52 P.2d 555.

[4] Plaintiff testified, and the trial court found, that he relied upon the said representations made by defendants and was induced thereby to purchase. Defendants argue that he could have ascertained the falsity of the representations by making a reasonable investigation. Hefferan v. Freebairn, 34 Cal.2d 715, 214 P.2d 386, involves a factual situation very similar to that in the instant case. There a judgment in favor of plaintiff rescinding his purchase of a restaurant and ordering the return of his cash payment was affirmed. The Supreme Court rejected defendant's contention that the plaintiff was precluded from rescinding because of the knowledge of the business which he acquired or should have acquired during the course of the negotiations. It held that negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation is intentional rather than negligent. The court pointed out, 34 Cal.2d at page 719, 214 P.2d at page 388, that exceptionally gullible or ignorant people may recover in circumstances where persons of normal intelligence would not have been misled. Further, that it is not incumbent on a buyer in a situation of this sort to investigate claims as to earnings realized.

[5] We conclude that the evidence was amply sufficient to support the findings and judgment of the trial court.

[6-8] The second point raised by defendants is that the trial court erred in denying their motion to reopen the case for the purpose of introducing additional testimony. The trial was concluded on November 4, 1954. On December 3, 1954, after a minute order had been made directing judgment for plaintiff, defendants filed a notice that they intended to move to reopen. The affidavit in support of this motion alleged that at the time of the trial the attorney representing defendants was under the impression that Leslie Hub-

bard, Esq., of the law firm of Hubbard & Hubbard, was the attorney representing defendants at the time of the transaction with plaintiff and that he was unable to contact Leslie Hubbard prior to trial; that, since the trial, defendants' attorney learned that it was H. R. Hubbard, Esq., who had represented the defendants; that H. R. Hubbard could testify to certain matters which would indicate that plaintiff's real reason for wanting to rescind was because of personal differences which had arisen and not because he had been defrauded. It is well settled that a motion to reopen after trial and before entry of judgment rests in the sound discretion of the trial judge. 24 Cal.Jur. 768. And it is equally fundamental that a trial judge may properly refuse to reopen a case for the introduction of further testimony when there is no showing of due diligence. 24 Cal.Jur. 770. There is a complete lack of any such showing. At the very outset of the trial, plaintiff testified that there were two Hubbards and that the one handling the transaction was a stout man. Defendants called Victor E. Cappa, an attorney, as their witness. He testified that he was requested to talk over the transaction with plaintiff because he could speak in Italian fluently.

"The Court: Q. Who requested you to do that? A. H. R. Hubbard.

"Q. That is, Hubbard represented Giomi [plaintiff]? A. No, he was representing the Viottis, the defendants in this action; he was representing them. Mr. Giomi was not represented, so Mr. Hubbard wanted to be satisfied that he knew what he was doing and understood the import of these papers that were to be signed, so he turned him over to me and I talked to him.

"Q. Were you the attorney for the Viottis? A. In a sense I was because I was associated with Hubbard & Hubbard."

It is clear that the denial of the motion to reopen was not an abuse of discretion.

"The rule is established by a long line of authorities that trial courts are vested with a broad discretion in permitting parties to reopen a case for the purpose of introducing further proof, and the trial court's ruling upon a request to reopen a case will be disturbed on appeal only where there has been a clear abuse of discretion to the prejudice of the party complaining." *Gelberg v. Consolo*, 51 Cal.App. 2d 516, 517, 125 P.2d 74.

The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



144 Cal.App.2d 723

Ethel Marie RUSS, Plaintiff and Appellant,
v.

Ralph F. RUSS, Defendant and Respondent.
Civ. 16932.

District Court of Appeal, First District,
Division 2, California.

Sept. 28, 1956.

Divorce action, wherein the Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered an interlocutory decree dividing the property of the parties, and the wife appealed. The District Court of Appeal, Draper, J. pro tem., held that even though it had power to make finding, and finding that certain realty was community property would support decree which awarded it to husband, reviewing court would have to reverse and remand, since there had been no direct finding that property was either community or separate and evidence would support finding to either effect, and since there was also a possibility that decree had been based upon an apportionment of community

and separate interests in property of parties.

Reversed with directions.

1. Husband and Wife ⇨258

Property is not necessarily made community by fact that all or substantial portion of cost of improvements came from community funds. *West's Ann.Civ.Code*, § 164.

2. Appeal and Error ⇨1122(1)

Reviewing court's power to make findings of fact is generally not to be exercised when evidence before trial court was conflicting. *West's Ann.Code Civ.Proc.*, § 956a.

3. Divorce ⇨287

Even though finding that certain realty was community would support decree which awarded it to husband, reviewing court would reverse and remand where there was no direct finding that property was either community or separate and evidence would support finding to either effect, and where there was also possibility that decree had been based upon an apportionment of community and separate interests in property of parties to divorce action. *West's Ann.Code Civ.Proc.*, § 956a.

Walter H. Duane, San Francisco, for appellant.

Leonard A. Worthington, San Francisco, for respondent.

DRAPER, Justice pro tem.

This appeal questions the award, by interlocutory decree of divorce, of real property not specifically found to be either community or separate. Decree was granted to plaintiff wife upon the ground of defendant's extreme cruelty. The community property was not extensive. An automobile and a boat were awarded to the parties in equal shares. Furniture (community property) located in a residence admittedly the separate property of plaintiff was awarded to her. Furniture of a

lesser value, located in another house, was awarded to defendant.

Real property in El Granada, San Mateo County, was awarded to defendant, and he was ordered to pay \$2,600 to plaintiff. The transcript indicates that the value of the El Granada property was taken to be \$5,000. Plaintiff's notice of appeal is "from the whole of said judgment," but her only attack is upon the award of the El Granada property.

Some three and one-half years after the marriage of the parties, appellant wife sold to the State of California property in Santa Clara County which was admittedly her separate property. From the proceeds of the sale she paid \$600 to the attorney representing her, deposited \$2,387.09 in a commercial account which contained \$21.14 at the time, and deposited the remaining \$3,000 in a savings account whose immediately preceding balance had been \$1.

Both of these accounts were in the name of plaintiff alone. However, it seems to be conceded that they were, to the extent of the small balances at the time of the above deposits, community property. Throughout the marriage, defendant had no bank account or property in his own name because of a deficiency judgment against him. Substantially all earnings of both parties, throughout their marriage, were deposited in bank accounts in the name of the wife.

On the day she deposited the sale proceeds, plaintiff paid \$500 from the same bank account as a deposit on purchase price of the El Granada property, and four days later paid, from the same account, \$881.20 as the remainder of the purchase price. Title was taken in plaintiff's name. The property was then unimproved, but thereafter the present house was added, with the costs thereof being paid from the bank account, and defendant doing some labor upon improvements. Plaintiff testified that the improvements cost \$2,000, and that all this sum was paid from proceeds of the above sale. However, she testified to other expenditures from these proceeds

which would make it impossible for more than \$914.80 to have come from this source for the improvements. The trial court was therefore entitled to find that at least a substantial part of the improvement cost came from earnings of the two parties deposited in the community account.

Upon these facts, the court found:

"That plaintiff purchased with her separate funds certain real property in El Granada * * *; that said real property has at all times stood of record in the name of plaintiff; that said plaintiff and defendant from time to time resided on said property, but since the separation of the parties on August 25, 1952, said defendant has made his home at said property, to which plaintiff made no objection; that the separate and community funds of the parties were so comingled [sic] that it has been impossible for this Court to determine whether or not all of the funds used for the purchase of said property were the separate property of plaintiff or community funds of the plaintiff and defendant."

Nowhere else in the findings, conclusions, or decree is the El Granada property described as either separate or community. The decree awards this property to defendant.

[1] As indicated above, the evidence warrants a finding that the purchase price of the El Granada lots was separate property. The negligible community balances in the accounts at the time of sale of the Santa Clara County property present no insuperable bar in tracing the proceeds of that sale into the prompt purchase of the El Granada land. *Cone v. Cone*, 131 Cal. App.2d 424, 431, 280 P.2d 871; *In re Estate of Granniss*, 142 Cal. 1, 6, 75 P. 324. Nor is the property necessarily made community by the fact that all or a substantial portion of the cost of the improvements came from community funds. *Shaw v. Bernal*, 163 Cal. 262, 124 P. 1012. The taking of the property in plaintiff's name raises a pre-

sumption that it is her separate property, Civ.Code, § 164.

On the other hand, the court could have found the property to be community in character. An agreement to this effect would be recognized. *Faust v. Faust*, 91 Cal.App.2d 304, 204 P.2d 906. The fact that the parties throughout the marriage avoided the holding of property in defendant's name, and that both recognize the bank accounts as community property, although in the wife's name, gives some color to an inference that such an agreement existed as to the real property. Support for such an inference might be found in the fact that proceeds of the Santa Clara County sale were deposited in these community accounts, and thence withdrawn for investment in the El Granada land. The wife testified that "It was a joint place." However, it should be noted that the transcript shows no direct testimony by defendant as to any such agreement.

The only question on this appeal is whether the property is separate or community in character. If the property is separately that of the wife, the decree awarding it to the husband must fall. Unfortunately, there is no direct finding that the property itself is either community or separate. As to the source of the funds which were used to purchase it, the findings are in direct conflict. After finding that "plaintiff purchased with her separate funds" the property in question, the same finding concludes with the statement that "it has been impossible * * * to determine whether or not all of the funds used for the purchase of said property were * * * separate property * * * or community funds."

[2,3] It is true that a finding that the property is community would support the decree. Under Code of Civil Procedure, section 956a, this court is empowered to make findings of fact. We should prefer to do so, in the spirit of that section, rather than remand the case for further proceedings. However, such power generally is not to be exercised when the evidence be-

fore the trial court is conflicting. *Treu v. Kirkwood*, 42 Cal.2d 602, 268 P.2d 482. In addition, there is the possibility, suggested by respondent's brief, that the decree is based upon an apportionment of community and separate interests in the property. The briefs on appeal leave us in some doubt as to the theory upon which the case was tried below. The transcript indicates a number of discussions between court and counsel which are not reported. These gaps in the transcript make most uncertain any attempt by us to resolve doubts as to the theory of the case as tried.

The decree is reversed with respect to the division of property, with directions to the trial court to amend, modify and clarify its findings, with leave to the trial court to take further evidence if in its discretion such is required.

NOURSE, P. J., and KAUFMAN, J.,
concur.



144 Cal.App.2d 617

PEERLESS CASUALTY COMPANY, a corporation, Plaintiff, Cross-defendant and Respondent,

v.

CONTINENTAL CASUALTY COMPANY, a corporation, Defendant, Cross-complainant and Appellant.

Prudential Assurance Company, Ltd., a corporation, Andrew Weir Insurance Company, Ltd., a corporation, and City General Insurance Company, Ltd., a corporation, substituted for Underwriters at Lloyds, Cross-defendants and Respondents.

No. 16741.

**District Court of Appeal, First District,
Division 2, California.**

Sept. 25, 1956.

Action for declaratory judgment to determine liability of three insurers rela-

tive to damage caused in one and the same accident. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., prorated liability between insurance policies of lessor and lessee covering the tractor and trailer involved in accident and lessee's insurer appealed. The District Court of Appeal held that where lessor's policy on tractor and trailer provided for prorating of a loss with other applicable insurance, and lessee's policy provided for liability for loss in excess of policy limits of other applicable insurance, clause of lessor's policy was applicable and loss would be prorated in proportion to maximum coverage provided by the respective policies and in addition third insurer was not liable under its policy which provided excess insurance above stated amount of primary insurance, in view of fact primary insurance policy was not exhausted.

Judgment affirmed.

Opinion, 296 P.2d 108, vacated.

1. Insurance \S 512½

Where liability policy issued to lessee of tractor and trailer provided that policy would afford only excess insurance with respect to any loss if insured had other collectible insurance, and policy issued to lessor covering same tractor and trailer contained clause providing for the prorating of any loss with other applicable insurance in the proportion that limits stated in declaration bear to applicable limits of the other insurance, clause of lessor's policy would control and liability for accident involving tractor and trailer would be prorated between the two insurers.

2. Insurance \S 512½

Although language of other insurance clauses and in liability insurance policies is prime material for consideration in determining respective responsibilities of insurers of same vehicle involved in accident, when such clauses are irreconcilable, other considerations, expressed or not, must determine results.

3. Insurance \S 512½

When a policy of insurance provides coverage for the excess over primary insurance to a specifically stated amount only, such provision must be given effect, but when excess clause is so formulated as to give policy which contains it the advantage, not only over primary coverage to a specific amount but also over all other unknown insurance which contributes in the loss, together with said specific primary insurance, it is doubtful whether such clause should be upheld.

4. Insurance \S 512½

When liability policy, which provides excess insurance above a stated amount of primary insurance, contains provisions which make it also excess insurance above all other insurance which contributes to the payment of the loss together with the specifically stated primary insurance, such provisions will be given effect as written.

5. Insurance \S 512½

Where liability insurance policy, which provided for excess insurance above stated amount of primary insurance on tractor and trailer, contained provisions which made it also excess insurance above all other insurance which would contribute to payment of any loss involving tractor and trailer, and after prorating of liability, arising out of accident involving tractor and trailer, between primary insurance policy and other applicable insurance, primary insurance policy was not exhausted, liability policy providing for such excess insurance would not attach to the accident.

Carroll, Davis & Burdick, San Francisco, for appellant Continental Cas. Co.

Hancock, Elkington & Rothert, San Francisco, for respondents Prudential Assurance Co. and others.

Bledsoe, Smith & Cathcart, San Francisco, Wilbur J. Russ, San Francisco, of counsel, for respondent Peerless Cas. Co.

Weinstock, Anderson, Maloney & Chase, Sidney L. Weinstock, John R. Maloney,

San Francisco, amici curiae in support of appellant.

PER CURIAM.

In this case we granted a rehearing for the sole purpose of giving further consideration to the question whether one excess insurance policy of the Underwriters at Lloyd's should to some extent contribute in the loss here involved, with respect to which point *Lamb v. Belt Casualty Co.*, 3 Cal.App.2d 624, 40 P.2d 311, was called to our attention by the petition for rehearing only. Thereafter *Oil Base, Inc., v. Transport Indem. Co.*, 143 Cal.App.2d 453, 299 P.2d 952, which involved a similar point, was decided. Finally, *Prudential Assurance Company, Ltd.*, a corporation, *Andrew Weir Insurance Company, Ltd.*, a corporation and *City General Insurance Company, Ltd.*, a corporation, have been substituted as respondents in place of Underwriters at Lloyd's. The name of the Underwriters at Lloyd's has been retained in this opinion also where the named corporations have succeeded to their rights. In view of the cited decisions we have concluded that the rejection by the trial court of all liability of the Underwriters at Lloyd's must be upheld, as will be stated hereinafter. Otherwise, we assume our former opinion with some revisions necessitated by the interrelation of the problems presented as follows:

This is an appeal on an agreed statement from a declaratory judgment determining the liability of three insurers, relative to the damage caused in one and the same accident. A tractor and trailer, leased by its owner, Nevada Trading Company (further called Nevada) to Vaughn Millwork Company (further called Vaughn) and driven by Vaughn's employee Campbell, collided in this state with a truck and trailer which suffered property damage and whose driver was injured. At the time of the accident Nevada had in its name:

1. a policy of comprehensive liability insurance issued by the Peerless Casualty Company (further called Peerless) covering the motor vehicle involved, with a limit

for bodily injury of \$10,000 for each person injured and of \$5,000 for property damage.

2. two policies of excess liability insurance issued by the Underwriters at Lloyd's, London (further called Lloyd's), the first of which provided coverage after exhaustion of the coverage of the above Peerless policy, to which specific reference was made, with a limit for bodily injuries of \$15,000 for each person injured (after the \$10,000 of the Peerless policy) and \$20,000 for property damage (after the \$5,000 of the Peerless policy) and the second of which provided coverage after exhaustion of the coverage of the above two policies, with a limit for personal injuries of \$175,000 for each person injured (after the above total of \$25,000 primary coverage).

Vaughn had at said time in its name one policy of comprehensive liability insurance issued by Continental Casualty Company, (further called Continental) with a limit for bodily injuries of \$100,000 for each person injured and of \$25,000 for property damage.

Each of the above policies provided liability insurance directly to Campbell as an additional insured for the claims ensuing from the accident. Pursuant to an agreement reserving judicial determination of the respective liabilities of the several insurers, Peerless and Lloyd's settled said claims by payment of \$5,946.60 for personal injuries and \$6,053.40 for property damage. The controversy of the parties relates mainly to the effect to be given to the "other insurance" clauses of the Peerless and Continental Policies.

The other insurance clause of the Continental Policy reads:

"13. Other Insurance.

"If the insured has other valid and collectible insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance with respect to such loss but shall apply only in the amount by which the applicable limit of liability stated in

the declarations exceeds the total applicable limits of liability of such other insurance."

The part of the other insurance clause of the Peerless policy applicable to the circumstances of this case reads:

"N. Other Insurance.

"If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limits of liability stated in the declaration bear to the total applicable limit of liability of all valid and collectible insurance against such loss; * * *."

[1] The trial court held that Peerless and Continental were liable for the total amounts of the settlements in proportion of the maximum coverage provided by their respective policies for the two kinds of damage involved. Lloyd's was held not liable on its policies. (The proportionate liability of Peerless does not exhaust the coverage provided by its policy.) Continental appeals, claiming primarily that this decision in prorating the loss, disregards the other insurance clause of its policy. We have concluded that the decision is supported by the authority of *Air Transport Mfg. Co. v. Employers' Liab., etc., Corp.*, 91 Cal.App.2d 129, 204 P.2d 647, 648 (hearing in the Supreme Court denied), and should be upheld.

In the *Air Transport* case, *supra*, a truck rented by Air Transport from American U-Drive and driven by an employee of Air Transport, was involved in an accident in which one person was injured. Air Transport and American U-Drive each had in its name a liability policy with a limit of \$25,000 as to the claim of one injured person. The policy in the name of Air Transport issued by Pacific contained an other insurance clause requiring prorating like the Peerless policy in our case. The policy in the name of American U-Drive issued by Employers' contained an other insurance clause reading as follows:

"8. Other Insurance. If other valid insurance exists protecting the Insured from liability for such bodily injury, sickness, disease or death or such injury to or destruction of property, this policy shall be null and void with respect to such specific hazard otherwise covered, whether the Insured is specifically named in such other policy or not; provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other valid insurance."

Both the trial court and the appellate court held that notwithstanding the latter clause Employers' was liable for its proportionate part (half) of the claim. Rejecting other bases of decision sometimes used, the court held that the liability of the insurers should be decided by construction of the other insurance clauses involved and in so doing held, that because of its pro rata clause the Pacific policy did not constitute such unconditional insurance as would render void the policy of Employers' under its clause and that by reason of the latter's policy, that of Pacific afforded only pro rata insurance. Employers' had therefore to bear the remaining portion of the loss.

Appellant tries to distinguish the *Air Transport* case, *supra*, by the contention that it involves a conflict between a "pro rata" clause and an "escape" clause, whereas the present case is said to involve a conflict between a "pro rata" and an "excess" clause, which "excess" clause is more regularly granted recognition and preponderance by the courts than an "escape" clause. We do not agree. The other insurance clauses, generally inserted in liability insurance policies and given many different formulations are often distinguished in three types: "Pro rata" clauses

providing for the apportionment of the loss with other valid insurance; "excess" clauses providing for liability up to the limits of the policy covering excess loss only after exhaustion of other valid insurance; and "escape" clauses providing for avoidance of liability when there is other valid insurance. See 5 Stanford L.R. 147; 38 Minn.L.R. 838, 840. The clauses of Continental in the case before us and of Employers' in the Air Transport case are neither characteristic excess nor characteristic escape clauses. Although the clause of Continental is formulated more like an excess clause and the one of Employers' more like an escape clause their effect is exactly the same and each is a composite of escape and excess elements. Each provides for excess insurance if and in so far only as its coverage exceeds all other valid coverage combined and does not provide for any coverage if its coverage is not so in excess. In the absence of such excess it works as an escape clause, if there is such excess as a modified excess clause, (which does not cover excess loss to the limit of its agreed coverage but only to the excess of such limit over other valid coverage). The clause of Continental does not say so expressly as the clause of Employers' that it shall be void in the absence of an excess of its coverage over all other coverage, but as it applies only in the amount of such excess it does not provide any coverage if there is no excess.

Both in the Air Transport case and in our case there was no such excess. In the Air Transport case the coverage under both policies was the same; in our case the combined coverage of the other policies (Peerless and Lloyd's) is the same as that of Continental with respect to property damage (each \$25,000) and exceeds that of Continental with respect to coverage of injury to one person (\$200,000 as against \$100,000). In both cases the clauses compared worked as escape clauses conflicting with pro rata clauses. With respect to the Air Transport case such was recognized expressly by the appellate court

which decided it in distinguishing said case in *Norris v. Pacific Indemnity Co.*, Cal.App., 237 P.2d 666, 672.

Under approximately similar facts and policy provisions a contrary result was reached in *McFarland v. Chicago Exp.*, 7 Cir., 200 F.2d 5, 7. In that case Employers', whose policy had the mixed escape and excess clause, was the insurer of the owner of the truck and the pro rata clause was contained in the policy of the user of the truck, directly responsible for the accident. Such may have influenced the decision although according to its terms the opinion, like the one in the Air Transport case, is based on "a construction of the language employed by the respective insurers". The *McFarland* opinion, however, starts its reasoning from the other side and holds that because of its escape clause the Employers' policy is not valid and collectible insurance to which the pro rata clause in the other policy applies, on which ground it is concluded that the writer of said policy was not entitled to prorating with Employers' but must bear the whole loss.

[2] No other cases involving a conflict between an escape clause and a pro rata clause have been found. Cf. Annotation 46 A.L.R.2d 1159, subd. (c), pp. 1167-1168. It is clear that the reasoning used in the above two cases, ostensibly based on construction of the language of the policy clauses but reaching opposite results, cannot be conclusive. It was pointed out in *Oregon Auto Ins. Co. v. United States Fidelity & Guar. Co.*, 9 Cir., 195 F.2d 958, 960, that such reasoning is "completely circular, depending, as it were, on which policy one happens to read first." Although the language of the policy clauses is the prime material for our consideration, when said clauses are irreconcilable other considerations, expressed or not, must determine the result. The validity of both clauses, leaving the insured unprotected, is generally considered unacceptable. The Oregon case, *supra*, which involves a conflict between an escape clause

and an excess clause, rejects all reasoning on the basis of which other cases grant preference to one or the other of the conflicting other insurance clauses and, holding that one cannot rationally choose between the two clauses involved, takes the position that the mutually repugnant clauses should be disregarded and prorating applied as if the policies did not contain any other insurance clauses. Although this solution seems sensible the case stands alone. The great majority of the cases treating a conflict of an excess and an escape clause give effect to the excess clause. See Annotation 46 A.L.R.2d 1159, subd. (b), p. 1165 et seq.; 5 Stanford L.Rev. 147, 148. The reasonings used to justify this result may not be convincing, the fact must be noted that the decisions in general show favor of excess clauses, disfavor of escape clauses. Such is understandable because an escape clause is less desirable, than a pro rata or excess clause in that, without prohibiting other insurance, it deprives the insured, when other insurance is taken out, of some of the protection he expects, whereas pro rata and excess clauses leave him all coverage expected and regulate the distribution of the loss among the several insurers only. The clause contained in the Continental policy before us has the added disadvantage that its partial escape character is more or less camouflaged and does not provide clear warning for the insured. In our case, where the conflict is between an escape clause and a pro rata clause, the reasoning of the Oregon case, supra, and the disfavor of escape clauses found in other cases lead to the same result. The proportionate liability of Peerless and Continental must be upheld.

Continental further contends that if prorating is applied, the coverage provided by the Lloyd's policies should also be included. Evidently, the second Lloyd's policy, whose primary limits are not reached by the total damage claims, cannot be involved and the same applies to the personal injury coverage of the first Lloyd's policy, as the primary limit of \$10,-

000 for loss with respect to one person is not reached. A question is, however, presented with respect to the property damage coverage of the first Lloyd's policy because the settlement for property damage, \$6,053.40 exceeds the primary limit of \$5,000 contained therefor in said policy, but the primary coverage of \$5,000 of Peerless, expressly referred to in said Lloyd's policy, has not been exhausted because of the prorating with the Continental coverage, not expressly referred to in the Lloyd's policy.

Lloyd's defends the exclusion from prorating of this part of its coverage on the basis of the following provisions of its policy, the second paragraph of its insuring agreement, which reads:

"Provided Always that it is expressly agreed that liability shall attach to the Underwriters only after the Primary Insurers have paid or have been held liable to pay the full amount of their respective *ultimate net loss* liability as follows:

"(a) Bodily Injury * * *

"(b) Property Damage

\$5,000.00 *ultimate net loss* in respect to each accident,
* * *" (Emphasis added.)

and the definition reading:

"2. *Ultimate Net Loss*.—The words 'ultimate net loss' shall be understood to mean the sums paid in settlement of losses for which the Assured is liable *after making deductions for all recoveries*, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not * * *." (Emphasis added.)

It concludes therefrom that liability under its policy can attach only after Peerless alone has paid \$5,000 for property losses of the assured, not counting amounts paid by other insurers. A further provision of its policy reading,

"3. *Attachment of Liability*.—Liability under this Insurance shall not attach unless and until the Primary Insurers shall have admitted liability

for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits."

it explains as adding further conditions to the provisions first stated and as not conflicting with them.

Continental does not deny that the above is a correct construction of the language of the Lloyd's policy as such, but urges that when this language comes in conflict with the other insurance clause of Continental's own policy, Lloyd's language is not decisive but an equitable solution must be found on another basis, as which prorating in accordance with the Oregon case, *supra*, could be considered.

[3-5] There can be no doubt that when a policy provides coverage for the excess over primary insurance to a specifically stated amount only, such provision must be given effect. Such insurance fulfills a special need for excess coverage at a special lower premium, comparable to insurance with a certain amount deductible from loss (own risk). However, when the excess clause is so formulated as to give the policy which contains it the advantage, not only over primary coverage to a specific amount, but also over all other unknown insurance which contributes in the loss, together with said specific primary insurance, it is doubtful whether such clause in that respect differs from other general clauses by which insurers try to shift the burden of a loss to possible other insurers and whether it should be held more invulnerable than such other clauses. On the basis of the Oregon case prorating with other insurance exceeding the stated amount of primary insurance might well be defensible. However, as stated before, the solution of the Oregon case is not generally accepted law, and with respect to the problem here under consideration, it is not accepted in California. In a situation very similar to the one in this case and also involving a Lloyd's excess policy, it was held in *Lamb v. Belt Casualty Co.*, 3 Cal.App.2d 624, 634, 40 P.2d 311, that

because of the prorating between the primary insurers, the excess policy of Lloyd's never attached. The Supreme Court denied a hearing. A case also very much in point is *Oil Base, Inc., v. Transport Indem. Co.*, 143 Cal.App.2d 453, 299 P.2d 952. In that case the lessee of a tractor involved in an accident was protected by the following liability policies: 1. A policy of Hardware with limit of \$100,000 for each person, containing a clause which with respect to any non-owned automobile made it excess insurance to all other available insurance. 2. A policy of Transport with a limit of \$10,000 for each occurrence containing a provision that, if there was other insurance against an occurrence covered by it, its insurance would be excess insurance above the applicable limits of such other insurance. 3. An excess policy of Security insuring \$40,000 for each occurrence in excess of \$10,000 ultimate net loss or of such greater amount as the insured shall be covered by primary insurance. 4. An excess policy of Transport with a limit of \$950,000 as excess insurance over underlying primary insurance of \$10,000 and \$40,000. With respect to a loss of \$360,000 it was held that the loss should primarily be prorated between the insurance of \$100,000 of Hardware and the primary insurance of \$10,000 of Transport. Only after these two prorated policies would be exhausted the first excess policy of Security would attach and the second excess policy of Transport only after exhaustion of the first one. The clauses of the excess policies of Security and Transport were sustained to their full extent, notwithstanding the fact that the policy of Hardware also contained an excess clause. The Supreme Court denied a hearing. We must conclude that when a policy which provides excess insurance above a stated amount of primary insurance contains provisions which make it also excess insurance above all other insurance which contributes to the payment of the loss together with the specifically stated primary insurance, such clause will be given effect as written. Under this rule the first Lloyd's policy did not attach

because the prorating of the Continental and Peerless policies prevented the Peerless policy from being exhausted.

The judgment is affirmed, Continental to pay all costs of the appeal.



144 Cal.App.2d 745

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William Henry SMITH, Defendant and
Appellant.

Cr. 1125.

District Court of Appeal, Fourth District,
California.

Sept. 28, 1956.

Defendant was convicted in the Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., of having committed lewd and lascivious acts with his daughter, and he appealed. The District Court of Appeal, Griffin, Acting P. J., held that the evidence sustained conviction.

Affirmed.

1. Lewdness ☞10

Conviction of defendant for having committed lewd and lascivious acts with his daughter was sustained by evidence. West's Ann.Pen.Code, § 288.

2. Criminal Law

☞369(1), 370, 371(1, 12), 372(1)

In California, trend has been to allow evidence of other crimes generally to show guilty knowledge, motive, intent or a common scheme or plan; but in cases involving lewdness, rule that evidence of other crimes is not admissible has not been relaxed. West's Ann.Pen.Code, § 288.

3. Criminal Law ☞1036(1)

Defendant could not raise for first time on appeal from conviction for having

committed lewd and lascivious acts with his daughter contention that evidence of similar conduct toward other girls was inadmissible. West's Ann.Pen.Code, § 288.

Casey & Kerrigan and Richard J. Weller, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Judge.

Defendant was charged in one count of the information with committing incest with his daughter, Carolyn (aged 15) on August 31, 1955, in violation of section 285 of the Penal Code. And in count two he was charged with having committed lewd and lascivious acts with another daughter Linda (aged 13) on October 7, 1955, in violation of section 288 of the Penal Code. Defendant pleaded not guilty and waived a jury trial. He was found not guilty on count one and guilty on count two. The court ordered a psychiatric examination of defendant and found he was not a sexual psychopath. Defendant moved for a new trial and it was denied. He was sentenced to State's prison, execution was suspended, and he was placed on probation for three years. This appeal followed.

The points raised are that the court erred in the reception of certain evidence; that the evidence was insufficient to sustain the findings and that the court erred in not granting a new trial for these reasons.

Linda, in support of count two, testified generally that she lived with her father in Colton after her stepmother had left him; that on the week-end of October 7th to 9th she was at home alone with him and he asked her to bring him a drink to his bedroom where he was lying on the bed partially undressed; that subsequently he took off part of her clothing and started massaging her breasts and "sort of making love" to her by kissing her breasts and putting his arms around her; that he had done these things to her before and on one occasion came close to having

sexual intercourse with her. She also testified that on one occasion she walked in on him when he was doing the same thing to her sister Carolyn.

The testimony of the prosecuting witness, given at the preliminary examination, was somewhat in conflict with her testimony at the trial in reference to the date and time of this claimed affair. She testified she subsequently reported these incidents to others because she was tired of living that kind of a life. She testified that when quite young she lived with her own mother and father in a nudist camp due to her mother's poor health and before she died.

A girl friend of Carolyn's, aged 15, then testified in chief for the prosecution that in October, 1955, she stayed all night at defendant's home with Carolyn; that defendant fixed them a Vodka drink; that she and Carolyn put on their robes and that defendant then told Carolyn to go in the bedroom and he would massage her legs because she was tired; that Carolyn did so and she followed her to the bedroom while defendant massaged Carolyn's legs and body and suggested to the witness that he do the same for her; that she was on the bed and he pulled up her robe from the bottom, massaged her legs, and then unhooked her "bra"; that he started rubbing her back and then her breasts and she was told by him that it would develop her; that he suggested she come over often and have it done; that she then told him she had enough and accordingly went to her room to bed; that defendant thought they should be massaged again the next morning but they refused; and that Carolyn told her this had been going on with her for some time. The witness said she later told her sister, Linda Sue, and her mother about the occurrence. Linda Sue then testified to a similar experience when she slept at defendant's home one week-end in October.

Another girl friend, 18 years old, visited Carolyn one night in the same month and defendant attempted, after massaging Car-

olyn, to massage the girl friend's legs and body but was repulsed. She testified that later defendant showed pictures of nude persons who lived in the nudist colony and who were related to defendant. Thereafter the people rested their case.

Defendant took the stand and testified that in 1952, he took his two daughters back East and left them with relatives; that later in 1953, he remarried and it aggravated the girls; that as a result of this they told defendant's relatives in the East that defendant had had sexual intercourse with both of them in California; that by consent of the girls they were examined there and it was found that there was no evidence of rupture of Linda's hymen; that thereafter the girls returned to California and lived with him and their stepmother whom they did not like; and that Carolyn was causing considerable trouble and had bragged to him about breaking up his marriage. He denied specifically and generally the charges made by his two daughters and the other girls but stated that he probably did massage one of the other girls' neck. He admitted massaging the two daughters on several occasions but claimed his wife was present at the time. He also said that he was at lodge on the days indicated and brought in a record of the roll-call indicating defendant's presence on certain dates enumerated. Defendant also claimed he was being treated by a doctor for sexual impotency during this period.

Essie Smith, the stepmother, testified that Carolyn was a source of trouble and had denied to her the charge made against the defendant in Illinois; that defendant did give his two daughters rubdowns or massages on certain occasions when they were tired but always in her presence; that defendant went shopping with her on the date and time charged in the first count of the information; that prior to October 1, 1955, the daughters complained to her about their father walking in on them in their privacy but did not say that defendant had committed any indecent acts towards them.

There was evidence of complaints made to others by the two girls concerning defendant's conduct.

[1] Without further discussion, it clearly appears that the evidence is sufficient to support the court's finding as to the charge contained in count two.

[2] The only other question is the claimed error in admitting evidence of similar conduct toward the other girls as part of the people's case in chief. Defendant relies principally upon the holding in *People v. Anthony*, 185 Cal. 152, 196 P. 47; *People v. Westek*, 31 Cal.2d 469, 476, 190 P.2d 9; *People v. Asavis*, 22 Cal.App.2d 492, 71 P. 2d 307; *People v. Buchel*, 141 Cal.App.2d 91, 296 P.2d 113; *People v. Hills*, 30 Cal. 2d 694, 185 P.2d 11; and *People v. Rogers*, 26 Cal.App.2d 371, 79 P.2d 404, disapproved in *People v. Westek*, supra.

It is the general rule, gathered from the above authorities, that in a prosecution for committing lewd and lascivious acts, prohibited by section 288 of the Penal Code, evidence that defendant perpetrated similar acts with a person or persons other than the prosecuting witness is inadmissible; that in this state the trend of decisions has been to allow evidence of other crimes generally to show guilty knowledge, motive, intent or a common scheme or plan, but in cases involving lewdness the rule that evidence of other crimes is not admissible has not been relaxed.

There are cases upholding certain exceptions to the general rule such as the *Westek* case where defendant, on direct examination, was asked whether he had ever committed any lewd act on certain of the prosecuting witnesses and he replied that he may have so touched them but that it was done without any lustful intent, and then to emphasize his innocence defendant volunteered the statement that he had never at any time or at any place committed on any boy any sexual crime as was charged. The prosecution had the right, on rebuttal, to present evidence which would tend to contradict defendant's self-serving statement or to weaken or modify its effect, such

as evidence that he had committed similar acts with boys other than the prosecuting witnesses. See also *People v. Hoffman*, 199 Cal. 155, 162, 248 P. 504; *People v. Turco*, 29 Cal.App. 608, 611, 156 P. 1001; *People v. Harrison*, 46 Cal.App.2d 779, 117 P.2d 19; *People v. Evans*, 113 Cal.App. 2d 124, 126, 247 P.2d 915; and *People v. Boyd*, 95 Cal.App.2d 831, 213 P.2d 724. In the latter case other claimed offenses against the sister of the prosecuting witness took place in the presence of the prosecuting witness and the facts indicated circumstances from which it could be inferred that defendant intended a second offense upon the prosecutrix.

Assuming it was error to allow testimony of the commission of claimed similar offenses on other girls when offered in evidence as a part of the people's case in chief, it affirmatively appears that counsel for defendant made no objection to the reception of such testimony at the time or during the trial, and without moving to strike such evidence, proceeded to cross-examine these witnesses in full in relation to such testimony.

It further appears from the proceedings on the motion for new trial that counsel for the defendant failed to call the court's attention to any such claimed error but rested solely on the insufficiency of the evidence to support the findings.

[3] It further appears that the trial court had no opportunity to rule on the admissibility of such testimony and the question was raised for the first time on appeal. Defendant is therefore precluded from raising this question for the first time in this court. *People v. Boyd*, supra, 95 Cal.App. 2d at page 833, 213 P.2d 724, was affirmed on this same additional ground. See also *People v. Simeone*, 26 Cal.2d 795, 161 P.2d 369; *People v. Westek*, supra; and *People v. Buchel*, supra. The order denying a new trial was justified.

Judgment affirmed.

MUSSELL, J., and BURCH, J. pro tem., concur.

144 Cal.App.2d 719

Florence SEXTON, Plaintiff and Respondent,

v.

KEY SYSTEM TRANSIT LINES, a corporation, Defendant and Appellant.

No. 16905.

District Court of Appeal, First District,
Division 2, California.

Sept. 28, 1956.

Rehearing Denied Oct. 26, 1956.

Hearing Denied Nov. 21, 1956.

Passenger brought action against transit company for injuries sustained by passenger at station when she was walking over to eastbound interurban electric train, which had stopped at station, and was struck by westbound train, which came into the station in violation of company regulation that when a train is in the station no other train may approach. The Superior Court, Alameda County, A. J. Woolsey, J., entered judgment for passenger, and company appealed. The District Court of Appeal, Draper, J. pro tem., held that question whether passenger was contributorily negligent in failing to look in direction from which westbound train was approaching, was for jury.

Judgment affirmed.

1. Carriers ⇨328(1)

In action by passenger against transportation company for injuries sustained by passenger at station when she was walking over to eastbound interurban electric train, which had stopped at station, and was struck by westbound train, which came into station in violation of company regulation that when a train is in the station no other train may approach, rule that a railroad track is itself a warning requiring a pedestrian to make use of all his senses to avoid danger of being struck by a train was not applicable, since such rule is not applicable at stations maintained for the use of passengers.

2. Carriers ⇨286(1)

A railroad owes a high degree of care to its passengers at a station maintained for the use of the passengers.

3. Carriers ⇨328(1)

Passenger, though not absolved from duty of exercising care for his own safety at railroad station, has right to presume that tracks intervening between him and train, which he is to board, will be kept safe while he is crossing them, so that the mere fact that he fails to look and listen will not necessarily be ascribed to his contributory negligence, and will not prevent a recovery of damages.

4. Carriers ⇨347(4)

In action by passenger against transportation company for injuries sustained by passenger at station when she was walking over to eastbound interurban electric train, which had stopped at station, and was struck by westbound train, which came into station in violation of company regulation that when a train is in the station no other train may approach, question whether passenger was contributorily negligent for failure to look in direction from which westbound train was approaching was for jury.

5. Appeal and Error ⇨1004(1)

It is not the function of a reviewing court to fix award of damages in a personal injury action, even within broad limits, and thus to impose its views on the trier of the fact.

6. Damages ⇨208(2)

Pain and suffering are not subject to precise measurement by any scale, and their translation into terms of money damages is peculiarly the function of the trier of the facts.

7. Appeal and Error ⇨1004(3)

Where trial judge, on motion for new trial in personal injury action, had opportunity to review amount of award, District Court of Appeal on appeal could interfere only in event that it appeared, as a matter of law, that verdict was a result of passion or prejudice.

8. Damages ⇨130(3)

Award of \$13,259.18 to woman who was badly bruised when struck by interurban train, and who, because of the acci-

dent, was in an anxiety state, which resulted in considerable emotional difficulty for many weeks, was not excessive.

Stafford P. Buckley, Edward J. Rice, Jr., Oakland, for appellant.

Charles Bagby, John F. Foley, San Francisco, for respondent.

DRAPER, Justice pro tem.

Plaintiff had judgment upon a jury verdict for injuries sustained when she was struck by an interurban electric train of defendant. Defendant appeals.

The accident occurred at Wesley Station on appellant's private right of way in Oakland, where respondent was about to board a train which had come from San Francisco and was headed east toward the Trestle Glen district of Oakland. She was struck by another train of appellant, which was westbound to San Francisco.

At Wesley Station appellant maintains a small building for the convenience of its passengers. This structure is about 10 feet west of the westernmost of the double tracks, which here run in a north-south direction. Westbound trains use the western tracks—those nearest the station building—and eastbound trains use the tracks farthest from the building.

Respondent had worked in this area for a number of years, and it was her habit to take the Glen train home each evening. She left work at about 5:30 p. m. on the day of the accident, did some shopping in the area, and went to Wesley Station, where she sat down to wait for her train. Several people were in the station. After respondent had waited about 15 minutes, she saw the eastbound Glen train approaching the station. She stood up, walked out of the building, and waited to see where the train would stop. When the doors of the train started to open she began to walk toward it. She had arrived at the first rail when she glanced to her left and saw the westbound San Francisco train bearing down upon her, about 7½ feet away. She had

heard no bell, whistle or other warning signal of any kind before she was struck. Other witnesses corroborated her statement that there was no audible warning.

A regulation of appellant requires that when a train is in the station no other train may approach that station. Respondent, through her long use of this line, knew that westbound trains always stopped short of the station when an eastbound train was stopped there.

There is testimony contradicting some of the facts stated above, but all conflicts in the evidence were for the jury to resolve. Hence appellant does not urge insufficiency of the evidence to establish its negligence. Rather, appellant contends that the evidence establishes contributory negligence of respondent as a matter of law. The argument is that in failing to look to her left before starting to cross the track intervening between her and the train she intended to board, respondent failed to exercise any care whatever.

[1] But appellant here cannot have the benefit of the rule that a railroad track "is itself a warning" requiring a pedestrian "to make use of all his senses * * * to avoid the danger" of being struck by a train. This rule, stated in *Holmes v. South Pac. C. Ry. Co.*, 97 Cal. 161, 167, 31 P. 834, 835, is often referred to as the "stop, look and listen" rule, since it stamps as contributory negligence *per se* the failure to stop, look and listen before crossing the tracks. *Wilkinson v. United Railroads*, 195 Cal. 185, 196, 232 P. 131.

[2,3] This rule is not applicable at stations maintained for the use of passengers. There the high degree of care owed by a common carrier to its passengers comes into play. The "station rule" does not require a passenger to stop, look and listen before approaching intervening tracks to reach a train. On the contrary "the passenger, while not absolved from the duty of exercising care for his own safety, has the right to presume that the tracks, intervening * * * will be kept safe while he is crossing; so that the mere fact that he

fails to look and listen * * * will not necessarily be ascribed to his contributory negligence, and will not prevent a recovery of damages * * *." *Wilkinson v. United Railroads*, supra, 195 Cal. at page 199, 232 P. at page 136. See also *Ferran v. Southern Pac. Co.*, 3 Cal.2d 350, 44 P.2d 533, and *MacGregor v. Pacific Elec. Ry. Co.*, 6 Cal.2d 596, 59 P.2d 123.

Here respondent did fail to look to her left before crossing the westbound tracks. But there is no evidence that she failed to listen, and any such inference from the fact that she failed to hear the westbound train is dispelled by the testimony of other intending passengers that they did not hear the train which struck respondent.

The present case is even stronger on its facts than the three cases last cited. Here, appellant's operating rule required the westbound train to stop short of the station when an eastbound train was stopped at the station. Respondent, from her long experience as a passenger on this line, knew this practice of appellant. Thus respondent had not only the "right to assume that the company will so regulate the movement of its trains * * * as to enable [her] to cross the tracks in safety,"" *MacGregor v. Pacific Elec. Ry. Co.*, supra, 6 Cal.2d at page 600, 59 P.2d at page 125, but she knew of and relied upon a specific practice of appellant in this respect.

[4] The cases cited above are clear that failure to look and listen does not constitute contributory negligence as a matter of law, but that the question is, on all the circumstances of the case, one of fact for the jury. We cannot accept appellant's argument that the *Wilkinson* case is to be distinguished, and we conclude that the rule of that case governs here.

[5-7] Appellant also contends that the award of \$13,259.18 is so excessive as to

require reversal. But it is not the function of an appellate court to fix the award of damages, even within broad limits, and thus to impose its views upon the trier of the fact. Pain and suffering are not subject to precise measurement by any scale, and their translation into terms of money damages is peculiarly the function of the trier of the facts. *Hallinan v. Prindle*, 17 Cal. App.2d 656, 671, 62 P.2d 1075. Here the trial judge, on motion for new trial, had the opportunity to review the award. In these circumstances, "an appellate court may interfere only in the event it appears * * *, as a matter of law, that the verdict was the result of passion or prejudice." *Harris v. Lampert*, 131 Cal.App.2d 751, 752, 281 P.2d 292, 293.

[8] There is evidence that respondent was badly bruised, suffered great pain, and that one result of the injury was "an anxiety state induced by adequate cause" which afforded considerable emotional difficulty for many weeks and which had continued in lesser degree up to the time of trial. Her physician described her injuries as "moderately severe." She was hospitalized for 12 days and lost 6 weeks' work. Her work requires her to stand, and the injury to her knee made this very difficult. At trial, 18 months after the accident, she still suffered pain in the knee. Her doctor gave some testimony that this knee injury will have permanent results.

Her hospital bills were \$459.15, doctor's bill was \$200, clothing and personal effects destroyed in the accident were valued at nearly \$200, and she had a substantial loss of wages. In the eyes of many, the award may be high. But we cannot say that it is excessive as a matter of law.

The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

144 Cal.App.2d 547

Cite as 301 P.2d 615

Joseph R. HIXSON et al., Plaintiffs,
v.

Delta M. BOREN et al., Defendants.

Delta M. BOREN, Cross-Complainant
and Appellant,
v.

William Lee FARRIS and Helen Sue Farris,
husband and wife, Cross-defendants
and Respondents.

Civ. 5191.

District Court of Appeal,
Fourth District, California.

Sept. 21, 1956.

Rehearing Denied Oct. 10, 1956.

Hearing Denied Nov. 14, 1956.

'Action against assignee of partnership payee and others for a declaratory judgment to determine validity of several hundred promissory notes executed by veterans as a secret side agreement over and above the agreed purchase price of homes purchased under loans guaranteed by the United States. After the Superior Court, San Diego County, Arthur L. Mundo, J., ruled in favor of assignee and the other defendants on the pleadings, assignee severed herself from co-defendants and filed a cross-complaint against two plaintiffs for balance due on their note and for a declaration of her rights in respect to the other outstanding notes. The Court denied the relief requested and assignee appealed. The District Court of Appeal, Griffin, Acting P. J., held that where partnership payee had failed to file a certification with county authorities showing names of partners as required of businesses operating under a fictitious name, partnership payee could not bring an action on notes, and as assignee took notes after maturity, she was subject to the same disabilities as partnership, but that ruling that judgment on cross-complaint applied to all notes was improper.

Judgment modified, and as modified, affirmed.

1. Partnership ⚖64

Where assignee who obtained note from a partnership payee after maturity,

failed to allege and prove in cross-action to recover balance due on note, that partnership had complied with fictitious name statute, assignee could not proceed further or recover judgment on the note. West's Ann. Civ.Code, §§ 2466, 2468, 2469.

2. Partnership ⚖64

Under fictitious name statute, partnership is required not only to show names of persons comprising partnership but names must be stated truthfully. West's Ann.Civ. Code, §§ 2466, 2468, 2469.

3. Partnership ⚖64

Fictitious name statute applies to an action for declaratory relief by an assignee of partnership as well as to the maintenance of another type of action. West's Ann.Civ. Code, §§ 2466, 2468, 2469.

4. Partnership ⚖64

In cross-action by assignee of a partnership payee to recover balance due on a note, evidence was sufficient to support finding that neither partnership nor assignee had made timely and truthful compliance with fictitious name statute. West's Ann. Civ.Code, §§ 2466, 2468, 2469.

5. Constitutional Law ⚖154(1), 240(1), 296(1) Partnership ⚖64

Conditions imposed on persons doing business as a partnership under fictitious name statute do not impair obligation of contract, deny equal protection or deprive assignee of note, acquiring title after maturity from partnership payee which had failed to comply with statute, from exercising her right to protection of court in conducting a lawful business without due process of law. U.S.C.A.Const. Amend. 5; West's Ann.Const. art. 1, §§ 11, 13, 16, 21; West's Ann.Civ.Code, §§ 2466, 2468, 2469, 3141; West's Ann.Code Civ.Proc., § 1962.

6. Estoppel ⚖118

In cross-action by assignee of partnership payee to recover balance due on a note, evidence was sufficient to support finding that makers were not estopped by untimely delay from raising question of partnership's noncompliance with fictitious name statute. West's Ann.Civ.Code, §§ 2466, 2468, 2469.

7. Partnership Ⓒ64

Assignee in cross-action to recover balance due on a note, claiming title to note by assignment after maturity from partnership payee, an entity doing business under a fictitious name, had burden of proving compliance with fictitious name statute. West's Ann.Civ.Code, §§ 2466, 2468, 2469.

8. Partnership Ⓒ64

The mere acceptance of deeds by grantees and execution of notes payable to the grantors operating a partnership, would not raise a conclusive presumption that partnership had complied with fictitious name statute. West's Ann.Civ.Code, § 2466; Servicemen's Readjustment Act of 1944, 38 U.S.C.A. § 693 et seq.

9. Declaratory Judgment Ⓒ385

In declaratory judgment action to determine validity of several hundred promissory notes wherein assignee of partnership payee of notes filed cross-complaint against two of makers to recover balance due on a note, and for a declaration of rights as to the other notes, trial court's recital in findings and judgment in favor of makers that the declaration applied to all notes executed by the purchasers of homes was improper, in view of fact that in other actions brought by assignee, compliance with the fictitious name statute might be waived by the defendants sued therein. West's Ann.Civ. Code, §§ 2466, et seq., 3141; Servicemen's Readjustment Act of 1944, 38 U.S.C.A. § 693 et seq.; West's Ann.Code Civ.Proc., § 1962.

Sloane & Fisher, San Diego, for appellants.

Huntington P. Bledsoe and Morris San-kary, San Diego, for respondents.

GRIFFIN, Acting Presiding Justice.

In the original complaint for declaratory and injunctive relief filed July 30, 1953, by Joseph R. Hixson, et al, including William Lee Farris and Helen Sue Farris, it is alleged that, in a representative capacity, they represent several war veterans who had formed a Protective Committee to test the

validity of several hundred promissory notes ranging from \$130 to \$150 each, which were signed by such veterans as a secret side agreement over and above the agreed purchase price of the home that each was purchasing under a loan guaranteed by the United States Government, Servicemen's Readjustment Act of 1944, 38 U.S.C.A. § 693 et seq.; that these notes were made payable to the Hubner Building Company, a copartnership, the grantor of the property; that about 1952, after the notes were past due and in default, defendant and appellant Delta M. Boren acquired from the Hubner Building Company, a thousand or more of the notes by assignment to her without recourse.

It appears from the files that defendant Delta M. Boren, et al, were successful in obtaining a ruling that such a representative suit would not lie in such a declaratory relief action under the pleadings as thus framed. The court allowed plaintiffs to amend but they refused. No judgment of dismissal followed. After several months defendant Boren, severing from her codefendants, then filed an answer and cross-complaint against William Lee Farris and wife, and therein stated that she "waived" the court's ruling in her favor and alone answered and denied generally the allegations of the first amended complaint. She alleged there was an actual controversy between plaintiff Hixson, the other veterans, and her concerning their liability on the notes, and by way of cross-complaint alleged that prior to December 9, 1952, Hubner Building Company was a copartnership engaged in the acquisition of lands in San Diego and the sale of such lands and buildings built thereon to veterans, and that E. J. Hubner and Ione C. Hubner, prior to the commencement of this action, caused to be filed and published, as required by section 2466 of the Civil Code, a certificate of fictitious name showing themselves to be the partners composing such partnership. She alleged the due execution of a \$150 note by the Farrises on March 10, 1951; that it was for advances of money made by Hubner Building Company for certain costs agreed

upon by the parties; that no fraud was committed and no conspiracy existed between her and any other person in relation to it; that on December 9, 1952, for a valuable consideration, Hubner Building Company transferred and assigned said note to her; and accordingly she claimed judgment against them and sought a declaration of her rights in respect to this and any other such outstanding notes.

The cross-complaint withstood an attack by demurrer and motion to strike. In Far-*r*is' answer to the cross-complaint, among other claimed defenses, it is pleaded as a special defense that Hubner Building Company was, at the time therein referred to, a copartnership, but it is denied that any of the partners thereof "ever, at any time prior hereto, caused to be filed or published as required by, or have fulfilled any of the requirements of section 2466 Civil Code". It is alleged in this regard that "the true partners were E. J. Hubner, Alton B. Jackson and Wrelton L. Clarke".

By amendment to the cross-complaint Mrs. Boren alleged that title of cross-defendants and all persons represented by them was derived solely from conveyances from Hubner Building Company, a copartnership composed of E. J. Hubner and Ione C. Hubner, and the notes were given in connection with this conveyance; that by their actions cross-defendants waived the necessity of filing and publishing any different certificate of fictitious name; that prior to December 9, 1952, when she purchased the notes, cross-defendants knew that Ione C. Hubner, E. J. Hubner, Clarke and Jackson had some interest in the assets of the copartnership; that cross-complainant did not discover the details of the relationship between E. J. Hubner and Ione C. Hubner and the other individuals named until the cross-complaint was filed and that cross-defendants, as well as other purchasers were estopped from showing any partnership relationship except that appearing on the public records. It was further alleged that Delta M. Boren, during the trial, caused to be published a certificate of part-

nership in accordance with section 2466, et seq. of the Civil Code, showing that between September 26, 1950, and June 7, 1951, Hubner, Clarke and Jackson were partners authorized to transact business under the name of Hubner Building Company.

In answer thereto cross-defendants denied generally these allegations and alleged that Mrs. Boren did know of the precise relationship and the actual partners at all times; that she knew a false certificate of partnership was filed and that it was for the sole and deliberate purpose of misleading and defrauding cross-defendants and to hide the true facts in relation to the members of said partnership from them and the public in general; and that she was a party to the filing of such false certificate through her own attorney and it was for the purpose of pretending that Jackson and Clarke were not copartners when, in fact, they were. They denied that they should be estopped from claiming this special defense, and alleged that cross-complainant should be estopped, by reason of her participation and knowledge of the true facts, from asserting that said partnership was other than one existing between Hubner, Clarke and Jackson; that the subsequent certificate of partnership was void, invalid, and had no effect on the present action.

Apparently the trial court postponed the trial of all issues and proceeded to trial on the issues presented by the special defense and held that both Jackson and Clarke were in fact partners in this transaction and that the certificate of copartnership, as published, was not a true certificate, was false and fictitious, and did not disclose the names of the true partners; that these facts were known by Mrs. Boren when she acquired the notes and when she offered the certificate of partnership in evidence in support of her cross-complaint that it was done deliberately, intentionally and fraudulently for the purpose of concealing from cross-defendants and the public generally the true names of the existing partners; that cross-complainant was not a holder in due course; that as assignee of said copartnership, Hub-

ner Building Company, she took the notes subject to all defenses and equities existing in favor of the makers of said notes against said partnership; that Ione C. Hubner permitted her name to be used as one of the partners for the sole purpose of concealing the true facts; and that cross-defendants are not estopped from showing the true relationship. It then found generally that the other allegations of the amended cross-complaint were untrue and that there was no compliance by the Hubner Building Company or cross-complainant with the provisions of sections 2466, 2468, 2469 or 2469.1 of the Civil Code, and accordingly she is not entitled to maintain any action to enforce the terms and conditions of any of the notes referred to in said cross-complaint and all actions by her to enforce collection of said notes are barred by reason thereof; that by the death of one of said partners and the dissolution of the partnership it is now impossible for her to comply with said statute and accordingly no trial on the other issues joined by the cross-complaint is necessary. Judgment was entered accordingly and cross-complainant appealed.

Without setting forth the complete evidence on this subject, it appears from the testimony of Jackson that he, Clarke, and Hubner sold homes under the name of Hubner Building Company, each participating in one-third of the profits; that the only interest Ione C. Hubner had was a one-half interest she subsequently obtained in a divorce settlement of her husband's one-third share; that before the Hubner Building Company had been formed he, Clarke and Hubner had organized and each had received one-third of the shares of a corporation of that name to conduct this business; that each party contributed \$7,000 cash for that purpose; that the corporation was dissolved and reorganized as a partnership and transferred the corporate business and assets to it; that the purported partnership agreement and certificate showing Ione and E. J. Hubner to be the partners was prepared and filed in order to make it appear of record that such persons were the only partners of the partnership because

"we were in the loan business. We didn't want to be in competition with our customers"; that Ione and E. J. Hubner were merely "fronting" the deal for the real partners under an oral agreement to do so; that when his loan company acted for the veterans to obtain the loans for the purchasers he never informed them that he was a partner nor had any interest in the Hubner Building Company, and he acted on his attorney's advice in the manner in which the deal was brought up, the documents signed, and the false certificate filed of record and the deception practiced.

Ione C. Hubner testified she was never a partner in the building company; that Jackson, Clarke and E. J. Hubner were at all times the real partners and conducted the business of the Hubner Building Company. Mrs. Boren admitted, on cross-examination, that she previously testified in her municipal court case against Hixson that she knew Jackson and Clarke were partners with E. J. Hubner and she bought the notes in December, 1952, after discussing the sale price with them (the three partners) and that this testimony was long before she verified her cross-complaint alleging that the partnership consisted of Ione C. and E. J. Hubner.

It is Mrs. Boren's claim on this appeal that the intended position of Clarke and Jackson was fundamentally that of beneficiaries of a subdivision trust; that by reason of the acceptance of the deeds and execution of the notes payable to the grantor, the grantees and payors are bound by the recitals in the instruments and conclusively bound as to the identity and membership of the grantor and payee partnership as thus disclosed; that the failure to comply with said sections operates as a penalty and that such forfeiture penalties are not favored in law, citing Section 1962, Code Civil Procedure; Section 3141 Civil Code, and such cases as *Commercial National Bank v. Reichelt*, 62 Mont. 302, 204 P. 1037; *People's State Bank v. Trombly*, 241 Mich. 199, 217 N.W. 47; *First Federal Trust Co. v. Stockfleth*, 98 Cal.App. 21, 276 P. 371;

and 18B McKinney's New California Digest, p. 302.

It is then argued that cross-defendants waived objection to full compliance with section 2466 et seq. of the Civil Code by untimely delay in raising the question in the pleadings, and by their conduct. It is then submitted that if the findings of the trial court are sustained, said sections herein referred to are unconstitutional and preclude cross-complainant from exercising her right to the protection of the court in conducting a lawful business guaranteed by sections 11, 13, 16 and 21, Article I of the California Constitution and Amendment 5 of the United States Constitution. Buxbom v. Smith, 23 Cal.2d 535, 546, 145 P.2d 305.

Cross-complainant concedes that she holds the notes as an assignee after maturity and would have no capacity to sue if her assignor, Hubner Building Company, had no capacity to sue.

Section 2466 of the Civil Code provides:

"* * * every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence. * * *

Section 2468 of the Civil Code provides in part that

"* * * No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of

this State until the certificate has been filed and the publication has been made as herein required."

Section 2469 of the Civil Code provides that

"On every change in the members of a partnership transacting business in this State under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, * * * a new certificate must be filed with the County Clerk * * *."

[1] Andrews v. Glick, 205 Cal. 699, 272 P. 587, definitely holds that the subject of section 2466, supra, is that public notice shall be given and a public record made of the individual members of the partnership with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing or to whom they are giving credit or becoming bound. See also Bank of America N. T. & S. A. v. National Funding Corporation, 45 Cal.App.2d 320, 327, 114 P.2d 49. The cases are numerous holding that in view of the requirements of the statute the partnership or its assignee, as the case may be, must allege and prove compliance with the statute in any suit to enforce a partnership contract or transaction, and failure to comply with the statute is fatal to the maintenance of the action by either the assignor or the assignee.

In the absence of proof by the cross-complainant of compliance with the statute, or upon a showing that a certificate filed does not comply with the statutory requirements, the cross-complainant may not proceed further or recover judgment. See North v. Moore, 135 Cal. 621, 67 P. 1037; Collection Service Corp. v. Conlin, 98 Cal. App. 686, 277 P. 749; Cohen v. Levy, 108 Cal.App. 524, 291 P. 864; Rudneck v. Southern California M. & R. Co., 184 Cal. 274, 193 P. 775; Sweeney v. Stanford, 67 Cal. 635, 8 P. 444.

[2, 3] A false certificate obviously does not comply with the statute and by its very

nature cannot constitute compliance. The statute requires not only the names of the persons comprising the fictitious partnership but they must be stated truthfully. A person should not be permitted to do business under a fictitious name and be protected by a certificate which falsely represents the names of the partners to be some other persons. The very object of the statute would be thwarted if such evasion of the statute were countenanced. *Schwarz & Gottlieb, Inc., v. Marcuse*, 175 Cal. 401, 165 P. 1015. This prohibition applies to an action for declaratory relief by an assignee as well as to the maintenance of another type of action. *Bank of America N. T. & S. A. v. National Funding Corporation*, 45 Cal.App.2d 320, 114 P.2d 49, *supra*.

[4, 5] The court's finding that neither the partnership nor the cross-complainant had made timely and truthful compliance with section 2466 of the Civil Code is sufficiently established. Originally, partnerships and individuals were not permitted to do business under fictitious names. The right to do so is a creature of statute and before a suit may be maintained by a fictitious partnership the legislature has the right to prescribe certain conditions. These conditions are not unconstitutional, as claimed. *Schwarz & Gottlieb, Inc., v. Marcuse*, *supra*.

[6-8] The trial court found, upon sufficient evidence, that cross-defendants were not estopped from raising this question at the time indicated. We cannot hold, as a matter of law, to the contrary. The burden of proof of compliance was upon plaintiff. *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 281, 193 P. 775, *supra*. By the mere acceptance of the deeds and the execution of the notes it cannot be conclusively presumed that the Hubner Building Company complied with section 2466 et seq. of the Civil Code, entitling it to maintain an action on the notes. This sufficiently disposes of the main contentions raised on this appeal.

[9] Lastly, it is argued that the court erred in the terms of the findings and the

judgment by reciting therein that this declaration applied to all of those certain promissory notes executed and delivered by purchasers of homes from the Hubner Building Company, a copartnership, to said partnership during the years 1950, 1951 and 1952, purportedly as part of the purchase prices thereof, or expenses incurred in connection therewith. The contention is that the trial court erred in the attempt to tie cross-complainant's hands in other actions and other courts in which actions she maintains compliance with the fictitious name statute might be waived by the defendants therein sued. There is merit to this claim and the declaration should not apply other than to those involved in the present proceeding.

As thus modified the judgment is affirmed. Respondent to recover costs.

MUSSELL, J., concurs.



144 Cal.App.2d 600

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

David W. BENTON, Defendant and
Appellant.
Cr. 1117.

District Court of Appeal, Fourth District,
California.

Sept. 24, 1956.

Defendant was charged with robbery, and he interposed defense of insanity. From a judgment of the Superior Court of Riverside County, John G. Gabbert, J., the defendant appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained the conviction and that the defense of insanity was not sustained by the preponderance of evidence.

Judgment affirmed.

1. Robbery §24(1)

Evidence sustained conviction of robbery. West's Ann.Pen.Code, §§ 211, 1016.

2. Criminal Law §48

Legal "sanity" in a criminal case means reasoning capacity sufficient to distinguish between right and wrong as to the particular act defendant is doing, knowledge and consciousness that what he is doing is wrong, and criminal, and will subject him to punishment.

See publication Words and Phrases, for other judicial constructions and definitions of "Sanity".

3. Criminal Law §570(2)

Defendant interposing the defense of insanity has the burden of proving insanity by a preponderance of evidence.

4. Criminal Law §570(1)

In robbery prosecution evidence did not sustain defense of insanity. West's Ann.Pen.Code, §§ 211, 1016.

Alan Nixen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged in an information with the crime of Robbery, a violation of Section 211 of the Penal Code. On August 26, 1955, he entered a plea of not guilty to the charge and on September 8th, on his motion, his plea of not guilty was ordered withdrawn and a plea of not guilty by reason of insanity was ordered entered. Alienists were appointed by the court and ordered to submit their reports. On October 11th the reports of the doctors were received and considered by the court and counsel and it was stipulated that the issue as to the defendant's sanity at the time of the commission of the crime be tried and determined on the doctors' reports. The court then found that the defendant was sane at the time of the commission of

the offense and the matter was referred to the probation officer for investigation and report. On October 21st the report of the probation officer was received and the defendant, when asked by the court if there was any legal cause why judgment should not be pronounced, informed the court that he did not understand the nature of his former plea and requested further counsel. The matter was then continued to November 3rd, on which date defendant informed the court that he had retained one Dale C. Miller as counsel and a continuance of the case was thereupon had to November 8th. On that date Alan Nixen was appointed as defendant's counsel and Mr. Miller was relieved as attorney of record. The matter was again continued to November 10th when, on defendant's motion, his plea of not guilty by reason of insanity was withdrawn and a plea of not guilty and not guilty by reason of insanity was entered. A jury trial was ordered and set for November 28th. On November 18, 1955, the trial court reviewed the history of the proceedings to the defendant, who then withdrew his plea of not guilty and stated that it was his intention to have the matter tried on the issue of not guilty by reason of insanity only. The court then explained to the defendant the consequences of such a plea and he stated that he fully understood. His pleas of not guilty and not guilty by reason of insanity were ordered withdrawn and his plea of not guilty by reason of insanity entered. A jury trial was had on this issue and a verdict was returned by the jury finding that the defendant was sane at the time of the commission of the offense charged. His application for probation was denied and he was sentenced to the state prison for the term prescribed by law. He appeals from the judgment of conviction.

[1] On March 16, 1956, pursuant to the request of the defendant, this court appointed Alan Nixen, the attorney who represented the defendant at the trial, as counsel for defendant on this appeal. Mr.

Nixen filed a report herein rather than a brief, *People v. Bennett*, 120 Cal.App.2d 835, 262 P.2d 59. He states therein that he has examined the complete record in the lower court and has concluded, after careful research of the points raised by the appellant, that appellant does not have any meritorious grounds for appeal. After studying the record herein, we agree with this conclusion.

The evidence shows that on August 15, 1955, at about 1:00 p.m., the defendant entered a variety store in Riverside and there waited until the Proprietress (Ann Loucks) finished waiting on customers then in the store. Defendant asked to look at a certain kind of paint and when Ann Loucks' back was turned, lunged at her and said, "Hold it right there. This is a stickup." Ann Loucks testified that he then took her to a back room, tied a rope around her waist and arms and closed her mouth; that he told her not to make any noise, that he had a knife with him. She stated that the defendant had the rope with him when he entered the store. A witness who was in the store immediately after Ann Loucks was taken to the back room, testified that she saw the defendant taking money out of the cash register. Defendant was arrested by the police officers shortly thereafter and was taken to the store where he was identified. He made conflicting statements to the officers as to his whereabouts at the time of the commission of the offense and concerning the coins and other personal property found in his possession. While it was stipulated at the trial that the defendant had committed the offense charged and on his plea of not guilty by reason of insanity he admitted the commission of the offense, Pen.Code, Sec. 1016, the evidence is amply sufficient to establish the robbery charge. The evidence on the issue of insanity consisted principally of the testimony of psychiatrists who had examined the defendant.

Dr. Daniel S. Castile, a psychiatrist, testified that he made an electroencephalogram test and tracings of the defendant's

brain which suggested damage thereto; that in his opinion the defendant was unable to differentiate between right and wrong and was therefore insane and that defendant was a man whose sanity was marginal.

Dr. Michael Koenig testified that from his examination of the defendant he concluded that the defendant did not have a clear idea of right and wrong; that he was not in a position to state whether the defendant was insane or not but that he did show evidence of mental impairment to a degree.

Dr. Robert Cook, a psychiatrist called by the People, testified that he examined the defendant and conducted several tests on the basis of which he stated that he found the defendant "by the legal definition of legal sanity to be sane."

[2-4] Dr. Otto L. Gericke, Superintendent and Medical Director of the hospital at Patton, Diplomat of the American Bureau of Psychiatrists and Neurologists and a Fellow in the American Psychiatric Association, testified that he examined the defendant and also reviewed the report of Dr. Castile and the electroencephalogram which he took; that he made a second examination of the defendant three weeks later; that it was his opinion that on the date of the alleged offense the defendant was sane and knew the difference between right and wrong and the nature and quality of his act.

As is said in *People v. Daugherty*, 40 Cal.2d 876, 894, 256 P.2d 911, 921:

"* * * Legal sanity, in a criminal case, under our court declared law, means "reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment." * * *

The defendant had the burden of proving insanity by a preponderance of the evidence, *People v. Daugherty*, *supra*, 40 Cal.2d 901, 256 P.2d 925, and we conclude

that the defendant did not meet this burden and that the finding of the jury that he was sane at the time of the offense charged is amply supported by the record.

The judgment is affirmed.

GRIFFIN, Acting P. J., and BURCH, Justice pro tem., concur.



144 Cal.App.2d 687

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Fred CARNER, Defendant and Appellant.

3 Cr. 2678.

District Court of Appeal, Third District,
California.

Sept. 27, 1956.

Defendant was convicted of forcible rape. The Superior Court, Solano County, Joseph M. Raines, J., entered judgment of conviction and order denying motion for new trial and defendant appealed. The District Court of Appeal, Schottky, J., held that errors in admission of testimony that defendant had been previously arrested for drunken driving and in instruction that jury could consider such testimony in determining defendant's credibility were not prejudicial, where the matter of the prior arrest would have little weight with jury.

Judgment and order affirmed.

1. Witnesses \Leftrightarrow 337(5)

In forcible rape prosecution, where no attempt was made to show that defendant had been convicted of a felony, defendant's credibility could not be impeached by cross-examining him as to whether or not he had ever been arrested, notwithstanding that defendant stated that he had never been in trouble before and offered

evidence that his general reputation for sexual morality was good. West's Ann. Code Civ.Proc. § 2051; West's Ann.Pen. Code, §§ 261, subd. 3, 1102.

2. Criminal Law \Leftrightarrow 786(6)

In forcible rape prosecution, instruction which permitted jury, in determining credibility of defendant, to consider inadmissible evidence that defendant had been arrested for a prior offense, should not have been given. West's Ann.Code Civ.Proc. § 2051; West's Ann.Pen.Code, §§ 261, subd. 3, 1102.

3. Criminal Law \Leftrightarrow 693

Where subject matter of question is objectionable and a party fails to interpose objection until after it is answered, he thereby waives his right to complain of admission of the testimony.

4. Criminal Law \Leftrightarrow 1169(5)

Where evidence is stricken out on motion of defendant and jury are admonished to disregard it, any error in admitting such testimony is generally cured.

5. Criminal Law \Leftrightarrow 1169(1), 1172(1)

In forcible rape prosecution, errors in admission of testimony that defendant had been previously arrested for drunken driving and in instruction that jury could consider such testimony in determining defendant's credibility were not prejudicial, where the matter of the prior arrest would have little weight with jury. West's Ann. Code Civ.Proc. § 2051; West's Ann.Pen. Code, §§ 261, subd. 3, 1102; West's Ann. Const. art. 6, § 4½.

Robert K. Winters, Benicia, for appellant.
Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant was convicted of the crime of forcible rape, Pen.Code, sec. 261, subd. 3, and appeals from the judgment and order denying his motion for a new trial. Defendant does not dispute the sufficiency

of the evidence to support the verdict of the jury but contends that reversible error was committed by the trial court in the improper admission of evidence and in an erroneous instruction to the jury.

It appears from the record that the defendant, Fred Carner, spent the late afternoon and evening of June 30, 1955, drinking at a Fairfield tavern. He left the inn at about 10:00 p. m. and drove to Vacaville where he stopped near a restaurant known as Corral Number 3.

Meanwhile, after a day of assisting her husband in a television repair business as well as caring for her baby and her household, 22 year old Carol June Lingo, the prosecutrix, decided to take a stroll near her Vacaville home and see how her friend and neighbor, Irma Smith, was getting along on a new job. At about 10:45 p. m. Carol arrived at the Corral Number 3 where Irma had just started working. She stayed only briefly since her friend was extremely busy.

Leaving the restaurant she paused for a moment to observe some construction work being done near the restaurant. As she gazed at the excavation she was addressed by the defendant and a brief casual conversation ensued. She was surprised when defendant called her by her first name and stated that he knew her father well. They talked politely for a moment then she stated that it was time for her to be getting home. He offered to drive her home but she declined politely saying that she would rather walk. He continued his offer to drive her home and appeared to be hurt and offended when she refused. Not wishing to offend a man whom she thought to be a friend of her father she finally consented to riding to her home with him.

It soon became abundantly clear that defendant had no intention of taking her home. She protested repeatedly and even tried to get him to stop at the home of one of her friends as they passed by. The defendant paid no attention and continued driving out of town at a high rate of speed.

The prosecutrix testified that defendant stopped the car on a lonely country road and after a violent struggle in which she resisted his advances to the limit of her strength, she was forced to submit to an act of sexual intercourse. Defendant later released the prosecutrix in the town of Vacaville and prosecutrix quickly reported to the police station the events that had transpired. Her testimony was corroborated by evidence of multiple scratches, abrasions and contusions upon her forehead, her right temple, her neck and upon her knees. Her husband testified that there were no observable bruises upon his wife when she left the house for her evening walk but that she was badly bruised when she returned home the next morning.

A medical examination of defendant following his arrest the next day revealed scratches, abrasions, and contusions upon his back, shoulders, legs, cheeks and lip. He also had a small abrasion on the inner edge of his foreskin. It was the opinion of the doctor that the injuries found upon the defendant's body were inflicted within 24 hours of the time of the examination.

Upon his arrest about 1:00 p. m. on July 1, 1955, defendant denied having seen the prosecutrix before and denied having had sexual intercourse with her, but upon the trial he admitted the act of sexual intercourse but maintained that the prosecutrix consented to the act and that no force or violence was used by him to accomplish the act.

[1] Defendant first contends that the court erred in overruling his objections to certain questions asked by the District Attorney during the cross-examination of defendant. The record shows the following:

"Q. [By Mr. Peterson]: * * * I believe you also testified in response to some of Mr. Winters' questions, that you decided to tell the truth after your attorney had talked to you, is that correct? A. That's true.

"Q. In other words, you weren't going to tell the truth until somebody

told you to, is that right? A. Well, that's the first time I'd been into any trouble. I didn't tell them what happened until I got hold of an attorney. He told me to go ahead and tell the truth, and nothing but the truth.

"Q. This is the first time you've been in any trouble? A. That's true.

"Q. This is the first time you've been arrested?

"Mr. Winters: I will object to that question as not being relevant to any issue here.

"The Court: Overruled.

"By Mr. Peterson: Q. Is this the first time you've been arrested? A. No, it isn't.

"Mr. Winters: I'm going to object, and cite the District Attorney for prejudicial misconduct. The only question permitted is, have you ever been convicted of a felony.

"The Court: I've overruled it.

"Mr. Winters: I'd like to take an exception, and cite Your Honor for prejudicial misconduct.

"The Court: The Court is trying to show both of you courteous treatment, and give your client a fair trial.

"Mr. Winters: I understand that, but when your ruling permits a prejudicial question to be asked of a witness concerning an offense not amounting to a felony, I feel that it's highly prejudicial to my client, both on your part—

"The Court: You may have your exception, and your objection is again overruled.

* * * * *

"Q. Have you ever been arrested before? A. I have."

On redirect examination, defendant's counsel further developed defendant's testimony and therein he stated in response to his counsel's inquiry that said arrest was for drunk driving.

Defendant is correct in his contention that the trial court erred in permitting the prosecution to ask defendant on cross-examination whether or not he had ever been arrested. This question was presented in *People v. Hamblin*, 68 Cal. 101, 8 P. 687, 688, where, as in the present case, there was no attempt made to show that the defendant had been convicted of a felony and the question merely sought to establish that defendant had been arrested. That court quoted the following language from *People v. Elster*, 65 Cal. xx, 3 P. 884, "The only possible object of asking the questions was to impeach the credibility of the witness. But the testimony was not admissible for that purpose. The mere fact that the witness had been arrested does not prove, nor tend to prove, that he had been convicted of any offense; and until there is proof of conviction the witness was protected by the legal presumption of innocence. Hence the rule formulated by section 2051, Code of Civil Proc.: * *." See also 3 Wigmore on Evidence 545, section 980a, 3d Ed. The language of said section providing that a witness may not be impeached by evidence of particular wrongful acts limits impeachment of this character to cases where there has been a conviction of a felony. Penal Code section 1102 makes this rule applicable to criminal trials.

Respondent contends that because defendant offered evidence to prove his good character in respect to the trait involved in the charge, i. e., that his general reputation for sexual morality was good, the challenged evidence was admissible to show that his general reputation was bad and to rebut defendant's gratuitous statement that he had never been in trouble before. We do not think that respondent correctly states the California rule. The state is confined to evidence of the general bad reputation of defendant for sexual morality or evidence of judgment of conviction of a felony. See 22 So. Cal. L. Rev. 341-347; 3d Ed.; *People v. Hamilton*, 33 Cal. 2d 45, 3 Wigmore on Evidence 550, section 983,

198 P.2d 873. All of the cases cited by respondent introduce other acts of the same nature for the purpose of establishing guilty intent or motive and are not in point.

[2] Defendant contends further that the error in not sustaining his objections to said questions was aggravated by the following instruction which the court gave to the jury:

"Evidence was elicited from the defendant on his cross-examination by the District Attorney, that he had been arrested for a prior offense, to wit: a misdemeanor; said prior offense was in no way connected with the charge on which defendant is now being tried. Such evidence was elicited and allowed by the court only on the question on the credibility of the defendant, and is not to be considered by you, in the slightest degree, as tending to connect the defendant with the offense of rape on which he is so being tried, nor as tending to prove in any way, his guilt thereof."

The instruction should not have been given because as provided in section 2051 of the Code of Civil Procedure a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony", and the instruction as given by the court permitted the jury to consider inadmissible evidence in determining the credibility of defendant.

[3,4] The remaining contentions of defendant are without merit. The record discloses that defendant's counsel objected to the question, "As a matter of fact, Mr. Button originally signed a surety on your bail, did he not?" after defendant's affirmative answer was given. Where the subject matter of the question is objectionable and a party fails to interpose objection until after it is answered, he thereby waives his right to complain of the admission of the testimony. *People v.*

Brazil, 53 Cal.App.2d 596, 598-599, 128 P.2d 204; *People v. Caritativo*, 46 Cal.2d 68, 292 P.2d 513. Then the question was asked, "And then Mr. Button subsequently withdrew as surety on your bail, did he not?" Objection by defendant's counsel was sustained and the jury admonished. Upon further cross-examination, defendant was asked a series of questions concerning whether or not he was still employed by Mr. Button and whether or not the latter took defendant home from two bars on a certain date. When defendant's counsel explained that said date was two days prior to the trial, the court sustained defendant's objection, ordered the answer stricken and admonished the jury. Where evidence is stricken out on motion of defendant and the jury are admonished to disregard it, any error in admitting such testimony is generally cured. *People v. Bolton*, 215 Cal. 12, 18-19, 8 P.2d 116. The jury is presumed to obey such orders. *People v. Pearson*, 111 Cal.App.2d 9, 21, 244 P.2d 35; *People v. Young*, 25 Cal.App.2d 148, 156, 77 P.2d 271.

[5] While, as we have hereinbefore stated, certain errors were committed in the admission of testimony and in instructions to the jury, we do not believe that such errors are sufficient to justify a reversal of the judgment. A reading of the entire record convinces us that the evidence was such that the admission of evidence that defendant had previously been arrested for drunk driving would have little weight with the jury in determining whether he was guilty of the crime of rape. We are convinced further that the instruction complained of would likewise have little weight with the jury. It must be borne in mind that the jury had an opportunity to see and hear the witnesses and that the record shows that defendant was ably defended. Defendant, a married man and the father of six children, admitted taking the prosecutrix in his automobile to a lonely road at a late hour of the night and there consummating an act of sexual intercourse with her. These admitted facts would undoubtedly prej-

judice defendant in the eyes of the jury far more than evidence that he had previously been arrested on a charge of drunk driving. Having in mind the provisions of section 4½ of Article VI of our state Constitution that no judgment shall be set aside on the ground of misdirection of the jury or error in the introduction or rejection of evidence or for error as to any matter of pleading, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice", we believe that no miscarriage of justice has resulted.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



145 Cal.App.2d 19

In the Matter of the ESTATE OF Joseph
FELDMAN, Deceased.

Helen Hayner FELDMAN, Petitioner and
Appellant,

v.

ESTATE OF Rose F. METZGER,
Respondent.

Civ. 21669.

District Court of Appeal, Second District,
Division 1, California.

Oct. 8, 1956.

Hearing Denied Dec. 5, 1956.

Proceedings in the matter of a decedent's estate, wherein testamentary trustees petitioned for instructions. The Superior Court of Los Angeles County, Victor R. Hansen, J., held that the estate of the first life income beneficiary of testamentary trust was entitled to all of net income received by executors on corpus of trust for period commencing with date of decedent's death and continuing up to and including date of beneficiary's death, and an appeal was taken. The District

Court of Appeal, Fourth, J., held that the word "trustee," as defined and used in the Principal and Income Law, does not include an executor, and that first life income beneficiary of testamentary trust was not entitled to income earned by trust and paid to executors, but not distributed to trustees during period between death of testator and death of such beneficiary.

Reversed with directions.

Opinion, 299 P.2d 441, vacated.

1. Wills ⇨684(7)

Both Probate Code section providing for income accrual from date of testator's death and Civil Code section providing for cessation of tenant's right to income are applicable to testamentary trust; and application of latter statute in those instances wherein beneficiary dies prior to decree of distribution does not by implication result in forfeiture of vested right. West's Ann. Civ.Code, § 730.06; West's Ann.Prob. Code, § 160.

2. Wills ⇨684(7)

The word "trustee," as defined and used in the Principal and Income Law, does not include an executor; and first life income beneficiary of testamentary trust was not entitled to income earned by trust and paid to executors, but not distributed to trustees during period between death of testator and death of such beneficiary. West's Ann.Civ.Code, § 730.03.

See publication Words and Phrases, for other judicial constructions and definitions of "Trustee".

Hanna & Morton, Harold C. Morton, Los Angeles, Max K. Jamison, Porterville, for appellant.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Stuart L. Kadison, Harvey M. Grossman, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by Helen Hayner Feldman, the widow of Joseph Feldman, deceased, and one of the beneficiaries under

the terms of his will, from an order instructing the trustees to pay to the estate of Rose F. Metzger, also a beneficiary, all monies ascertained to have been received during the period *June 24, 1953*¹ to January 5, 1954, on the corpus of each of the trusts created by paragraphs Fifth (B) and Fifth (C)² of the will of decedent.

Joseph Feldman died on July 24, 1953. By his will, dated July 1, 1948, he created three trusts, only two of which are involved in this appeal. The three trusts were created by paragraph Fifth of decedent's will, the two trusts in question being those created by paragraphs Fifth (B) and Fifth (C).²

In essence, the trust created by paragraph Fifth (B) provided Rose F. Metzger, the sister of decedent, with a life estate in the income with a remainder over of the income to Helen Hayner Feldman, his wife, in the event his wife outlived Mrs. Metzger. The trust created by paragraph Fifth (C) established a life estate to Helen Hayner Feldman in the income to the extent that the trustees deemed it neces-

sary that the income be paid to her in order to supplement (for her support and maintenance) the income received from the trust created by paragraph Fifth (A), and during the lifetime of Helen Hayner Feldman to pay the balance of the income to Rose F. Metzger.

Under the terms of the will, Helen Hayner Feldman, Rose F. Metzger and Percival E. Jackson were named as executors, qualified as such and acted until January 5, 1954, at which time Rose F. Metzger died. Decedent's will named Rose F. Metzger and Percival E. Jackson, together with the Farmers and Merchants National Bank of Los Angeles as trustees of the trusts created by paragraphs Fifth (B) and (C) of the will.

During the period of administration of the estate Helen Hayner Feldman has received a family allowance from the estate of \$5,000 per month. Such sum has been ample, without reference to the income payable to her under the trust established by paragraph Fifth (A) of the will, for her proper support and maintenance. The

1. This is an obvious clerical error in the order which should read "*July 24, 1953*", the date of decedent's death. The findings of fact and conclusions of law correctly give the period in question as July 24, 1953 to January 5, 1954.
2. The pertinent provisions of paragraphs Fifth (B) and Fifth (C) are as follows:

"(B) Another such part of twenty-five (25%) per cent to my Trustees hereinafter named, in trust, nevertheless, to invest the same and keep the same invested, to collect the rents, income and profits thereof, and to pay over the net income arising therefrom to my sister, Rose F. Metzger, during her lifetime, and upon her death to pay over the net income arising therefrom to my wife, Helen Hayner Feldman, and upon the death of my sister and my wife, the principal shall be disposed of as follows:

* * * * *

"(C) Another such part of twenty-five (25%) per cent to my Trustees hereinafter named, in trust, nevertheless, to invest the same and to keep the same invested and collect the rents, income and profits thereof and to pay over such portion of the net income arising therefrom

to my wife, Helen Hayner Feldman, during her lifetime, monthly, to the extent that my Trustees, in their discretion, deem necessary that the income provided to be paid her under the provisions of paragraph 'Fifth (A)' be supplemented for her proper support and maintenance during that period, and further, if in any calendar year subsequent to the year in which my death shall occur, the income from this Trust should, in the opinion of my Trustees, be insufficient together with the income from the Trust created in paragraph 'Fifth (A)' hereof, to provide for proper support and maintenance for my wife, then to pay over to my said wife out of the principal of this Trust so much thereof as my Trustees deem necessary for her support and maintenance during that period, and during the lifetime of my wife to pay over the balance of the net income, and upon her death the whole of the net income arising therefrom, to my sister, Rose F. Metzger, monthly during her lifetime, and upon the death of my wife and my sister, the principal or so much thereof as shall be remaining in the hands of my said Trustees, shall be disposed of as follows:

* * * * *

trustees made no finding that any additional monies were, during the period from July 24, 1953, through January 5, 1954, needed by Helen Hayner Feldman for her support and maintenance.

In their amended first account current and report, the executors reported net income from the estate in the amount of \$146,407.45, as of June 30, 1954. Pursuant to an order for partial distribution dated September 2, 1954, the sum of \$12,500 from the income cash on hand was distributed to the trustees of the trust created by paragraph Fifth (B) and a similar amount distributed to the trustees of the trust created by paragraph Fifth (C). Pursuant to a further order for partial distribution dated November 12, 1954, the sum of \$24,101.86 cash from the income on hand was distributed to the trustees of the trust created by paragraph Fifth (B), and a similar amount distributed to the trustees of the trust created by paragraph Fifth (C).

On a petition for instructions filed by the trustees, the trial court determined that the estate of Rose F. Metzger is entitled to all of the net income received by the executors on the corpus of the trusts created by paragraphs Fifth (B) and Fifth (C) of the will of Joseph Feldman for the period commencing with the date of the death of Joseph Feldman on July 24, 1953, to and including January 5, 1954, the date of the death of Rose F. Metzger and entered its order accordingly. It is from that order that the appeal herein is taken.

The sole question for determination is whether the first life income beneficiary of a testamentary trust is entitled to all income earned by the trust and paid to the executors, but not distributed to the trustees, during the period between the death of the testator and the death of such beneficiary.

Appellant contends that the provisions of Section 730.06 of the Civil Code are applicable and that she, as successor beneficiary, is entitled to the income received by the executors but not distributed to the

trustees until after the death of Rose F. Metzger, the first life income beneficiary.

Section 730.06 of the Civil Code provides as follows: "[Cessation of right of tenant to income]. Whenever a tenant's right to income shall cease by death, or in any other manner, all payments theretofore actually paid to the tenant or in the hands of the trustee for payment to the tenant shall belong to the tenant or his personal representative; all income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established."

It is appellant's contention that, applying the foregoing provisions of Section 730.06 of the Civil Code, when a trust is created to pay the income to a beneficiary for life and thereafter to pay the income to another beneficiary, upon the death of the first beneficiary the second beneficiary is entitled to receive all income from the trust which at the date of the death of the first life income beneficiary has not been paid to such beneficiary or is not yet in the hands of the trustees to pay to such beneficiary.

Respondent, upon the other hand, contends that Section 160 of the Probate Code is determinative of the issue, citing *In re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825, and that the construction of Section 730.06 of the Civil Code urged by appellant would nullify Section 160 of the Probate Code and result in a forfeiture of a vested right in those cases wherein the income beneficiary dies prior to the decree of distribution.

Section 160 of the Probate Code provides: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death."

In Re Estate of Platt, supra, the issue was whether the income from a testamentary trust accrued from the date of the testator's death or from the date of dis-

tribution of the estate to the trustee. The applicability of the Principal and Income Law, Civil Code, Sections 730-730.15, which was originally adopted in 1941, Stats.1941, ch. 898, p. 2476, and added to the Civil Code in 1953, Stats.1953, ch. 37, p. 666, was not in issue, the trusts having come into existence prior to its enactment. Moreover, the life beneficiary survived distribution. The rule laid down in the Platt case is that Section 160 of the Probate Code is applicable to a testamentary trust; hence the right to income accrues from the testator's death where the will is silent in this respect. In holding that the life beneficiary was entitled to the earnings on the corpus during administration as against the remainderman, the court stated, 21 Cal. 2d at page 347, 131 P.2d at page 828: "As title to all testamentary dispositions vests at the testator's death (Prob.Code, §§ 38, 300), the title of the trustee to Mr. Platt's property vested as of that date, even though the trust estate was residuary in character. (Citing cases.) As a necessary corollary, the title of the life tenant also dates from the death of the testator. The income earned by the trust property during the period of administration inures, of course, to the benefit of the trust, and is payable by the executor to the trustee upon distribution."

In *Re Estate of Van Wyck*, 185 Cal. 49, 196 P. 50, cited by respondent, was decided long before the Principal and Income Law was adopted and is therefore inapplicable. In *Re Estate of Schiffmann*, 86 Cal.App.2d 638, 195 P.2d 484, the life beneficiary died prior to the date the estate was ordered distributed. The income received by the trustee after the death of the life beneficiary was distributed to the remaindermen pursuant to the express terms of the trust which provided that the life beneficiary was to receive the net income from the trust *available for distribution*. The decree set forth that the income to which the trustee would have been entitled upon distribution of the estate had not been received by the trustee and was

therefore not *available for distribution* prior to the death of the life beneficiary.

Union Nat. Bank of Pasadena v. Hunter, 93 Cal.App.2d 669, 209 P.2d 621, involved an inter vivos trust. The net income accrued but not actually received by the trustee prior to the death of the trustor (the first life beneficiary) was ordered distributed pursuant to the provisions of Section 4 of the Principal and Income Act (now Section 730.06 of the Civil Code).

[1,2] It is our opinion that both Section 160 of the Probate Code and Section 730.06 of the Civil Code are applicable to testamentary trusts; further, that the application of the latter statute in those instances wherein the beneficiary dies prior to the decree of distribution does not, as contended by respondent, by implication result in the forfeiture of a vested right.

In the instant case, since the will does not expressly fix a date from which income shall be paid, it accrues from the testator's death. Probate Code, Section 160; In *re Estate of Platt*, supra. The death of the testator having occurred subsequent to September 1, 1941, the provisions of the Principal and Income Law are applicable. Civil Code, Sections 730.02, 730.04. Therefore, although title to the trust estate vested in the trustees as of the date of Mr. Feldman's death, and the income during the period of administration inured to the benefit of the trust, the provisions of Section 730.06 of the Civil Code are applicable in determining the rights of the respective beneficiaries to such income. Since concededly none of the income earned by the trust estate was actually received by the trustees prior to the death of Rose F. Metzger, the first life income beneficiary, Helen Hayner Feldman, the successor beneficiary is entitled to the income which was received by the executors during the period from the date of the testator's death to the date of the death of Rose F. Metzger and distributed to the trustees pursuant to the decrees of distribution of September 2, 1954 and November 9, 1954.

There is no merit in respondent's contention that the word "trustee" as defined and used in the Principal and Income Law includes an executor. A trustee is defined in Section 730.03 of the Civil Code as follows: "'Trustee' as used in this chapter includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee." The trust came into being upon the death of the testator and the original trustees are specifically named in the will.

The judgment is reversed with directions to the trial court to order the trustees to pay to Helen Hayner Feldman, as successor beneficiary, the net income received by the executors for the period from July 24, 1953, through January 5, 1954, and paid to the trustees pursuant to the decrees of distribution of September 2, 1954 and November 9, 1954.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.



SEVEN UP BOTTLING COMPANY OF LOS ANGELES, Incorporated, Plaintiff and Respondent,

v.

GROCERY DRIVERS UNION LOCAL 848, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; Thomas L. Pitts, individually and as Secretary thereof; Joint Council of Teamsters No. 42, a labor organization and an unincorporated association; Ralph Clare, individually and as an officer and member thereof; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A.F.L.; Dave Beck, individually and as Executive Vice President and member thereof; Jack Anand, individually and as a member and representative thereof; Einar Mohn, individually and as a member and representa-

tive thereof; Ice Drivers, Helpers and Cold Storage Warehousemen Union Local No. 942, A.F.L., a labor organization and an unincorporated association; Irvin N. Gustafson, individually and as an officer and member thereof; Beer Drivers Union Local No. 203, A.F.L., a labor organization and an unincorporated association; George Leonard, individually and as an officer and member thereof; Steel, Paper House, Chemical Drivers & Helpers Union Local No. 578, A.F.L., a labor organization and an unincorporated association; John McGee, individually and as an officer and member thereof; Grocery Warehousemen Union Local 595, A.F.L., a labor organization and an unincorporated association; L. L. Sylva, individually and as an officer and member thereof; Wholesale Salesmen Dairy and Frozen Food Union, Local No. 306, A.F.L., a labor organization and an unincorporated association; John G. Marshall, individually and as an officer and member thereof; Doe One to Doe One Hundred (inclusive of all intervening numbers as though each said Doe was severally and separately designated), Defendants and Appellants.*

Civ. 20896.

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1956.

Rehearing Denied Oct. 4, 1956.

Hearing Granted Nov. 14, 1956.

Suit to enjoin defendants labor unions, officers, members and representatives thereof, and others from soliciting an association of plaintiff corporation's employees to break a collective bargaining agreement, picketing places where plaintiff's products were sold, requesting transportation companies to refuse to deliver merchandise to plaintiff's customers, etc., and to recover damages for such alleged activities. From a judgment of the Superior Court of Los Angeles County, A. Curtis Smith, J., for plaintiff, defendants appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported trial court's findings that plaintiff did not interfere with association or defendant unions and that there was a jurisdictional dispute, within Jurisdictional Strike Law, as to whether associ-

* Opinion vacated 320 P.2d 492.

tion or one of such unions should represent plaintiff's employees.

Judgment affirmed.

1. Labor Relations ⇨949

In suit to enjoin certain labor unions and others from soliciting association of plaintiff corporation's employees to break association's collective bargaining agreement with plaintiff and engaging in other activities violating Jurisdictional Strike Law, trial court found on issue whether association was financed, interfered with or controlled by plaintiff, in view of court's finding, in words of statute, that association was "not found" to be financed or interfered with by plaintiff, and finding that allegations of certain paragraph of complaint, containing allegation that association was not financed, wholly or partly, or interfered with, dominated or controlled by plaintiff, were true. West's Ann.Labor Code, § 1117.

2. Labor Relations ⇨949

In suit to enjoin defendant labor unions' solicitation of association of plaintiff corporation's employees to break collective bargaining agreement with plaintiff and other activities in alleged violation of Jurisdictional Strike Law, trial court, having found that association was not financed or interfered with, dominated or controlled by plaintiff, was not required to make findings respecting plaintiff's specific acts, from which question whether plaintiff interfered with association could be determined as court finding ultimate facts is not required to make findings as to various evidentiary matters. West's Ann.Labor Code, § 1117.

3. Trial ⇨397(1)

Special facts need not be detailed in trial court's findings, if court's general finding necessarily embodies implied finding on such facts.

4. Labor Relations ⇨948

In suit to enjoin labor unions from soliciting association of plaintiff corporation's employees to break collective bargaining agreement with plaintiff and engaging in other activities violating Jurisdictional

Strike Law, whether plaintiff interfered with association or defendant unions was fact question for determination by trial judge. West's Ann.Labor Code, § 1117.

5. Labor Relations ⇨942

In suit to enjoin labor unions from soliciting association of plaintiff corporation's employees to break collective bargaining agreement with plaintiff and engaging in other activities violating Jurisdictional Strike Law, evidence was sufficient to support trial court's finding that plaintiff did not interfere with association or defendant unions. West's Ann.Labor Code, § 1117.

6. Labor Relations ⇨765, 938

To prove existence of jurisdictional dispute within Jurisdictional Strike Law, so as to give state court jurisdiction of suit to enjoin and recover damages for labor unions' activities in alleged violation of such law, plaintiff was not required to prove that someone, on unions' behalf, stated that unions claimed right to represent plaintiff's employees. West's Ann.Labor Code, § 1118.

7. Labor Relations ⇨942

In suit to enjoin defendant labor unions' solicitation of association of plaintiff corporation's employees to break collective bargaining agreement with plaintiff and other activities in alleged violation of Jurisdictional Strike Law, evidence was sufficient to support trial court's finding that there was a jurisdictional dispute within such law as to whether association or one of such unions should represent plaintiff's employees, so as to give state court jurisdiction of suit. West's Ann.Labor Code, § 1118.

8. Pleading ⇨259

In suit to enjoin defendant labor unions' activities in alleged violation of Jurisdictional Strike Law, trial court did not err in denying defendants' motion to amend their answer so as to allege that plaintiff operated under exclusive franchise granted by foreign corporation, which shipped ingredients of beverage made and distributed

by plaintiff to it in California from another state, for purpose of raising issues of interstate commerce and National Labor Relations Board's exclusive jurisdiction over acts alleged, where none of such unions were certified by Board as collective bargaining representative of plaintiff's employees. West's Ann.Labor Code, § 1115 et seq.

9. Constitutional Law Ⓒ90

Labor Relations Ⓒ991

An injunction, restraining labor unions from preventing a corporation from securing, selling or delivering merchandise, inducing persons to refrain from using, transporting or selling corporation's products, representing that corporation's employees were unorganized or that corporation was unfair to organized labor, etc., did not exceed Superior Court's jurisdiction as not limited to alleged controversy over representation of corporation's employees in collective bargaining, but blanketing unions' activities as to free speech and other constitutional rights, regardless of whether they related to such representation. West's Ann.Labor Code, § 1115 et seq.

10. Labor Relations Ⓒ942

In suit to enjoin labor unions and others from interfering with plaintiff corporation's business by picketing, boycotting, and other activities in alleged violation of Jurisdictional Strike Law, evidence, including stipulations, warranting conclusion that several named defendants, claimed by defendants to be unconnected with case, participated in concerted interference with plaintiff's business, evidence that a defendant coordinating body, with which defendant local unions were affiliated, approved such activities, and defendants' stipulations that they intended to continue picketing plaintiff unless restrained, sustained judgment for plaintiff as to such named de-

fendants and coordinating body. West's Ann.Labor Code, § 1115 et seq.

John C. Stevenson, Los Angeles, and Clarence Todd, San Francisco, for appellants.

Thomas P. Menzies, Harold L. Watt, Hill, Farrer & Burrill, and Carl M. Gould, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff sought to enjoin defendant Grocery Drivers Union Local 848 and several other defendants from (1) soliciting the Seven Up Employees' Association to breach the collective bargaining agreement between plaintiff and said association; (2) picketing places where 7-Up is sold; (3) requesting transportation companies to refuse to deliver merchandise to customers of plaintiff; (4) soliciting plaintiff not to recognize the Seven Up Employees' Association as the exclusive collective bargaining agency for plaintiff's employees; (5) inducing purchasers of 7-Up to refrain from doing business with plaintiff; (6) publicly asserting that plaintiff is unfair to organized labor. Plaintiff also sought to recover damages based upon such alleged activities of defendants. The theory of plaintiff was that there was a jurisdictional strike involving the claim on the part of defendants that plaintiff should recognize defendants Teamster Unions as the collective bargaining agent of plaintiff's employees. Prior to the trial, the action was dismissed as to defendant Dave Beck. Judgment was in favor of plaintiff—injunction granted, and damages in amount of \$4,000 awarded. Defendants appeal.

Appellants contend that the complaint does not state a cause of action under the Jurisdictional Strike Law.¹ They argue that the allegations of the complaint, with

1. Section 1115 of the Labor Code provides: "A jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful."

Section 1118 of the Labor Code pro-

vides: "As used in this chapter, 'jurisdictional strike' means a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more

respect to a jurisdictional dispute, fail to show that any controversy existed between the Seven Up Employees' Association and the Teamsters Union as to which of them has or should have the exclusive right to represent plaintiff's employees in collective bargaining with plaintiff. They also assert that, in all cases involving interstate commerce, the federal government has preempted the field which the Jurisdictional Strike Law attempts to control; and that the federal government has preempted the field of labor relations covered by the actions described in the pleadings.

There was a former appeal in this action. *Seven Up Bottling Co. v. Grocery, etc., Union*, 40 Cal.2d 368, 254 P.2d 544, 33 A.L.R.2d 327. At the former trial, defendants' objection to the introduction of any evidence on the ground that the complaint did not state a cause of action was sustained and the trial court rendered judgment that plaintiff recover nothing. On the former appeal it was said in 40 Cal.2d at page 370, 254 P.2d at page 546: "The primary issue presented for decision in the court below and here is the validity of California's Jurisdictional Strike Law, *infra*. The Court, in rendering its judgment, did not purport to pass upon anything but the sufficiency of the complaint." It was also said therein, 40 Cal.2d at page 372, 254 P.2d at page 547: "The jurisdictional strike is 'against the public policy' of the state and is 'unlawful,' *Id.*, § 1115, and any person suffering injury from a violation of the act is entitled to injunctive relief and damages. *Id.*, § 1116." It was also said therein, 40 Cal.2d at page 372, 254 P.2d at page 547: "There

is no allegation showing that plaintiff was engaged in a business affecting interstate commerce and hence the Labor Management Relations Act of 1947 [29 U.S.C.A. § 141 et seq.], *supra*, has no application." It was also said therein, 40 Cal.2d at pages 372-373, 254 P.2d at page 547: "It should be clear that the activities of defendants, as alleged, fall within the terms of the act, Jurisdictional Strike Act. Defendants and the association are labor organizations and the latter is not financed, interfered with, dominated or controlled by plaintiff. There has been a concerted interference by defendants with plaintiff's-employer's business. That interference arises out of a controversy between two or more labor organizations—defendants and the association—as to which of them should have the right to collectively bargain with plaintiff-employer." It was held on the former appeal that the Jurisdictional Strike Act (of California) is valid. The judgment therein, based upon the ruling that a cause of action was not stated, was reversed. Since the substance of the allegations of the complaint is shown in the opinion on the former appeal, the allegations will not be set forth herein. During the trial, involved on the present appeal, plaintiff dismissed certain portions of the complaint as follows: paragraph II of the third cause of action; and paragraphs II, IV, V, and VI of the fourth cause of action. The allegations of these paragraphs are to the effect that defendants, by their activities, are endeavoring to induce plaintiff to breach its agreement with the Seven Up Employees' Association, and are endeavoring to compel plaintiff to recognize defendants as bargaining agents

labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer."

Section 1117 of the Labor Code provides: "As used herein, 'labor organization' means any organization or any agency or employee representation committee

or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer.

"As used herein, 'person' means any person, association, organization, partnership, corporation, unincorporated association, or labor organization."

when it would be unlawful, under sections 921-923 of the Labor Code, for plaintiff to do so. The complaint states a cause of action.

The trial court found that defendant unions (referred to in the findings as Teamster Unions) are labor organizations which exist for the purpose of dealing with employers concerning grievances, labor disputes, and wages; that each individual named as a defendant is an officer and agent of a certain defendant union; that plaintiff employs a number of persons in the production, bottling and distribution of beverages; on March 4, 1949, a written collective bargaining agreement was executed by the plaintiff and the Seven Up Employees' Association; said association is a labor organization in which employees participate, and it exists for the purpose of dealing with plaintiff concerning grievances, labor disputes, wages, hours of employment and conditions of work; and said association is not financed in whole or in part, or interfered with, dominated or controlled by the plaintiff in any manner whatsoever; said agreement prescribes rates of pay, hours of employment and conditions of work for employees of plaintiff; said agreement was at all times and now is in full force and effect; defendants and their agents have been engaged in concerted interference with plaintiff's business; said concerted interference arises out of a controversy between defendant Grocery Drivers Union Local 848 and the Seven Up Employees' Association as to which of said labor organizations should have the exclusive right to bargain collectively with plaintiff on behalf of its non-supervisory production, bottling and distribution employees, and arises out of a controversy between said organizations as to which of them should have the exclusive right to have their members perform production, bottling and distribution work for plaintiff; the defendant labor organizations and the Seven Up Employees' Association are labor organizations as defined in section 1117 of the Labor Code, and said organizations are not found to be financed in whole or in part,

interfered with, dominated or controlled by plaintiff, or by any of plaintiff's officers or agents, either in their organization or operation; plaintiff has no dispute or controversy of any kind with any of its employees; the effect of the unlawful activities, resulting in a refusal of retail markets to purchase and sell beverages produced and distributed by plaintiff, has been to impede the operation of plaintiff; plaintiff has been injured by the activities of defendants and is threatened with further injury by defendants, and this is a proper case for injunctive relief; said actions of defendants, particularly said labor organizations and their agents, are in violation of sections 1115 to 1120 inclusive of the Labor Code; plaintiff has been damaged in the sum of \$4,000.

[1] Appellants assert in effect that the plaintiff was not entitled to rely on the Jurisdictional Strike Law as a basis for an injunction and damages. They argue that plaintiff interfered with the affairs of the Seven Up Employees' Association, and that such interference removed that association from the classification of a "labor organization," as defined in section 1117 of the Labor Code. That section states that a "labor organization" means any organization * * * in which employees participate, and exists for the purpose * * * of dealing with employers * * * which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer." Appellants also argue that the court did not find on the issue as to whether the Seven Up Employees' Association was financed, interfered with, or controlled by plaintiff; that said issue is jurisdictional; and until there is a conclusive showing by findings of fact that the association was not financed in whole or in part, interfered with, dominated or controlled by plaintiff, the court has no jurisdiction of the action. They argue further that the finding that the defendant labor organizations and said association "are not found" to be financed or interfered with by plaintiff is not a valid finding—it is not a finding that they

were not financed or interfered with—but it is a negative legal conclusion which leaves the record with no finding on the subject of interference. That finding follows the language of section 1117 of the Labor Code wherein it is stated, "which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer." In other words, the court has made a finding, in the words of the statute, that the association is not found to be financed or interfered with by the plaintiff (employer). Also, it is to be noted that the court did find (at another place in the findings) that the association was not financed in whole or in part, or interfered with, dominated or controlled by the plaintiff. (This is finding V which states that the allegations of paragraph VI [of the first cause of action] of the complaint are true. One of the allegations therein is: "* * * said labor organization [Seven Up Employees' Association] is not financed in whole or in part, or interfered with, dominated or controlled by the plaintiff employer in any manner whatsoever.") In view of those two findings, it is clear that, contrary to appellants' argument, the court did find on the issue as to whether the association was financed or interfered with by plaintiff.

[2, 3] Appellants assert further that a finding that a labor organization is "not interfered with" is a legal conclusion, and that the court should have made findings with respect to specific acts on the part of plaintiff, so that a determination could be made from a consideration of the acts whether plaintiff interfered with the association. The court made findings as to ultimate facts. It was not required to make findings as to various evidentiary matters. In *Petersen v. Murphy*, 59 Cal.App.2d 528,

at page 534, 139 P.2d 49, at page 52, it was said: "[S]pecial facts need not be detailed in the findings if a general finding necessarily embodies an implied finding on such special facts." Some of the evidence presented by appellants, with reference to such alleged specific acts on the part of plaintiff, was as follows: that plaintiff spied on the activities of the company union (association) and the teamsters union; that plaintiff induced new employees (before and at the time they were employed) to sign a wage deduction authorization or card² by which the employee directed that dues in the company association be deducted from his wages each month and turned over to the association, and the association had no other application forms for membership; that plaintiff deducted all such dues and remitted them to the association, together with a list of the new employees paying such dues; that plaintiff maintained control of the official positions in the association "because of an association by-law that no employee could be a candidate for association office" unless he had been an employee for one year; that plaintiff maintained control of the association officers by an arrangement with the association that when the officers were discharged by plaintiff their removal from office in the association was automatic; that plaintiff removed the vice-president of the association while he was a negotiator in negotiations which were in progress; that plaintiff discharged an employee (White) for protesting the discharge of the vice-president; that the association had no procedure for expulsion or suspension of a member, and the association officers did not know who the new members were until they received the dues-deduction check from plaintiff at the end of each month; that the contracts between the association and the company were never

2.

"Gentlemen:

You are authorized to deduct from my pay or salary thirty (30) days from date below, the sum of \$3.00, and then you are authorized to deduct from my pay or salary each and every month thereafter

the sum of \$1.00. All monies deducted under this authorization are to be forwarded to the Secretary-Treasurer of the Seven Up Employees Association.

Dated: This _____ day of _____, 1943

Signed _____

Witness _____"

discussed at length in association meetings, and every president of the association who remained in the employment of the company was made a supervisor after he had served in one of the contract sessions.

[4, 5] The evidence presented by appellants with reference to those alleged matters was in conflict with evidence presented by plaintiff with reference thereto. Some of such evidence presented by plaintiff was as follows: the company association was formed in 1940 by the employees at their own instance without the knowledge of the company; the meetings of the association have been held off the premises of plaintiff; the officials of plaintiff first knew of the existence of the association when the association requested plaintiff to recognize it; plaintiff had nothing to do with the preparation of the constitution or bylaws or the amendments thereto; the association issued membership cards and maintained membership rolls; plaintiff never contributed any money to the association; dues-deduction cards and membership cards are printed and paid for by the association; meetings of the association are not attended by officers or supervisors of plaintiff; no official or supervisor of plaintiff has had anything to do with the administration of the affairs of the association; plaintiff has not expressed to any employee any preference in favor of any union or any opposition to any union; plaintiff had nothing to do with spying or attempted spying on the teamsters union; there was no discriminatory practice by plaintiff, based on union activities, with reference to employing or discharging employees. Many witnesses testified that there was no such discriminatory practice by plaintiff. An offer of proof was made by plaintiff and accepted by appellants that 32 witnesses would testify that there was no such discriminatory practice by plaintiff, that there was no spying by plaintiff, that there was no opposition by plaintiff to the teamster union, and that at various meetings of the association various members spoke up in the same manner as White and

others had spoken, and such employees were not discharged.

The reporters' transcript consists of 3,781 pages. It is not necessary to state the details of the testimony. The question as to whether plaintiff interfered with the company union or the defendant unions was a question of fact for the determination of the trial judge. The above general references to the testimony are sufficient to show that there was substantial evidence in support of the finding that plaintiff did not interfere with the association or the defendant unions.

[6, 7] Appellants also contend that the finding to the effect that there was a jurisdictional dispute, between the company association and the defendant unions as to which of them should represent the employees of plaintiff, is unsupported by the evidence. They assert that the teamster unions were in "a dispute over company [plaintiff] violations of every principle of our Labor Code"—that the picketing or activity of the teamsters in 1949 was conducted solely as a protest against discharges, spying and discrimination by plaintiff against employees who were favorable to the teamsters' union; that it was a typical "unfair labor practice" protest, which had no relation to a controversy over representation. They also argue that there was no evidence that anyone asserted on behalf of defendant unions that the defendant unions claimed the right to represent plaintiff's employees; and that on the contrary there was testimony that the defendants did not assert that they claimed the right to represent plaintiff's employees. The Seven Up Employees' Association is a labor organization and it has had a collective bargaining agreement with plaintiff since 1940 which requires plaintiff to recognize it as said association's exclusive bargaining agent. There was evidence (testimony of a witness on behalf of defendants, and stipulations) that the picketing and boycotting was for the purpose of adversely affecting plaintiff's business so that plaintiff would make a contract with defendant un-

ions whereby those unions would be the bargaining agents of plaintiff's employees. There was evidence (testimony of a witness on behalf of defendants, and stipulations) to the effect that picketing, boycotting, and listing as unfair by defendant unions cease when a company makes a bargaining contract with defendant unions. There was no controversy between plaintiff and its employees. In order to prove that a jurisdictional dispute existed, it is not necessary to prove that someone on behalf of the defendant unions stated that the unions claimed the right to represent plaintiff's employees. It was stipulated that the appellants were engaged in concerted activity involving plaintiff. The court found, upon substantial evidence, that appellants have been engaged in concerted interference with plaintiff's business and that such interference arises out of a controversy between defendant Grocery Drivers Union Local 848 and the company association as to which of them should have the exclusive right to bargain with plaintiff. There was substantial evidence in support of the finding to the effect that there was a jurisdictional dispute.

[8] Appellants assert further that the court erred in denying their motion to amend their answer to allege that plaintiff operates under a franchise granted by the Seven Up Company of St. Louis, Missouri, which gives plaintiff exclusive right to make and distribute 7-Up in the Los Angeles area; that the syrup and extract necessary to manufacture 7-Up is shipped from St. Louis; and that exclusive jurisdiction over the acts alleged in the complaint is in the National Labor Relations Board. Appellants stated that under the amendment they desired to raise the issue of interstate commerce and to submit evidence showing exclusive jurisdiction in federal agencies. The motion to amend was made more than four years after the complaint was filed, and of course was made after the first appeal in this case.

In *Sommer v. Metal Trades Council*, 40 Cal.2d 392, 254 P.2d 559, the defendant

unions demanded that plaintiff recognize them as the bargaining representative of plaintiff's employees. At that time the employees were not organized. A few months later the employees formed an association or union and demanded that plaintiff recognize it as their bargaining representative. Plaintiff refused to recognize either of them. Defendant unions commenced picketing and boycotting, which interfered with plaintiff's business. The employees' union filed a petition with the National Labor Relations Board for certification as a representative for collective bargaining purposes. Defendant unions intervened and contested for recognition. The Board found that plaintiff was engaged in commerce within the meaning of the federal labor relations law and ordered an election. An election was conducted which resulted in favor of the employees' union, but it did not appear whether certification followed. Defendant unions continued their concerted activity, and plaintiff obtained an injunction. Plaintiff contended on appeal that the activity of defendants constituted a jurisdictional strike in violation of the Jurisdictional Strike Act of which the state court had jurisdiction. The defendants contended that their activity was not in violation of that act and in any event was governable solely pursuant to federal law. The court said in 40 Cal.2d at page 396, 254 P.2d at page 563, that it may be assumed that evidence before the National Labor Relations Board bears on the issues before the court, "[b]ut it does not follow that the state court does not have jurisdiction of this controversy." It was also said in 40 Cal.2d at pages 399-400, 254 P.2d at page 564: "[T]he factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board. They also demonstrate that the problem is not one which in every case is resolved solely by looking to the provisions of the federal

act; but that if the subject matter of the local statute is otherwise one within the area of permissible exercise of state power in the maintenance of industrial peace, and state policy is consistent with federal policy, the state does not necessarily encroach upon the area of control vested in the National Board." It was also said in 40 Cal.2d at pages 400-401, 254 P.2d at page 565: "If the union activity here involved is not protected under the federal act it is not immunized from state action. The union concerted activity was not protected under the federal act if another union was certified by the national board as the collective bargaining representative of the plaintiff's employees. And in the absence of such certification there is no immunity under the state law if the employees' Local constitutes a collective bargaining representative within the meaning of the anti-jurisdictional strike provisions. [Citation.] Since the certification of a union other than the defendant is not shown, a case of condemnation of the union activity under the federal act is not presented. And as it does not appear that the National Board has seen fit to act finally in either the representation or the unfair charges proceedings there is involved a possible area of activity which is neither protected nor condemned under the federal act, and pursuant to the foregoing decisions is subject to state action under the anti-jurisdictional strike provisions of the Labor Code. Thus, there is here an area open to the state for the exercise of its police power." The order granting the injunction was affirmed. In the present case none of the unions involved had been certified as the representative of plaintiff's employees. The trial court in the present case did not err in denying defendants' motion to amend.

[9] Appellants contend further that the injunction exceeds the jurisdiction of the court. They argue that the injunction is not limited to the alleged controversy over representation, and that it blankets the activities of the unions as to free speech and other constitutional rights regardless of

whether the activities relate to the matter of representation. The injunction provides in substance that defendants refrain from: preventing plaintiff from securing, selling or delivering merchandise; inducing any person or customer to refrain from using, transporting or selling any of plaintiff's products; representing to any person that plaintiff's employees are unorganized or that plaintiff's products are made by non-union labor or that plaintiff is unfair to organized labor; maintaining plaintiff on any "we do not patronize" list; taking part in any interference with the business of any person for the purpose of inducing the person to cease handling or selling plaintiff's merchandise; serving consumer, who requests plaintiff's beverage, a substitute beverage; interfering with plaintiff's business; intimidating or interfering with any employee of plaintiff. The matter of free speech with respect to the claim of unconstitutionality of the Jurisdictional Strike Act is discussed in the opinion on the former appeal. *Seven Up Bottling Co. v. Grocery etc. Union*, supra, 40 Cal.2d 368, 373-380, 254 P.2d 544, 33 A.L.R.2d 327. Also, in the opinion on the former appeal, 40 Cal.2d at page 380, 254 P.2d at page 552, there is a quotation, with respect to the breadth of a restraining order, which is applicable here. It was there stated, in part: "They contend that its language prohibits inducement not only of employees of Deltorto but also the inducement of employees of any other employer to strike, where an object thereof is to force Giorgi or any other employer or person to cease doing business with Langer. To confine the order solely to secondary pressure through Giorgi or Deltorto would leave Langer and other employers who do business with him exposed to the same type of pressure through other comparable channels. * * *

"When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." " This contention of appellants is not sustainable.

[10] Appellants also contend that there was no evidence to sustain the judgment as to many defendants. They named several defendants who, according to appellants' argument, were unconnected with the case. There is evidence (including stipulations) from which it could be concluded that the defendants participated in the concerted interference with plaintiff's business. There was evidence that appellant Joint Council of Teamsters No. 42 constitutes a co-ordinating body with which all teamsters local unions are affiliated, and that said council

approved the picketing, boycotting and unfair listing of plaintiff. There were stipulations on behalf of defendants to the effect that the intention of defendants, unless restrained, was to continue to picket plaintiff. This contention is not sustainable.

By reason of the above conclusions, it is not necessary to discuss other points on appeal.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

47 Cal.2d 62

PACIFIC SOUTHWEST DEVELOPMENT CORPORATION, a corporation, Plaintiff and Appellant,

v.

WESTERN PACIFIC RAILROAD COMPANY, a corporation, Defendant and Respondent.

L. A. 23646.

Supreme Court of California.

In Bank.

Oct. 5, 1956.

Rehearing Denied Oct. 31, 1956.

Action by licensed realty broker for compensation for alleged services rendered in connection with defendant's procurement of an option to purchase certain realty. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for defendant and broker appealed. The Supreme Court, Spence, J., held that a contract employing a broker to obtain an option for the purchase of realty came within the statute of frauds, and therefore had to be in writing, and where writings did not establish such a contract broker could not recover on an alleged agreement for payment of commission and defendant was not estopped from pleading the statute in bar of claim, notwithstanding fact that broker had conducted unsuccessful negotiations with vendor for purchase by defendant of an option for the realty in question.

Judgment affirmed.

McComb, Carter and Schauer, JJ., dissented.

Opinion, 293 P.2d 800, vacated.

1. Vendor and Purchaser ⇨18, 57

An "option to purchase real property" is a contract containing an irrevocable and continuing offer to sell at a stipulated price within a specified time conveying no interest in land to the optionee but vesting in him only a right in personam to buy at his election and such agreement relating to the sale of land is not a sale of property, but a sale of a right to purchase.

See publication Words and Phrases, for other judicial constructions and definitions of "Option to Purchase Real Property".

301 P.2d—52¼

initions of "Option to Purchase Real Property".

2. Frauds, Statute of ⇨74(1)

An option to purchase real property falls within the statute of frauds and therefore must be in writing. West's Ann.Civ. Code, § 1624, subd. 5; West's Code Civ. Proc., § 1973, subd. 5.

3. Frauds, Statute of ⇨55

The term "real estate" as used in the statute of frauds conforms with the common law definition of real property as including only a freehold interest in land, excluding estates for years or lesser duration. West's Ann.Civ. Code, § 1624, subd. 5; West's Code Civ. Proc., § 1973, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Real Estate".

4. Brokers ⇨43(2)

While a contract employing a broker to purchase or sell realty comes within the statute of frauds, a contract employing a broker to sell oil and gas leases running only for a fixed term of years does not, since the latter employment relates to "chattels real," a species of personal property as distinguished from real estate or real property. West's Ann.Civ.Code, § 1624, subd. 5; West's Code Civ.Proc., § 1973, subd. 5.

5. Brokers ⇨43(2)

In determining the nature of the services which will bring an employment contract within portion of statute of frauds providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless in writing, the phrase "sell or purchase" includes, aiding or assisting in the purchase or sale of real estate. West's Ann.Civ.Code, § 1624, subd. 5; West's Code Civ.Proc., § 1973, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Sell or Purchase".

6. Brokers ⇨43(2)

One of the primary purposes of the statute of frauds is the protection of realty owners from the assertion of false claims

by brokers and agents. West's Ann.Civ. Code, § 1624, subd. 5; West's Code Civ. Proc., § 1973, subd. 5.

7. Brokers ⇨43(2)

The procurement of an option agreement for the purchase of realty is a contract that aids or assists in the purchase of sale or realty and comes within the provisions of the statute of frauds, and therefore, a contract employing a broker to obtain an option for the purchase of realty must be in writing in order to be valid. West's Ann. Civ.Code, § 1624, subd. 5; West's Code Civ. Proc., § 1973, subd. 5.

8. Brokers ⇨43(3)

The chief element required to be shown in writing in order to show a compliance with portion of statute of frauds providing that an agreement employing a broker to purchase or sell realty for compensation must be in writing and subscribed by the party to be charged is the fact of employment of the broker to act for the principal in the transaction. West's Ann.Civ.Code, § 1624, subd. 5; West's Code Civ.Proc., § 1973, subd. 5.

9. Brokers ⇨43(3)

Although a reference to compensation is not essential to establishing the employment of a broker for the purchase or sale of realty if there is in fact a contract of employment since a reasonable amount as a commission will be inferred, where there is a failure in the writings offered to mention the fact of employment the further fact that there is no mention of a commission is significant in considering whether such writing in fact established a written contract of employment within statute of frauds. West's Ann.Civ.Code, § 1624, subd. 5; West's Code Civ.Proc., § 1973, subd. 5.

10. Brokers ⇨43(3)

In action by licensed realty broker for compensation for alleged services rendered in connection with defendant's procurement of an option to purchase certain realty, evidence, including a letter to an agent of broker indicating defendant's interest in

purchasing certain property, was insufficient under the statute of frauds to establish employment of broker in writing. West's Ann. Civ.Code, § 1624, subd. 5; West's Code Civ.Proc. § 1973, subd. 5.

11. Statutes ⇨235

When a law has been enacted for the purpose of protection against the assertion of unfounded claims it should be so construed as to effect the object of the enactment.

12. Brokers ⇨43(2)

Where there was no unconscionable injury to a broker because of a change of position in reliance upon his alleged contract of employment by defendant, or an unjust enrichment of defendant through acceptance of the benefits of the alleged contract without itself being obligated thereunder, defendant was not estopped to plead the statute of frauds in defense of broker's claim for commission. West's Ann.Civ. Code, § 1624, subd. 5; West's Code Civ. Proc., § 1973, subd. 5.

13. Brokers ⇨43(2)

Mere fact that a broker rendered services and conducted unsuccessful negotiations with a prospective seller on behalf of purchaser did not constitute a change of position to broker's detriment, nor did the fact that purchaser refused to pay broker a realty commission upon an option which purchaser later procured through direct negotiations with vendor constitute an unjust enrichment within the meaning of the doctrine of estoppel so as to prevent purchaser from pleading the statute of frauds in bar to brokers' claim for a commission. West's Ann.Civ.Code, § 1624, subd. 5; West's Code Civ.Proc., § 1973, subd. 5.

14. Evidence ⇨65

A licensed real estate broker is presumed to know that contracts for real estate commissions are invalid and unenforceable unless put in writing and subscribed by the person to be charged. West's Ann.Civ. Code, § 1624, subd. 5; West's Code Civ. Proc., § 1973, subd. 5.

Gregory M. Creutz, Los Angeles, for appellant.

Smith, Van Dyke & Hildreth, H. Allen Smith and Jack E. Hildreth, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff, a licensed real estate broker, sought compensation for alleged services rendered in connection with defendant's procurement of an option to purchase certain real property. The amended complaint contained in evidentiary detail all the facts on which plaintiff based its right to compensation, including the correspondence between the parties, which was set out *in haec verba*. At the outset of the trial, the court declared its opinion that plaintiff could not recover because the pleaded agreement was not in writing as required by the statute of frauds. Plaintiff thereupon made an offer of proof, and it was stipulated that the documents pleaded in the amended complaint were deemed to have been offered in evidence, that an objection was made thereto and sustained by the court. Judgment was then entered for defendant, and plaintiff appeals.

As grounds for reversal, plaintiff contends: (1) that the pleaded agreement does not come within the statute of frauds; but (2) if the statute does apply, there was a sufficient writing as required; and (3) in any event defendant is estopped to rely on the statute as a defense. Our review of the record, in the light of the authorities hereinafter cited, leads to the conclusion that plaintiff's contentions cannot be sustained.

The substance of plaintiff's offer of proof is as follows: Cliff A. Nelson, then an employee of the Fortune Realty Company of San Jose, conducted certain negotiations with defendant's representative, F. B. Stratton, for the purchase of the property in question. Various propositions, offers, and counter-offers were discussed by the parties relating to the purchase but no definite arrangements were concluded as to the price to be paid, or concerning any employment of Nelson individually, or of Fortune Realty

Company to represent defendant. While negotiations were still pending and on August 15, 1950, Nelson became an employee of plaintiff and remained in such employ until December 15, 1950. Meanwhile Nelson and Stratton continued to correspond. On August 29, Stratton wrote to Nelson suggesting a price of \$3,000 per acre and \$1,500 for an option. Nelson responded by letter of August 31, advising Stratton that a meeting should be arranged and proposing a five per cent commission as defendant's broker.

On September 6, 1950, Stratton met Nelson and plaintiff's president Creutz in Los Angeles. At that time Creutz examined a proposed option agreement submitted by Stratton, subsequently redrafted it, and on September 8 he mailed it to Stratton. Defendant apparently was endeavoring to obtain an option for a purchase price of less than \$3,000 per acre. Another meeting of Stratton, Nelson and Creutz was had on September 21, and the option agreement was revised to state the price of \$2,500 per acre for the property and \$1,500 payable for the option. A few days later Creutz and Nelson conferred with Lenfest, the owner of the property, and the latter's attorney concerning the option agreement. At that time Lenfest objected to the \$2,500 per acre price contained in the option agreement and subsequently, on October 3, through his attorney, declined the offer. Nelson reported the outcome immediately to Stratton, who thereupon declared that there was "no hurry about the deal" and "just kind of let him (Lenfest) simmer along." Then without further call upon plaintiff or Nelson, and on October 5, 1950, Lenfest met Stratton and they orally agreed upon an option for a purchase price of \$2,750 per acre. This oral agreement was reduced to writing and signed on December 15, 1950. Thereafter pursuant to its terms, defendant purchased the property for \$204,517.50, escrow arrangements were concluded, and on June 25, 1951, Stratton forwarded to the Fortune Realty Company defendant's check for \$5,112.94, "representing agreed to commission in connection with the purchase * * * of

the Lenfest property" and with the understanding that "one-half of the above amount, or \$2,556.47, will be paid by you to Mr. Nelson." This reference to "agreed to commission" obviously related to the correspondence between Nelson, Stratton, and Fortune Realty Company in May and June, 1951, whereby those parties agreed upon a commission of two and one-half per cent of the purchase price to be divided equally between Nelson and Fortune Realty Company, which correspondence was written long after Nelson had left the employ of plaintiff and long after the time that Stratton had obtained the option from Lenfest. Now plaintiff by this action claims that five per cent of the total price, or \$10,225.87, is owing for its alleged services to defendant.

[1] Plaintiff contends that an agreement authorizing or employing a broker to obtain an option to purchase real property is not within the statute of frauds and therefore is not subject to the requirement that it or some note or memorandum thereof be in writing. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5. In support of its position, plaintiff relies on these settled principles: that an option to purchase real property is a contract containing an irrevocable and continuing offer to sell at a stipulated price within a specified time; that it conveys no interest in land to the optionee but vests in him only a right *in personam* to buy at his election; and that such agreement relating to the sale of land is "by no means a sale of property, but is a sale of a right to purchase." Warner Bros. Pictures v. Brodel, 31 Cal.2d 766, 772, 192 P.2d 949, 952, 3 A.L.R.2d 691; Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395; Transamerica Corp. v. Parrington, 115 Cal.App.2d 346, 351-353, 252 P.2d 385; see, also, Kritt v. Athens Hills Development Co., 109 Cal. App.2d 642, 646, 241 P.2d 606; Seeburg v. El Royale Corp., 54 Cal.App.2d 1, 4, 128 P.2d 362. However, the cases upon which plaintiff relies were not concerned with the application of the statute of frauds but only with the distinction between the "option contract" and the "contract to which the ir-

revocable offer of the optionor relates". Warner Bros. Pictures v. Brodel, supra. It therefore does not follow, as plaintiff contends, that since an option contract is not itself a contract for the purchase or sale of real estate but only evidences the "right" to performance of such agreed act, a contract employing a broker to obtain the option does not fall within the statute of frauds.

[2] In California an option to purchase real property has been held to come within the statute of frauds and so must be in writing. Bovo v. Abrahamson, 100 Cal.App. 373, 383, 280 P. 191. The propriety of this holding was recognized in Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770, 772, where the enforcement of an oral extension of a written option to repurchase certain real property was in question. After observing that "certain contracts to be enforceable are required to be in writing, or that some note or memorandum thereof be in writing, subscribed by the party to be charged or his agent" Civ.Code, § 1624; Code Civ.Proc. § 1973, the court stated that it is "equally well settled that the facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds and foreclose such party from relying thereon." 8 Cal.2d at page 421, 65 P.2d at page 772. Upon this basis of equitable estoppel, the court held that the fact of oral extension of the option would not defeat the optionee's rights thereunder.

Plaintiff cites Howard v. D. W. Hobson Co., 38 Cal.App. 445, 176 P. 715, for the proposition that a broker may recover on an oral contract of employment to procure an option for the purchase of real property. But that case concerned an agreement between two brokers to divide equally a commission to be paid upon the sale of the land. This court, upon denying the application for a hearing in that case, said 38 Cal.App. at pages 460-461, 176 P. at page 722: " * * * we deem it proper to say that we are not prepared to hold that subdivision 6 of section 1624 of the Civil Code [now subdivision 5] is not applicable in the case of a simple contract between a real estate agent

or broker and a proposed purchaser to obtain an option for the purchase of real estate by the purchaser. The opinion clearly shows that this was in substance a joint venture on the part of plaintiff and defendant for the sale of real property of a third party, and the distribution of the profits between them. The District Court of Appeal was clearly right in concluding that subdivision 6 of section 1624 of the Civil Code [now subdivision 5] does not extend to agreements between brokers to co-operate in making sales for the sake of the commission or profits and that this substantially was such a case."

[3, 4] The term "real estate" as used in our statute of frauds, Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5, conforms with the common law definition of real property as including only a freehold interest in land, and excludes estates for years or lesser duration. *Dabney v. Edwards*, 5 Cal.2d 1, 6-7, 53 P.2d 962, 103 A.L.R. 822. Therefore, it has been held that while a contract employing a broker to purchase or sell real estate comes within the statute of frauds, *Marks v. Walter G. McCarty Corp.*, 33 Cal.2d 814, 819, 205 P.2d 1025, a contract employing a broker to sell oil and gas leases running only for a fixed term of years does not, because the latter employment relates to "chattels real," a species of personal property as distinguished from "real estate" or "real property." *Dabney v. Edwards*, supra.

[5-7] In determining the nature of the services which will bring an employment contract within the statute, the phrase "to sell or purchase" includes "to aid or assist in the purchase or sale" of real estate. *Hooper v. Mayfield*, 114 Cal.App.2d 802, 806, 251 P.2d 330; *Duckworth v. Schumacher*, 135 Cal.App. 661, 666, 27 P.2d 919. Such broad construction of the term conforms with one of the primary purposes of the statute, the protection of real estate owners from the assertion of false claims by brokers and agents. *Toomy v. Dunphy*, 86 Cal. 639, 642, 25 P. 130; also *Gorham v. Heiman*, 90 Cal. 346, 358, 27 P. 289; *Hoop-*

er v. Mayfield, supra, 114 Cal.App.2d 802, 807, 251 P.2d 330. Likewise, the procurement of an option agreement for the purchase of real property is a contract that aids or assists in the purchase or sale of real property, and properly comes within the provisions of the statute. Accordingly, a contract employing a broker to obtain an option for the purchase of real property, like a contract employing a broker to purchase or sell real property, *Steiner v. Rowley*, 35 Cal.2d 713, 717, 221 P.2d 9; *Marks v. Walter G. McCarty Corp.*, supra, comes within the statute and must be in writing. To hold otherwise would open the door to the assertion of unfounded claims by brokers and others on the pretense of oral employment in real estate transactions relative to options, and so frustrate the purpose of the statute.

Plaintiff next claims that if the statute of frauds is held to apply to the contract of employment in procuring the option, there nevertheless was a sufficient writing to comply therewith "subscribed by the party to be charged or by his agent." Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5. But an examination of the documents on which plaintiff relies to meet the specifications of the statute discloses their insufficiency.

[8] The chief element required to be shown in writing is the fact of employment of the broker to act for the principal in the transaction. 9 Cal.Jur.2d § 40, p. 185; *Toomy v. Dunphy*, supra, 86 Cal. 639, 642, 25 P. 130; *Hooper v. Mayfield*, supra, 114 Cal.App.2d 802, 807, 251 P.2d 330; *Moore v. Borgfeldt*, 96 Cal.App. 306, 309-310, 273 P. 1114. To satisfy this requirement, plaintiff refers to the considerable correspondence between Nelson and Stratton on the subject, but in such exchange there is only one letter written by Stratton, while Nelson was employed by plaintiff. In that letter dated August 29, 1950, and addressed to Nelson, Stratton stated: "I am in a position to take an option on the Lenfest property at \$3,000.00 per acre. We would not wish to pay more than \$1,500.00 for the option and would want it for 90 days, with

a contingent extension of time long enough to have the property rezoned. * * * If you think this proposal is worth your trip, let me know perhaps by telephone tomorrow and I will arrange to meet you at San Jose—maybe we can get the deal signed up. * * *

The above letter merely states the terms and conditions on which defendant was willing to negotiate for the property, but it does not show employment of plaintiff to act for defendant. *Morrill v. Barneson*, 30 Cal.App.2d 598, 600, 86 P.2d 924; *Egan v. Pacific Southwest Trust & Sav. Bk.*, 92 Cal.App. 1, 3, 267 P. 719; *Patterson v. Torrey*, 18 Cal.App. 346, 348, 123 P. 224; *Kleinsorge & Heilbron v. Liness*, 17 Cal. App. 534, 535-537, 120 P. 444. Furthermore, the last sentence of the letter indicates that various details yet remained for consideration in completing any transaction. It is true that Nelson, on plaintiff's behalf, acknowledged Stratton's letter stating that he would be "willing to start negotiations on the basis of \$2,500 per acre—[defendant] to pay the 5% commission"; that thereafter Stratton met with Nelson and plaintiff's president, Creutz, and the option papers were drawn, submitted to Lenfest, and finally rejected because Lenfest refused to sell at the \$2,500 acreage price. But such writing by Nelson and subsequent meetings with Stratton in attempting to work out a suitable arrangement for purchase of the Lenfest property cannot satisfy the statutory requirement of a writing "subscribed by the party to be charged, or his agent."

[9-11] The only writing with which defendant can be charged here is the letter of August 29, 1950, by Stratton to Nelson, and as above quoted, it made no reference to the fact of employment by defendant of plaintiff or to any compensation. True, the latter reference is not essential if there is a contract of employment, for a reasonable amount as a commission will be inferred. *Toomy v. Dunphy*, supra, 86 Cal. 639, 642-643, 25 P. 130; *Caminetti v. National Guar. Life Co.*, 56 Cal.App.2d 92,

96, 132 P.2d 318. But where there is a failure to mention the fact of employment, the further fact that there is no mention of a commission is significant. The authorities require that a writing "subscribed by the party to be charged, or his agent" must unequivocally show the fact of employment of the broker seeking to recover a real estate commission. *Steiner v. Rowley*, supra, 35 Cal.2d 713, 717, 221 P.2d 9; *Marks v. Walter G. McCarty Corp.*, supra, 33 Cal.2d 814, 819, 205 P.2d 1025, *Sanstrum v. Gonser*, 140 Cal.App.2d 732, 295 P.2d 532; *Hooper v. Mayfield*, supra, 114 Cal.App.2d 802, 807, 251 P.2d 330; *Colburn v. Sessin*, 94 Cal.App.2d 4, 6, 209 P.2d 989; *Blanchard v. Pauley*, 92 Cal.App.2d 244, 247, 206 P.2d 864; *Herzog v. Blatt*, 80 Cal.App.2d 340, 342, 180 P.2d 30. It must therefore be concluded that the writings here are insufficient under the statute of frauds to sustain plaintiff's claim. As was said regarding this statute in *Egan v. Pacific Southwest Trust & Sav. Bk.*, supra, 92 Cal.App. 1, at page 5, 267 P. 719, at page 721: "When a law has been enacted for the purpose of protection against the assertion of unfounded claims, it should be so construed as to effect the object of the enactment."

[12, 13] Nor is there any merit to plaintiff's contention that defendant is estopped to plead the statute of frauds by reason of the fact that Stratton, on behalf of defendant, finally concluded an option agreement with Lenfest for purchase of the property and the sale was subsequently consummated. This is not a case of unconscionable injury to plaintiff because of a change of position in reliance upon the alleged contract of employment *Le Blond v. Wolfe*, 83 Cal.App.2d 282, 188 P.2d 278, or an unjust enrichment of defendant through acceptance of the benefits of the alleged contract without itself being obligated thereunder. *Monarco v. Lo Greco*, 35 Cal.2d 621, 220 P.2d 737. The fact that plaintiff rendered services and conducted unsuccessful negotiations with Lenfest does not constitute a change of position to plaintiff's detriment,

nor does the fact that defendant refused to pay plaintiff a real estate commission upon an option which defendant later procured through direct negotiations with Lenfest constitute an unjust enrichment within the meaning of the estoppel doctrine. To hold otherwise, in the absence of any showing of fraud, would defeat the purpose of the statute of frauds in relation to real estate transactions. *Hicks v. Post*, 154 Cal. 22, 28, 96 P. 878; *Augustine v. Trucco*, 124 Cal.App.2d 229, 241-244, 268 P.2d 780; *Hooper v. Mayfield*, supra, 114 Cal.App.2d 802, 809, 251 P.2d 330; *Colburn v. Sessin*, supra, 94 Cal.App.2d 4, 6, 209 P.2d 989.

[14] Plaintiff is a licensed real estate broker and, as such, is presumed to know that contracts for real estate commissions are invalid and unenforceable unless put in writing and subscribed by the person to be charged. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5; *Steiner v. Rowley*, supra, 35 Cal.2d 713, 717, 221 P.2d 9; *Marks v. Walter G. McCarty Corp.*, supra, 33 Cal.2d 814, 819, 205 P.2d 1025. Nevertheless, plaintiff failed to secure proper written authorization to protect itself in the transaction. Rather it assumed the risk of relying upon claimed oral promises of defendant, and it has no cause for complaint if its efforts go unrewarded. *Augustine v. Trucco*, supra, 124 Cal.App.2d 229, 241, 268 P.2d 780.

In conclusion, it should be said that this case clearly illustrates the desirability of requiring a written memorandum of a contract employing any person as a broker in a transaction of the type involved. Prior to the time that Stratton obtained the option directly from Lenfest at the price of \$2,750 per acre, there was no memorandum signed by Stratton which unequivocally evidenced the employment, as defendant's broker, of Nelson individually or Fortune Realty Company, which was Nelson's former employer, or plaintiff, which was Nelson's subsequent employer. A reference to employment and compensation was contained in the above-mentioned letter from Nelson to Stratton dated August 31, 1950,

which suggested that a five per cent commission be paid by defendant, but this was on the basis of securing an option from Lenfest, the seller, at the price of \$2,500 per acre and subject to negotiations concerning certain further conditions. Prior to that letter, the correspondence between Nelson and Stratton is entirely consistent with the idea that Nelson or his employer should look to the owner of the property for any compensation which might be anticipated. Not only did Stratton never agree in writing to Nelson's suggestion of August 31, concerning employment or commission but furthermore, no option to purchase at \$2,500 per acre was ever obtained. After Lenfest refused to grant an option at that price and on satisfactory conditions, Stratton and Lenfest negotiated directly, and without the aid of any broker, upon the final terms of an option at \$2,750 per acre. In this situation, and without any showing in the record that there was any binding obligation on the part of defendant to pay a broker's commission to anyone, defendant finally agreed to, and did pay to, Fortune Realty Company and Nelson the sum of \$5,112.94 for their services. There is therefore no legal or equitable basis shown to sustain plaintiff's action against defendant for its claimed compensation in said transaction.

The judgment is affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

McCOMB, Justice.

I dissent for the reasons set forth by Mr. Justice Fourt in the opinion prepared by him for the District Court of Appeal in 293 P.2d 800.

SCHAUER, Justice.

I agree with Justice McCOMB that the judgment should be reversed but I prefer to place the reversal on another ground.

Regardless of whether an agreement employing a real estate broker, for a commission, to secure an option to purchase real property does or does not come within

the provisions of subdivision 5 of section 1624 of the Civil Code (and subd. 5, § 1973, Code Civ.Proc.), I am of the view that plaintiff is entitled to a hearing on the merits of his claim.

The amended complaint alleges, and the offer of proof comprehends a showing, that: (1) Nelson, the negotiating salesman, was, throughout most of the period he was rendering the service to defendant, an employe of plaintiff broker; (2) defendant was aware of the above stated relationship, and its dealings with salesman Nelson, under the circumstances, appear to be dealings with Nelson's employer, the broker-plaintiff; (3) defendant, through its authorized employe Stratton, wrote Nelson, "I think everything is in order for the acquisition of the property and as soon as the escrow is closed will get in touch with you so that the commission factor can be disposed of. Believe I told you we would pay 50% [sic] commission through Fortune with the understanding that you would receive half."

The above quoted writing, which is subscribed by Stratton with his signature over the designation of his office with defendant, "Industrial Commissioner," appears on its face to constitute "some note or memorandum" of employment and of obligation to pay a commission. Perhaps "Fortune," as well as plaintiff and Nelson, should be parties to the litigation with defendant, but defendant, having acknowledged the employment of an "agent or broker" and an obligation to pay a commission for Nelson's services as a real estate agent rendered during a time when he was employed by the plaintiff broker, is not in my view entitled to judgment on demurrer. A writing made subsequent to partial execution of the agreement meets the statute of frauds. (See *Walsh v. Standart* (1917), 174 Cal. 807, 810, 164 P. 795; 23 Cal.Jur.2d 365-366, and cases there cited.)

In this connection it is further to be noted that Nelson on July 24, 1950, advised

defendant that "Re my new connection, I will be in charge of the Industrial Department of Pacific Southwest Development Corporation * * * Have written my superior, Mr. Gregory M. Creutz, who is President * * * about our development deal here in San Jose. Haven't had a chance to discuss it with him personally yet but believe we will be interested." In response to the above mentioned letter defendant's representative addressed his letter as follows, "Mr. Cliff A. Nelson, Manager Industrial Department, Pacific Southwest Development Corp.," and stated therein that "I am in a position to take an option on the Lenfest property at \$3,000.00 per acre. We would not wish to pay more than \$1,500.00 for the option * * *". Thereafter, under date of September 8, 1950, Mr. Nelson on the letterhead of "Pacific Southwest Development Corporation" wrote to defendant's representative that "In keeping with our conversation of Wednesday it is our understanding that the five per cent commission on the final sale price of the properties mentioned * * * would be paid to us by Western Pacific Railroad and we would not look to Lenfest or Cappelloni for any commissions. We prefer this since we are going to represent you rather than the sellers * * * As mentioned, Pacific Southwest Development Corporation will take care of an equitable payment that may appear to be due to Fortune Realty for their work up to the date of my coming with this corporation and transferring my salesman's license down here from Fortune Realty Co."

In the light of the circumstances shown I am of the view that a question of mixed law and fact arises. Is it not permissible to construe defendant's admission of employment of a broker or agent, and admission of liability for a commission, as running in favor of plaintiff? It seems to me that we should not hold on demurrer (to the evidence as well as the pleading) that a construction in favor of plaintiff could not be supported.

For the reasons above stated I would reverse the judgment.

CARTER, Justice.

I dissent.

I agree with Mr. Justice McCOMB that an agreement to obtain an option to buy real property does not come within an agreement employing an agent "to purchase or sell real estate" within the statute of frauds inasmuch as it is nothing more than employing an agent to obtain personal property—a chose in action. Civ. Code, § 1624(5). In addition to the discussion in the able and learned opinion prepared by Mr. Justice Fourt for the District Court of Appeal, 293 P.2d 800, adopted by Mr. Justice McCOMB, it should be mentioned that real property is defined as lands, tenements and hereditaments, Code Civ.Proc. § 17(2), and personal property includes goods, chattels and "things in action" Id., § 17(3). Hence an option being a chose in action is personal, not real, property. Real estate and real property are synonymous, *City of Santa Barbara v. Maher*, 25 Cal.App.2d 325, 77 P.2d 306, and that is true with reference to the statute of frauds, Civ.Code, § 1624(5), here involved. *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822. An agent's charge for procuring a lease is not subject to the statute of frauds. *Dabney v. Edwards*, supra, 5 Cal.2d 1, 53 P.2d 962. There is no more reason why, therefore, obtaining an option to buy, should be read into the statute.

I also agree with Mr. Justice SCHAUER in his dissent, that, assuming a writing is necessary the case should be tried to see if there is a sufficient memorandum here. The memorandum pleaded appears to be sufficient.

I further believe, however, that on the third ground urged by plaintiff, estoppel, the defendant could not rely on the statute of frauds. In *Monarco v. Lo Greco*, 35 Cal.2d 621, 220 P.2d 737, this court clarified the law in relation to estoppel to plead

the statute of frauds. This court stated two fundamental principles: (1) Estoppel to rely on the statute of frauds may exist where injury would result when the party has changed his position in reliance on the oral contract, or (2) unjust enrichment would result to the other person if he were permitted to assert the statute successfully. The question then is only, was the injury which resulted from plaintiff's change of position, and the resulting unjust enrichment of defendant, sufficient. In the *Monarco* case the supplying of services to the parents for many years in reliance on the oral contract was held enough under both principles. In the instant case plaintiff had rendered valuable services to defendant to obtain an option on the land in reliance on the oral contract and hence was injured. Defendant was unjustly enriched by the acceptance of those services (he obtained the option) for which he refused to pay. Suppose plaintiff had devoted all of his time to the project for five years, would there be any doubt that there was both injury and unjust enrichment? In *Ruinello v. Murray*, 36 Cal.2d 687, 227 P.2d 251, this court held there was no injury because the employee was paid for his services but clearly intimated he could recover the reasonable value thereof to the extent it was above what he was actually paid. There can be no doubt, therefore, that plaintiff here should be entitled to recover the reasonable value of his services even though the contract was oral. Some of the cases cited in the majority opinion for the proposition that there cannot be estoppel as to real estate brokers' contracts were before the decision in the *Monarco* case, see *Hicks v. Post*, 154 Cal. 22, 96 P. 878; *Colburn v. Sessin*, 94 Cal.App.2d 4, 209 P.2d 989, and the others do not mention or discuss it. See, *Augustine v. Trucco*, 124 Cal.App.2d 229, 268 P.2d 780; *Hooper v. Mayfield*, 114 Cal.App.2d 802, 251 P.2d 330.

I would reverse the judgment.

Rehearing denied; CARTER, SCHAUER and McCOMB, JJ., dissenting.

47 Cal.2d 152

William Branch RILEY, also known as William Brand Riley, Plaintiff and Respondent,

v.

Hallie Ford TURPIN, Defendant and Appellant.

S. F. 19261.

Supreme Court of California.

In Bank.

Oct. 11, 1956.

Action was brought for partition of realty and for recovery of taxes paid by plaintiff. The Superior Court, Marin County, B. C. Hawkins, J., granted the relief sought, and defendant appealed. The Supreme Court, Schauer, J., held that since defendant was both life tenant and contingent remainderman, it had been error for court, in apportioning proceeds of sale, to fail to take into account value of life estate.

Reversed and remanded with directions.

Opinion, 296 P.2d 901, vacated.

1. Joint Tenancy ⚡

A joint tenancy may be created in an equitable or legal estate or any other kind of estate recognized by law.

2. Joint Tenancy ⚡3

Remainders ⚡4

Provision for nephew was not irreconcilable and repugnant to joint tenancy estate created by agreement under which property was to be held by man and woman in joint tenancy, subject to condition that property should vest in man's nephew if he survived both of them, and under such agreement (1) man and woman held a life estate in joint tenancy and (2) man, woman and nephew each held contingent remainder, dependent upon surviving other two.

3. Partition ⚡16

Taxation ⚡531(2)

Contingent remainderman had such interest in property as would entitle him to make tax payment without being consid-

ered a mere volunteer; and, having made such payment, he succeeded to lien held by public taxing bodies, and, as holder of such lien, was entitled to bring action for partition as against life tenant.

4. Partition ⚡87

Where contingent remainderman, holding lien on property for amount of taxes which he had paid to meet obligation which legally was that of life tenant, brought partition action, he was entitled to have trial court therein deduct from life tenant's share of proceeds of sale of property amount of taxes paid. West's Ann. Civ.Code, § 840.

5. New Trial ⚡151

On conflicting affidavits presented, in connection with life tenant's motion for new trial, in partition action brought by contingent remainderman, on ground of newly discovered evidence of unrepresented interest in property, trial court was warranted in concluding that there was no such unrepresented interest.

6. Partition ⚡111(1)

Where defendant in partition proceedings was both life tenant and contingent remainderman, it was error for court, in apportioning proceeds of sale, to fail to take into account value of life estate. West's Ann.Code Civ.Proc., §§ 778, 779.

Russell T. Ainsworth, San Francisco, for appellant.

Hilary H. Crawford and Hilary H. Crawford, Jr., San Francisco, for respondent.

SCHAUER, Justice.

Defendant appeals from an interlocutory judgment in partition under which certain real property is ordered sold and the proceeds divided between plaintiff and defendant according to a formula set forth in the judgment. We have concluded that the judgment is correct except as to computation of the percentages of the proceeds to which the respective parties are entitled, but that a reversal is required for further proceedings to permit correction of the error.

In February, 1941, Arthur Brand and Hallie Turpin (defendant) entered into a written agreement whereby a home owned by Brand would thereafter be "the joint property of the parties hereto with the right of survivorship, except that in the event that" William Riley (Brand's nephew, and plaintiff herein) survived both of them the property "shall vest in William Branch Riley, in fee simple, but in the event of the death of William Branch Riley, dying before both of the parties to this Agreement, then the survivor of * * * [Brand and Turpin] shall take all the property in fee simple absolute."

Brand died in May, 1947, and defendant, Mrs. Turpin, has lived in the home ever since. She did not pay the real property taxes and on June 25, 1948, the property was sold to the state. (Rev. & Tax.Code, § 3436.) Near the end of the five-year redemption period plaintiff Riley made formal demand upon defendant to pay the taxes but she failed to do so. In May, 1953, plaintiff paid enough on the taxes to prevent a final forfeiture. (Rev. & Tax.Code, § 3613.)

In July, 1953, plaintiff filed this suit against Mrs. Turpin seeking partition and sale of the property and recovery, from defendant's share of the sale proceeds, of the taxes paid by plaintiff. The court entered its interlocutory judgment so ordering,¹ and this appeal by defendant followed.

[1,2] As grounds for reversal, defendant first urges that under the written agreement plaintiff has no interest in the property whatsoever, and suggests that he acted as a mere volunteer in paying the taxes. It is apparent, however, that the trial court properly held that defendant is the owner of a life interest in the property with a contingent remainder in the fee dependent upon her surviving plaintiff, and that plaintiff is owner of a contingent remainder in the fee dependent upon his surviving defendant.

Defendant argues that because the right of survivorship is one of the essential elements to a joint tenancy, therefore any ex-

ception to such right contained in the agreement is irreconcilable and repugnant to a joint tenancy estate and is therefore void. This contention is without merit. *McDonald v. Morley* (1940), 15 Cal.2d 409, 101 P.2d 690, 129 A.L.R. 810, and *California Trust Co. v. Anderson* (1949), 91 Cal.App.2d 832, 205 P.2d 1127, relied upon by defendant, both involved joint tenancies in the entire estate in the property involved, whereas in the present case the joint tenancy created was of a life estate only, based upon the life of the survivor of the two parties to the agreement, Brand and defendant. A joint tenancy may, of course, be created in an equitable or legal estate or any other kind of estate recognized by the law. (See *O'Neill v. O'Malley* (1946), 75 Cal.App.2d 821, 824, 171 P.2d 907; *Lowenthal v. Kunz* (1951), 104 Cal.App.2d 181, 183, 231 P.2d 62; 13 Cal.Jur.2d 300.) Brand and Mrs. Turpin agreed that as between themselves the survivor should retain the property until his or her death, and that the remainder would be the property of the survivor as between themselves and plaintiff Riley. Thus, Brand and Mrs. Turpin held a life estate in joint tenancy, and Brand, Mrs. Turpin and Riley each held a contingent remainder, dependent upon surviving the other two. In *Zeigler v. Bonnell* (1942), 52 Cal.App.2d 217, 220, 126 P.2d 118, the court remarked that "While both joint tenants are alive each has a specialized form of life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives."

McGarrigle v. Roman Catholic Orphan Asylum (1905), 145 Cal. 694, 79 P. 447, 1 L.R.A.,N.S., 315, and *Litten v. Warren* (1936), 11 Cal.App.2d 635, 54 P.2d 39, also relied upon by defendant, concern writings lacking the specific and definite language employed by the parties to the agreement here involved, and contain nothing in point or persuasive on the issues before us.

[3] The next question is whether Riley is entitled to bring an action in partition

1. See Code of Civil Procedure, sections 752, 763, under which sale of the prop-

erty is authorized in lieu of physical partition.

against Mrs. Turpin. Section 752 of the Code of Civil Procedure provides that " * * where real property is subject to a lien on a parity with that on which the owner's title is based, [an action in partition may be brought] by the owner or by the holder of such lien, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the parties." Here, the obligation to pay the taxes was upon Mrs. Turpin as life tenant (Civ.Code, § 840), and, as we have seen, Riley paid them in order to prevent final forfeiture of the property. It is established that, as a contingent remainderman, his interest in the property was such as to entitle him to make such payment without being considered a mere volunteer (*Schofield v. Green* (1944), 115 Ind.App. 160, 56 N.E.2d 506, 507 [1], 508 [7]; *Sheldon on Subrogation*, p. 12; 31 C.J.S., Estates, § 98, pp. 116-117; see also *Treat v. Craig* (1901), 135 Cal. 91, 93, 67 P. 7; *San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.* (1892), 96 Cal. 623, 635, 29 P. 500, 31 P. 588, 18 L.R.A. 465, 470; *Miller & Lux, Inc., v. Sparkman* (1932), 128 Cal.App. 449, 453-454, 17 P.2d 772; *In re Estate of Kemmerrer* (1952), 114 Cal.App.2d 810, 814, 251 P.2d 345, 35 A.L.R.2d 1393; 20 Cal.Jur. 908-909; cf. *Huddleston v. Washington* (1902), 136 Cal. 514, 69 P. 146); and that under equitable principles of subrogation he thereby succeeded to the lien held by the public taxing bodies. (See *Willmon v. Koyer* (1914), 168 Cal. 369, 371, 374-375, 143 P. 694, L.R.A.1915B, 961; *Fresno Investment Co. v. Brandon* (1926), 79 Cal. App. 387, 389, 249 P. 548; *Bumiller v. Bumiller* (1918), 179 Cal. 119, 124, 175 P. 897; *Finnell v. Finnell* (1911), 159 Cal. 535, 540, 114 P. 820; *Kenney v. Kenney* (1950), 97 Cal.App.2d 60, 62-63, 217 P.2d 151; *In re McCarty's Estate* (1936), 158 Misc. 287, 285 N.Y.S. 641, 643-644; *Harris on Subrogation*, p. 224; 23 Cal.Jur. 925-926, 930, 935, and cases there cited; 50 Am.Jur. 728-729, 762; *Camden v. Fink Coal & Coke Co.*, 106 W.Va. 312, 145 S.E. 575, 61 A.L.R. 587;

Central Wisconsin Trust Co. v. Swenson, 222 Wis. 331, 267 N.W. 307, 106 A.L.R. 1212; see also 33 Am.Jur. 997.) Further, it is specifically provided in section 2903 of the Civil Code that "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit." (See *Stein v. Simpson* (1951), 37 Cal.2d 79, 83-85 [3, 4, 5, 6], 230 P.2d 816; *Bumiller v. Bumiller* (1918), supra, 179 Cal. 119, 124, 175 P. 897; *Kenney v. Kenney* (1950), supra, 97 Cal. App.2d 60, 62-63, 217 P.2d 151; *Seale v. Balsdon* (1921), 51 Cal.App. 677, 680, 197 P. 971.)

We conclude that plaintiff holds a lien against the involved property which qualifies him to bring this action in partition under the provisions of section 752, quoted hereinabove.

[4] Defendant next contends that the trial court erred in providing that the amount of taxes paid by plaintiff be deducted from defendant's share of the proceeds of sale of the property. As already indicated, however, plaintiff held a lien on the property for the amount of such taxes, which he had paid to meet an obligation which legally was that of defendant. Under such circumstances no error appears in the respect complained of by defendant. (*Willmon v. Koyer* (1914), supra, 168 Cal. 369, 374, 143 P. 694, L.R.A.1915B, 961.)

[5] Defendant further urges that her motion for a new trial on the ground of newly discovered evidence should have been granted. Such motion was supported by affidavit of her attorney that following the trial he had discovered a recorded deed by which Brand had conveyed his interest in the property to plaintiff's father and that the father was therefore a necessary party in the partition action. The father executed a counter-affidavit in which he denied

any delivery of the deed; and alleged that during Brand's last illness he, the father, had found it among Brand's personal effects and had it recorded without realizing that there had been no delivery of the deed to him, that as executor of Brand's last will and testament the father had in 1947 filed a federal estate tax return in which it was stated that the deed had not been delivered, that the father claimed no interest in the property, and that property covered by the deed (other than the "joint tenancy" property involved in the present partition action) had been included in the estate inventory and was being administered as part of Brand's estate. In his affidavit the father further disclaimed any interest in the property, and a quitclaim deed was executed by him and recorded before the court ruled on the new trial motion. The trial court was therefore warranted in concluding that the father had never acquired any interest in the property and in denying a new trial.

[6] Defendant's final contention is that the trial court erred in apportioning the proceeds of sale between the parties in proportion only to the respective values of their contingent remainders, based on their respective life expectancies, and in failing to take into account the value of defendant's life estate. In this defendant is correct. Section 778 of the Code of Civil Procedure provides that "The person entitled to a tenancy for life, * * * whose estate has been sold [in partition proceedings], is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing * * *," and section 779 of the same code states that if the amount of such reasonable satisfaction is not agreed upon, "at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum * * *" It follows that the judgment must be reversed to permit determination, in accordance with the above-quoted sections, of the sum to be

received by defendant as satisfaction for her life estate.

The judgment is reversed and remanded for such further proceedings as may be necessary to make findings of fact and conclusions of law and to enter a judgment not inconsistent with the views expressed herein, each party to bear his or her own costs on appeal.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 159

S. A. PONCE, Plaintiff and Respondent,

v.

Ethel Ruth MARR, Defendant and Appellant.

S. F. 19283.

Supreme Court of California.

In Bank.

Oct. 11, 1956.

Action by administrator of estate of deceased grantor to cancel a deed on ground that it had been delivered to defendant by reason of fraudulent representation that she would care for elderly grantor during his declining years. The Superior Court, San Mateo County, Aylett R. Cotton, J., entered judgment for plaintiff and defendant appealed and the cause was transferred to Supreme Court on its own motion. The Supreme Court, Shenk, J., held that testimony of grantee that first of several canceled checks, introduced in evidence by plaintiff to rebut grantee's assertion that deed was given in payment for services previously performed for grantor, represented a loan from grantor, for which there should be a canceled note, and similar testimony offered by grantee in explanation of other checks

did not violate best evidence rule and could not properly be excluded on ground that court found it unworthy of belief.

Judgment reversed.

Opinion, 295 P.2d 43, vacated.

1. Courts ⚡488(1)

A cause transferred from District Court of Appeal to Supreme Court is removed from jurisdiction of District Court of Appeal and is then pending in Supreme Court the same as if originally lodged there.

2. Courts ⚡488(1)

Upon transfer of cause from District Court of Appeal to Supreme Court, opinion and decision of District Court of Appeal become a nullity and are of no force or effect either as a judgment or as an authoritative statement of any principle of law therein discussed, unless approved or adopted by Supreme Court.

3. Appeal and Error ⚡1056(1)

Where administrator of estate of deceased grantor, in action to cancel deed on ground that it had been delivered to defendant by reason of fraudulent representation that she would care for elderly grantor during his declining years, introduced in evidence canceled checks indicating payments by grantor to grantee to rebut grantee's assertion that deed was given in payment for services previously performed for grantor, rejection of grantee's testimony that first check represented a loan from grantor and other similar testimony offered in explanation of other checks was prejudicial to grantee.

4. Evidence ⚡158(27)

Parol testimony that canceled check, indicating payment of money by drawer, since deceased, to witness, represented a loan from drawer, for which there should be a canceled note, and similar testimony offered in explanation of other such checks did not violate "best evidence" rule, since such testimony did not attempt to show by parol the terms of a written instrument.

See publication Words and Phrases, for other judicial constructions and definitions of "Best Evidence".

5. Evidence ⚡425

Where the question is as to whether a writing has been made and not as to contents thereof and the question comes collaterally in issue, it may be proved by parol.

6. Deeds ⚡202

Where administrator of estate of deceased grantor, in action to cancel deed on ground that it had been delivered to defendant by reason of fraudulent representation that she would care for elderly grantor during his declining years, introduced canceled checks, indicating payments by grantor to grantee, to rebut grantee's assertion that deed was given in payment for services previously performed for grantor, grantee was entitled to present otherwise competent testimony in explanation of such checks and court could not properly exclude such testimony as unworthy of belief, even if, after being heard, it might be rejected on such ground.

7. Cancellation of Instruments ⚡46, 49

In action by administrator of estate of deceased grantor to cancel deed allegedly delivered to defendant by reason of fraudulent representation that she would care for elderly grantor during his declining years, defendant was entitled to a complete hearing and to produce all relevant, competent and material evidence on any material issue.

8. Trial ⚡45(1)

Where trial court made it clear that additional testimony offered by defendant in explanation of canceled checks would not be received, complete offer of proof by defendant was rendered unnecessary.

John J. Fahey, Jr., Daly City, for appellant.

William A. Finger, Burlingame, for respondent.

SHENK, Justice.

This cause was transferred to this court on its own motion. A trial in the Superior Court in and for the County of San Mateo resulted in a judgment for the plaintiff. On appeal the judgment was reversed by the District Court of Appeal. *Ponce v. Marr*, 295 P.2d 43, 45. A hearing was ordered because of the italicized portion of the following quotation concerning the continuing effect of an opinion and decision of the District Court of Appeal after an order of transfer to this court:

"An excellent explanation of the distinction between an attempt to show the terms of an instrument by secondary evidence, which attempt properly would be denied under the best evidence rule, and the producing of oral evidence although written evidence also exists, is given in the case of *Altramano v. Swan* (Cal.App.), 119 P.2d 401. That case does not appear in the California Appellate Reports because the Supreme Court granted a hearing. *Altramano v. Swan*, 20 Cal.2d 622, [128 P.2d 353]. The Supreme Court came to the same conclusion as the district court of appeal as to the disposition of the cause, but did not mention the point of evidence; *however, since the cause was remanded for further trial and since the district court of appeal had made its ruling on the point of evidence specifically for the guidance of the trial court at the new trial, and the supreme court did not interfere with that ruling, the ruling may be regarded as authoritative.*"

[1,2] The emphasized language in the foregoing quotation is not a correct statement of the law and, if allowed to stand, would result in confusion with reference to the subject. It therefore seems necessary to reiterate that the effect of an order of transfer to this court is to remove the cause in its entirety from the District Court of Appeal. Thereafter it is pending in this court the same as if originally lodged here. *Moran v. District Court of Appeal*, 15 Cal.2d 527, 530, 102 P.2d 1079; *In re Stierlen's Estate*, 199 Cal. 140, 144,

248 P. 509; *Rockridge Place Co. v. City Council*, 178 Cal. 58, 60, 172 P. 1110. Again it was stated in *Knouse v. Nimocks*, 8 Cal. 2d 482, at page 483, 66 P.2d 438: "The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. * * * [W]ithout some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise, than if they had not been written." To the same effect see *In re Estate of Kent*, 6 Cal.2d 154, 156, 57 P.2d 901; *E. J. Stanton & Sons v. County of Los Angeles*, 78 Cal.App.2d 181, 193, 177 P.2d 804.

From the foregoing it necessarily follows that upon the transfer to this court of the case of *Altramano v. Swan* referred to in the above quoted paragraph from the opinion of the District Court of Appeal that case ceased to be authoritative in any sense as a precedent. Likewise the decision and opinion of the District Court of Appeal in the present case has been rendered a nullity and of no force and effect by the order of transfer to this court.

On the merits of the appeal it appears that the plaintiff, S. A. Ponce, as administrator of the estate of his deceased father, commenced the action to cancel a deed which the decedent had delivered to the defendant, Ethel Ruth Marr. The complaint alleged and the plaintiff sought to prove that the deed in question was delivered to the defendant by reason of the fraudulent representation to the elderly grantor that she would care for and nurse him during his declining years. The defendant denied that she had made such an agreement, claiming that the deed was delivered in consideration of certain prior services performed by her for which she had not been paid. To rebut that assertion and to impeach the defendant's testi-

mony the plaintiff offered in evidence a number of cancelled checks which on their face indicated payments of money from the decedent to the defendant and claimed by the plaintiff to be in consideration for the services performed by the defendant. As a witness in her own behalf the defendant attempted to explain the payments indicated by the checks. Prior to their introduction she had admitted that she had obtained a loan from the decedent. She testified that a particular check in the amount of \$200 was a loan to be used in adding a room to her home and that the loan had been repaid. She stated: "I think there should be a cancelled note."

[3] At that point the plaintiff's counsel moved that the defendant's testimony be stricken on the ground that it was not the best evidence. The court granted the motion, but it is not clear whether the evidence was rejected on the ground that it violated the best evidence rule or that the court found it, so far as it went, unworthy of belief and decided to hear no more on the same subject. The defendant's counsel unsuccessfully attempted to introduce evidence in explanation of the other checks. Judgment for the plaintiff was directed from the bench and it is apparent from the record that if the evidence of the defendant thus tendered was improperly rejected the error was prejudicial to her cause.

[4,5] The parol explanation that the first check was a loan and the offer of similar explanations as to other checks were not in violation of the best evidence rule as there was no attempt to show by parol the terms of a written instrument. The defendant was attempting to testify as to claimed repayments, and she should not be foreclosed from doing so by the existence of a written instrument which also would show the fact sought to be proved. The existence of the writing was collateral to the issue of repayment and we "understand

the rule to be that, where the question is not as to the contents of a writing, but as to whether one has been made or not, and the question comes collaterally in issue, it may be proved by parol." *Marriner v. Dennison*, 78 Cal. 202, 213, 20 P. 386, 391; see also *People v. Skeen*, 93 Cal.App.2d 489, 491, 209 P.2d 132; *Wigmore on Evidence*, 3rd Ed., vol. IV, p. 485.

[6,7] If, on the other hand, the court excluded the defendant's testimony relating to the checks because it found it to be unworthy of belief, there was error in doing so. Without suggesting that the court did not have the right to disbelieve the defendant or to reject her testimony after hearing it, still she should not have been deprived, for that reason alone, of her right to present such testimony. Her further testimony may have satisfied the court that the other checks could be properly explained and may have caused the court to alter its opinion as to the first check. The defendant was entitled to a complete hearing, and to produce all relevant, competent and material evidence on any material issue. *Lawless v. Calaway*, 24 Cal.2d 81, 92, 147 P.2d 604; *Foster v. Keating*, 120 Cal.App.2d 435, 451, 261 P.2d 529; *Bole v. Bole*, 76 Cal. App.2d 344, 345-346, 172 P.2d 936; *Mashbir v. Mashbir*, 29 Cal.App.2d 733, 735, 85 P.2d 482.

[8] A complete offer of proof by the defendant was rendered unnecessary as the court made it clear that additional testimony in explanation of the checks would not be received. *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905; *Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 100, 142 P.2d 741.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

47 Cal.2d 163

SOUTHERN PUBLIC UTILITY DISTRICT,
a public corporation, Plaintiff and
Appellant,

v.

Jean J. SILVA et al., Defendants and
Respondents.
S. F. 19572.

Supreme Court of California.
In Bank.
Oct. 11, 1956.

Proceeding in eminent domain by public utility district to acquire improvements in right of way for power system. The Superior Court, Contra Costa County, Harold Jacoby, J., entered an order denying the plaintiff's motion for an order of abandonment and dismissal of the proceeding and the plaintiff appealed. The Supreme Court, McComb, J., held that the condemnation proceeding could not be voluntarily abandoned by the public utility district more than 30 days after judgment notwithstanding extension of the time allowed by statute for payment of the award as authorized by the statute where the state or public corporation is the condemner.

Order affirmed.

Opinion, 297 P.2d 705, vacated.

1. Eminent Domain ⇨246(2)

Extension of time allowed by statute for payment of award by filing affidavit pursuant to statutory provisions did not extend time allowed by statute for abandonment of proceedings by condemner where time for appeal, motion for new trial, or motion to vacate judgment had passed, and notwithstanding such extension of time for payment of award, condemnation proceedings to acquire improvements and rights of way for condemner's power system could not be abandoned by public utility district more than 30 days after judgment. West's Ann.Code Civ.Proc., §§ 1251, 1255a.

2. Eminent Domain ⇨246(2)

Under the statute authorizing condemner to abandon proceedings at any

time after filing complaint and before expiration of 30 days after judgment, the term "final judgment" means a judgment when all possibility of a direct attack thereon by way of appeal motion for new trial or motion to vacate the judgment has been exhausted. West's Ann.Code Civ.Proc., § 1255a.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

3. Statutes ⇨223.2(35)

The statute allowing an extension of time for payment of condemnation award is not in pari materia with the statute providing for the abandonment of condemnation proceedings, since the statutes deal with different subjects and have different purposes and objectives. West's Ann.Code Civ.Proc., §§ 1251, 1255a.

4. Eminent Domain ⇨246(3)

Under the statute a condemnee has the option either to enforce judgment as best he may or treat such nonpayment of the award as implied abandonment of the proceedings but the statute does not give the condemner who has not abandoned the proceeding within the time limited thereby, the privilege of treating his own default in payment of an award as an abandonment of the proceedings particularly in view of the remedies afforded the condemnee by the statute where the condemner fails to pay the award within the time required. West's Ann.Code Civ.Proc., §§ 1251, 1252, 1255a.

John A. Nejedly and King Crosno, Walnut Creek, for appellant.

Gilbert Harelson, City Atty., and Jennings, Engstrand & Henrikson, La Mesa, amici curiae, for appellant.

Breed, Robinson & Stewart and Popper & Burnstein, Oakland, for respondents.

McCOMB, Justice.

This cause was transferred to this court after decision by the District Court of Appeal, First Appellate District, Division

One. Upon further examination of the record, we adopt the opinion of that court prepared by Mr. Justice Wood (Fred B.), with such omissions and additions as hereinafter appear, as and for the decision of this court. As modified, it reads:

In this proceeding in eminent domain judgment was rendered authorizing the plaintiff to acquire certain improvements and rights of way for its sewer system upon payment of \$62,000 and interest to defendant Scherer-Hobart Company. Neither party appealed.

Within 30 days from the date of the judgment, plaintiff filed an affidavit pursuant to section 1251 of the Code of Civil Procedure, declaring that to provide money necessary to pay the award, bonds of the district must be issued and sold. That, of course, extended to one year from the date of the judgment the period of time within which to pay the award.

Six months later (nearly seven months after the date of the judgment) plaintiff filed a notice declaring that it "hereby abandons the proceeding on file herein," and moved for an order of abandonment and for judgment dismissing the proceeding. This motion was denied and plaintiff has appealed from the order of denial.

[1] The order must be affirmed. The purported abandonment was without authority in law. It came too late. [The time for appeal, motion for a new trial, or a motion to vacate the judgment had passed.]¹ The applicable statute authorizes a plaintiff to "abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after *final judgment*". (Code Civ.Proc., § 1255a.) [Italics added.]

[2] [The term "final judgment" as used in section 1255a of the Code of Civil Procedure means a judgment when all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) motion to vacate the judgment, has

been exhausted. (Code Civ.Proc., § 1264.7) Any statements to the contrary in *City of Los Angeles v. Deacon*, 3 Cal.2d 641, at page 648 [2], 46 P.2d 165, are overruled; likewise, contrary statements in *City of Los Angeles v. Aitken*, 32 Cal.App.2d 524, at page 528 [2] et seq., 90 P.2d 377, are disapproved.]

[3] Plaintiff's main argument is that sections 1251 and 1255a are to be read together, with the result, it claims, that extension of the time within which to pay (by filing the affidavit sanctioned by § 1251) extends the time within which to abandon (by filing the affidavit prescribed by § 1255a).

There is no such interlacing of the provisions of these two sections. They deal with different subjects (payment and abandonment, respectively) and have different purposes and objectives. Section 1251 has been in the code ever since 1872. Originally, it prescribed 30 days after final judgment as the period of time within which the condemner must pay the sum of money assessed, without any provision for extension of that period. Commencing in 1911 (Stats. 1911, ch. 80, p. 92) the section has been amended from time to time to provide, as it now does, that this 30-day period may be extended to enable the raising of money by issuing bonds if the state or a public corporation is the condemner.

In January of 1911, the decision in *Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal.App. 216 [114 P. 808, 810], was rendered in which the court stated that a condemner "is entitled to abandon the claim to the property and ask a dismissal before the expiration of 30 days from the entry of the judgment" (15 Cal.App. at page 218, 114 P. at page 809) and held that in such a case the costs to which the condemnee was entitled did not include "necessary and reasonable expenses in preparing for and defending this action" (15 Cal. App. at page 217, 114 P. at page 809), such as expenses incurred for "surveying

1. Brackets enclosing material (other than editor's added parallel citations) are used

to denote insertions or additions by this court.

and engineering work and maps and * * attorney's fees" (15 Cal.App. at page 218, 114 P. at page 809). By a legislative bill introduced and passed that session and approved by the governor March 17, 1911, the Legislature added section 1255a to the code, using therein language so similar to that used by the court in the case cited that it is a fair inference that the Legislature had that decision before it and was considering solely the subject of abandonment and costs upon abandonment and was not considering any other subject such as the time within which an award must be paid by a condemner as prescribed in section 1251. []²

[The judgment of the award to the defendant had become final.]

[The extension, from 30 days to one year, of the time within which the plaintiff must pay the award is for the convenience of the plaintiff in seeking to obtain the money through the medium of a bond issue. Its obligation to pay is fixed and is not subject to diminution or modification by the lapse of time.]

[4] Plaintiff makes an additional argument based upon that provision of section 1255a which declares that "failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding." That simply means that if the condemner (not having abandoned within the time limited therefor by section 1255a) fails to pay the amount of award (either directly to the defendant or by deposit in court for his benefit) within the time limited therefor, the condemnee has the option of enforcing the judgment as best he may or of treating such nonpayment as an implied abandonment. It would be unreasonable to ascribe to the Legislature, as plaintiff would have us do, an intent to authorize voluntary abandonment not later than 30 days after entry of judgment and then give the condemner the privilege of treating his own default as an abandonment, especially in view of the

remedies accorded the condemnee by the provisions of section 1252 of the Code of Civil Procedure when the condemner fails to pay within the time required.

The order appealed from is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



47 Cal.2d 75

Earl F. HEDLUND, Petitioner,

v.

Alice DAVIS, as County Clerk of the County of Tehama, State of California, Board of Supervisors of the County of Tehama, State of California, Earl Davies, Albert Pryor, Clarence Mendenhall, Lynn Raymond and Walter Dale, as Members of said Board of Supervisors, Respondents.

Edward J. Allen, Real Party in Interest.

Sac. 6750.

Supreme Court of California.

In Bank.

Oct. 5, 1956.

Petition for a writ of mandate to require the respondents to place the office of district attorney of County of Tehama on the ballot at the general election to be held on November 6, 1956. The Supreme Court, Schauer, J., held that where office of district attorney of Tehama County was vacated by resignation of incumbent the appointment of the appointee was not for the full unexpired term of the incumbent which would terminate in January 1959 but terminated at the general election to be held on November 6, 1956 so as to require that such office appear on the ballot for the November 6, 1956 general election.

Peremptory writ issued.

2. [] Brackets together in this manner are used to indicate deletions from the opinion of the District Court of Appeal.

1. Counties Ⓒ24

Charter of the County of Tehama providing for the times at which and the terms for which the county district attorney shall be elected or appointed is not limited by the general law which might otherwise apply. West's Ann.Const. art. 11, § 7½.

2. District and Prosecuting Attorneys Ⓒ2(1)

Under charter of the County of Tehama, unexpired term of the office of district attorney is to be filled by election at the first general election which occurs following the vacancy for which election candidates could qualify under any method prescribed by law. West's Ann.Elections Code, §§ 3000 et seq., 3046-3050; St.1917, p. 1891.

3. Statutes Ⓒ219

The language of a law cannot be altered by any misunderstanding of its effect nor can the meaning of that language be changed by failure of administrative agents to make earlier announcement of the necessity for an election under its provisions. West's Ann.Elections Code, § 3000 et seq.

4. District and Prosecuting Attorneys Ⓒ2(1)

Failure of the county officers of Tehama County to announce that the unexpired term of district attorney shall be filled at the election of November 6, 1956 could not justify as within administrative discretion the withholding of the office of district attorney from the ballot at such election nor affect the rights of qualified persons to circulate and file nominating papers pursuant to the Election Code. West's Ann.Elections Code, § 3000 et seq.; West's Ann.Const. art. 11, § 7½.

5. Elections Ⓒ1, 10

The right of suffrage is protected by the Constitution and every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process. West's Ann.Elections Code, § 3000 et seq.; West's Ann.Const. art. 2; art. 11, § 7½; St.1917, p. 1891.

6. District and Prosecuting Attorneys Ⓒ2(2)

Where office of district attorney of Tehama County was vacated by resignation

of incumbent on June 11, 1956 and was filled by appointment by the board of supervisors to serve for the unexpired term of the incumbent, the appointment of the appointee was not for the full unexpired term of the incumbent which would terminate in January 1959 but terminated at the general election to be held on November 6, 1956 so as to require that such office appear on the ballot for the November 6, 1956 general election. West's Ann.Elections Code, § 3000 et seq.; West's Ann.Const. art. 11, § 7½.

Earl F. Hedlund, in pro. per.

Rawlins Coffman, Red Bluff, for respondent Davis.

No appearance for respondent supervisors.

Edward J. Allen, Red Bluff, in pro. per.

SCHAUER, Justice.

Earl F. Hedlund petitions for a writ of mandate to be addressed to the county clerk and to the board of supervisors of Tehama County. Petitioner asks that respondents be directed to perform such official duties respectively as under the law devolve upon them to the end (1) that the office of district attorney of the County of Tehama shall be placed upon the ballot at the general election to be held on November 6, 1956, in order that a qualified candidate may be elected at such general election to serve for the remainder of the unexpired term of Bruce Werlhof, who was elected in November, 1954, for a term which is to expire in January, 1959, and who resigned from such office on June 11, 1956; (2) that there shall be accepted, examined, and otherwise dealt with in accordance with law all independent nomination papers which may be timely tendered by candidates for the office of district attorney of the County of Tehama, to be voted on at the general election of November 6, 1956; and (3) that there shall be printed on the ballots to be used at the general election of November 6, 1956, in the County of Tehama, the name or names of any person or persons who pursu-

ant to law may be found to have qualified as a candidate or candidates for the office of district attorney of such County of Tehama, pursuant to the provisions of sections 3000 et seq. of the Elections Code of the State of California.

Due to the industry of petitioner, of the incumbent district attorney as a real party in interest, and of counsel for respondent county clerk, the issue before us has been fairly, promptly, and concisely presented. It is purely one of law. From the petition and the returns thereto filed by the county clerk, and by the incumbent district attorney,¹ it appears that at the time of the holding of the primary election in California on June 5, 1956, and thereafter until June 11, 1956, one Bruce Werlhof was the duly elected and acting district attorney for Tehama County; he had been elected for the term which will expire in January, 1959. On June 11, 1956, subsequent to the primary election, Werlhof resigned his office effective immediately, and immediately thereafter respondent board of supervisors appointed Edward J. Allen to the office which had been made vacant as above noted; the board purported to appoint Allen to serve "for the 'unexpired term'" of Werlhof, although, petitioner contends, by virtue of the charter provisions of the County of Tehama the appointment of Allen is, and can be, effective only until the general election on November 6, 1956.

On September 11, 1956, petitioner caused a statement to be published in the newspapers of Tehama County stating that in his understanding of the law the term of the incumbent district attorney will expire on November 6, 1956, and that the people have the right to elect their district attorney on that date. His published statement concludes, "I am making this public announcement of my intention in order that, should my construction of the law be correct, every attorney who is interested in the office will

have a fair and equal opportunity to seek it * * *"

On September 14, 1956, petitioner and Allen, the incumbent district attorney,² each tendered to the county clerk \$180 for prepayment of the filing fee required by law, and received from her appropriate nomination forms. The clerk at that time informed them, however, that she was "conditionally" accepting the fees and "conditionally" issuing the nomination papers and that because of shortness of time for the completion of the nomination procedure provided by sections 3000 et seq. of the Elections Code she could not assure them that the name of either petitioner or Allen would actually appear on the ballot at the November 6 election or that an election would in fact be held for the office of district attorney on that date or that she might not demand, as a condition to the acceptance of nomination papers when completed, a court order requiring her to accept such papers.

Sections 3000 et seq. of the Elections Code provide for the type of independent nomination procedure which petitioner seeks to follow here. Sections 3046 to 3050, inclusive, prescribe the form and substance which the nomination papers shall follow. Such nomination papers, according to section 3043, shall be filed not more than 65 nor less than 40 days before the day of election. September 27 is the fortieth day before November 6. There is a further provision, however, in section 3045, that "Not more than five days before the first day, and not less than five days before the last day on which a nomination paper may legally be filed, it shall be * * * left with the county clerk for examination, or for examination and filing"; the last day for compliance with this last requirement would be September 22 which, being a Saturday, the parties agree would make the last day fall on September 21. The al-

1. The board of supervisors have stated that no return will be filed by them.

2. Although Mr. Allen takes the position that his appointment continues for the

full unexpired term of Werlhof (that is, until January, 1959), he seeks to qualify as a candidate for the November 6, 1956, ballot, if it is determined that the office should appear on such ballot.

ternative writ herein was issued on September 19.

Both petitioner and Allen circulated their respective nomination papers throughout the County of Tehama and filed them with respondent county clerk on or before September 21. That official, at the date of her return, was in the course of examining them, although she alleges that "she is unaware of any vacancy in the office of district attorney of the County of Tehama."

The basic issue before us is whether under applicable law the appointment of the incumbent, Allen, is inherently effective for the full unexpired term of Werlhof, which will terminate in January, 1959, or whether such appointment terminates at the general election³ to be held on November 6, 1956. If the appointment as a matter of law carries over for the full unexpired term then no vacancy will exist in the office of district attorney to be voted on at the November 6, 1956, general election, but if petitioner is correct in his contentions then the office should appear on the November 6, 1956, ballot, together also with the names of candidates for that office who have qualified as such under the independent nomination procedures.

The charter of Tehama County (art. IX, § 6; Stats.1917, p. 1891) provides, "*Whenever a vacancy shall occur in an elective office in this County other than a member of the Board of Supervisors the Board of Supervisors shall fill such vacancy, except as otherwise provided in this Charter, until the election and qualification of his successor. In case of any such vacancy there shall be elected at the next general election an officer to fill such vacancy for the unexpired term, unless such unexpired term ends on the first Monday after the first day of January next succeeding the election, in which case the election shall be for the unexpired term and for an entire new term in addition.*" (Italics added.)

3. We are not in this proceeding concerned with any question as to whether, technically, the appointive term would ipso facto end on the day of the election or

The Constitution of this state declares, in section 7½ of article XI, that in county charters "It shall be competent * * * to provide * * * for the following matters: * * *

"2. For sheriffs, * * * district attorneys * * *, for the election or appointment of such officers, or any of them, for the times at which and the terms for which, said officers shall be elected or appointed, * * * and, if appointed, for the manner of their appointment; and * * *

"Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature, as herein provided, the general laws adopted by the Legislature in pursuance of Sections 4 [repealed in 1933] and 5 [having to do, among other things, with the election or appointment of county officers] of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein * * *

[1,2] Pursuant to the above constitutional provisions the charter of the County of Tehama (art. IX, § 6, also quoted above) has made the authorized provision for the "times at which and the terms for which" the county district attorney shall be elected or appointed. It is established that the charter provisions thus adopted are not limited by the general law which might otherwise apply. (Estate of Miller (1936), 5 Cal.2d 588, 592-593, 55 P.2d 491; County of Tehama v. Winter (1922), 56 Cal.App. 341, 205 P. 97; see also 11 Ops.Cal.Atty.Gen. 136; 28 Ops.Cal.Atty.Gen. 17.) Under such charter provisions it is plain that the unexpired term of Werlhof is to be filled by election at the very first general election which occurs following the vacancy, for which election candidates could qualify under any method prescribed by

would carry over until the counting of ballots, the delivery of a certificate of election, and the actual qualification of an elected successor.

law. (See also *DeWoody v. Belding* (1930), 210 Cal. 461, 465, 292 P. 265.)

[3] Respondents and the real party in interest argue that the term "general election," when applied to nonpartisan offices such as the office of district attorney here involved, embraces the entire elective process, including the June primary, since nonpartisan candidates may be and often are elected at the primary by receiving a majority of the votes," and, further, that because of the shortness of time in which candidates could qualify to appear on the November 6 ballot, following announcement by petitioner of his position on the issue, the right of suffrage of the people will not be exercised in a well-considered and deliberate election. But the charter requirement that "there shall be elected at the next general election an officer to fill such vacancy [created by Werlhof's resignation] for the unexpired term" is clear and inclusive, not exclusive, and was applicable at the very time (June 11, 1956) that Werlhof resigned and Allen was appointed district attorney to fill the vacancy. The language of the law cannot be altered by any misunderstanding of its effect nor can the meaning of that language be changed by failure of administrative agents to make earlier announcement of the necessity for the election. The fact that the vacancy did not occur until after the primary election of June, 1956, is wholly immaterial when considered in the light of the language of the charter. To hold, as further suggested by the appearing respondent and the real party in interest, that the term "next general election" refers to the first general election at which the office of district attorney is normally filled for the full four-year term would render meaningless the words "for the unexpired term" and would make surplusage of the provision for tacking the unexpired term to the succeeding four-year term. The conjunction of the last mentioned charter provisions makes altogether clear the conclusions we have reached.

[4-6] It is our view, furthermore, that the failure of the county officers of Tehama County to announce that the unexpired term should be filled at the election of November 6, 1956, cannot properly be held to justify, as within administrative discretion, withholding the office of district attorney from the ballot or to affect the rights of qualified persons to circulate and file nominating papers pursuant to sections 3000 et seq. of the Elections Code. The right of suffrage is protected by the Constitution of California (art. II; see also *Pierce v. Superior Court* (1934), 1 Cal.2d 759, 762 [4], 37 P.2d 453, 96 A.L.R. 1020) and every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process. (See generally, 18 Am.Jur. 188, § 11.) The provisions of article IX, section 6, of the Tehama County Charter and of article XI, section 7½, of the state Constitution are controlling here, and petitioner is entitled to the peremptory writ which he seeks.

For the reasons above stated we did, on September 25, 1956, enter our order as follows:

It Is Hereby Ordered That a peremptory writ of mandate issue forthwith directing that respondents Alice Davis, as County Clerk of the County of Tehama, State of California; Board of Supervisors of the County of Tehama, State of California; Earl Davies, Albert Pryor, Clarence Mendenhall, Lynn Raymond and Walter Dale, as Members of said Board of Supervisors, perform such official duties respectively as under the law devolve upon them to the end that:

1. The office of district attorney of the County of Tehama, State of California, shall be placed upon the ballot at the general election to be held on November 6, 1956, in order that a qualified candidate, if any there shall be, may be elected at such November 6, 1956, general election, to serve for the remainder of the unexpired term of Bruce Werlhof, who had been elected in November, 1954, for a term which is to ex-

pire in January, 1959, and who resigned from such office on June 11, 1956.

2. There shall be accepted, examined, and otherwise dealt with in accordance with law all independent nomination papers of candidates for the office of district attorney of the County of Tehama, State of California (unexpired term of Bruce Werlhof, resigned), at the general election of November 6, 1956.

3. There shall be printed on the ballots to be used at the general election of November 6, 1956, in the County of Tehama, State of California, the name or names of any person or persons who pursuant to law may be found to have qualified as a candidate or candidates for the office of district attorney of such County of Tehama (unexpired term of Bruce Werlhof, resigned), pursuant to the provisions of sections 3000 et seq. of the Elections Code of the State of California.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and McCOMB, JJ., concur.



47 Cal.2d 131

In re ESTATE of Charlie Ella FRAYSHER,
Deceased.

Georgia REYNOLDS, Objector and
Appellant,

v.

David N. FRAYSHER, Executor and
Respondent.
L. A. 23995.

Supreme Court of California,
In Bank.

Oct. 11, 1956.

Proceeding on objections as to first account current and report of executor and petition for allowances upon commissions of executor and attorneys' fees and confirmation of sale of personalty. From por-

tions of order of Superior Court, San Bernardino County, Martin J. Coughlin, J., approving account and report including allowances and confirming sale of personalty and from order denying motion for an order requiring executor to produce for inspection bank account, checks and diary of testatrix, the objector appealed. The Supreme Court, Spence, J., held that where every item of executor's claim for reimbursements for advances made on behalf of deceased except small amounts for postage was supported by receipts or cancelled checks, court's order settling issues of fact after review of conflicting affidavits filed in proceeding on objections to claim and court's finding as to propriety of contested items would not be disturbed on appeal.

Portions of order approving account from which appeal was taken affirmed and attempted appeal from order denying objector's motion for order requiring executor to produce for inspection bank statement, cancelled checks and diary of deceased dismissed.

Opinion, Cal.App., 297 P.2d 466, vacated.

1. Executors and Administrators ⚡510(2)

Order denying motion for an order requiring executor to produce for inspection bank account, check and diary of testatrix was not an appealable order. West's Ann. Prob.Code, § 1240.

2. Executors and Administrators ⚡510(7)

Normally in contest of an executor's accounts, respective parties produce witnesses to be examined in open court, and when appeal is taken on issues of fact, it is necessary to bring a record of the evidence before the appellate court.

3. Affidavits ⚡18

Ordinarily affidavits may not be used in evidence unless permitted by statute.

4. Executors and Administrators ⚡510(8)

Where both parties in proceeding on objections to executor's account participated in presentation of evidence by affidavits as matters of convenience, in view of fact

that both were nonresidents of state, parties could not question propriety of such procedure on appeal.

5. Appeal and Error ⇨204(1)

Evidence which is admitted in trial court without objection although incompetent should be considered in support of that court's action and objection may not be first raised at appellate level.

6. Executors and Administrators ⇨510(11)

Where every item of executor's claim for reimbursement or advances made on behalf of deceased, except small amounts of postage, was supported by receipt or cancelled check, court's order settling issues of fact after review of conflicting affidavits in proceeding on objections to claim and court's findings as to propriety of contested items would not be disturbed on appeal.

7. Executors and Administrators ⇨510(4)

On appeal from order approving executor's account, propriety of yearly water charges paid by executor could not be raised where such point had not been in issue in proceeding on objections to account.

8. Executors and Administrators ⇨109(1), 510(10)

In passing upon reasonableness and necessity of expenditures during administration, court below is vested with broad discretion which will not be disturbed on appeal except when abused.

9. Executors and Administrators ⇨111(1)

Allowance of extraordinary attorney fees for such service as commencement of proceedings for sale of real property and successful representation of executor on two separate court hearings required on objector's motion for executor's removal rests largely in discretion of court in first instance.

10. Executors and Administrators ⇨111(1)

Where record in proceeding on objection to account of executor disclosed that attorneys had commenced proceedings for sale of real property in the estate and had successfully represented executor on two separate court hearings required by objector's motions for executor's removal,

there was basis for allowance of \$200 for extraordinary attorneys' fees.

11. Executors and Administrators ⇨496(1)

Computation of statutory fees allowed executor and attorneys on basis of full inventoried assets as set forth in inventory which included two disputed claims which were against decedent's daughters and on which court directed executor not to file suit was proper under circumstances and in absence of bad faith on part of executor in preparing inventory.

12. Executors and Administrators ⇨358(4)

Where both parties presented evidence by affidavits in proceeding and court accepted executor's sworn statement that four months prior to sale of household goods appraiser's finding of value of property and summary of estate's indebtedness was sent objector's attorney, that attorney indicated that objector would pay expenses and let property be distributed to her, that objector failed to pay expenses and that property was sold to pay estate's indebtedness as allowed by statute, order confirming sale would not be disturbed on appeal. West's Ann.Prob.Code, §§ 750, 751.

13. Executors and Administrators ⇨508(2)

Implicit in court's order approving executor's account is finding that executor had acted properly, with due diligence and in good faith in administration of estate.

14. Executors and Administrators ⇨506(3)

In proceeding on objection to executor's account, evidence sustained finding that executor made various attempts to rent house owned by estate and that tenant recommended by objector was not satisfactory. West's Ann.Prob.Code, § 581.

15. Executors and Administrators ⇨504(6)

It is the general rule that in absence of an independent inquiry undertaken by the court, issues for settlement are limited by executor's account and report on one hand and written objections on the other.

16. Executors and Administrators ⇨504(6)

Where affidavit relating to alleged failure of executor to account for money re-

ceived by him for burial expenses were served on executor's attorney on day of hearing on objections to account, executor neither had opportunity nor was he required to submit evidence on alleged accounting discrepancies tardily raised and they were not properly before the court for settlement.

17. Executors and Administrators §510(8)

Where affidavit relating to alleged failure of executor to account for money received by him for burial expense were served on executor's attorney on day of hearing, alleged discrepancies were not matters for consideration on appeal from order approving account.

C. E. Crowley, Ontario, for appellant.

Edgar C. Keller, San Bernardino, for respondent.

SPENCE, Justice.

Charlie Ella Fraysher, a widow, died leaving a small estate and an holographic will, which gave to each of her children \$1, except for her daughter Georgia Reynolds, to whom she bequeathed "the Place & all Households articulars." It is agreed that this bequest meant the deceased's home, appraised at \$2,500, and the furnishings therein, appraised at \$100, which property constituted the principal assets of the estate. Pursuant to the will, the deceased's son, David N. Fraysher, was appointed the executor. When the executor, a resident of Oregon, sought approval of his first account and accompanying report, Georgia Reynolds, a resident of Kansas and the principal beneficiary, filed written objections to several items, citing certain credits and debts, a sale of part of the personal property, and the failure to rent the real property. In support of her objections, she filed her own affidavit and that of her sister, Shirley Smith; and the executor filed an affidavit in his behalf. As the parties agree, the account and objections, affidavits and counteraffidavit, were all submitted to the court "without taking of testimony" and "after argument."

Thereafter, the court made its "Order Approving First Account Current and Report of Executor, Including Allowance upon Commissions of Executor, Attorney Fees and Extraordinary Attorney Fees; Confirming Sale of Personal Property; and Instructing Executor." The objector Georgia Reynolds appeals from those portions of the order (a) "approving the claim of David N. Fraysher in the sum of \$461.67"; (b) "approving 'all items of expenses listed in Schedule "A" of said account excepting the certain items enumerated'"; (c) "approving the claim of \$200 for extraordinary attorney's fees, and allowing statutory fees for executor and attorneys"; (d) "confirming the sale of the household furnishings set forth as Exhibit 'A,' sold to a son of the executor, at least six months before appraisement, without notice"; and (e) generally "approving said account current 'in all other respects, other than as otherwise herein set forth,' thereby overruling the objections to said report made by this appellant."

[1] Following the hearing and the making of the order, the objector moved for an order requiring the executor to produce for inspection the bank statements, cancelled checks and diary of the deceased. The court made its order denying such motion, and the objector appeals therefrom. As there is no authority for such an appeal, Prob.Code, § 1240, it must be dismissed.

Turning to the appeal from the order settling the executor's account, appellant contends that the challenged portions were approved without sufficient evidence, "without due consideration and without authority." Her position is not well taken.

[2] Preliminarily, there is a question of procedure to be determined. Normally, in the contest of an account the respective parties produce witnesses to be examined in open court. And when an appeal is taken on issues of fact, it is necessary to bring a record of the evidence before the appellate court. In re Estate of Reed, 9 Cal.App.2d 94, 96-97, 48 P.2d 177; see 34 C.J.S., Executors and Administrators, § 931 Record, pp.

1145-1147. Here the executor's account was settled solely upon the basis of opposing affidavits. There is therefore no reporter's transcript. Section 1233 of the Probate Code authorizes the use of affidavits or verified petitions as evidence " * * * in any uncontested probate proceedings"; but there appears to be no statutory provision authorizing the substitution of affidavits for oral evidence in a contested probate proceeding such as this.

[3-5] Ordinarily, affidavits may not be used in evidence unless permitted by statute. 2 Cal.Jur.2d § 30, p. 637. Thus, it has been held error to admit affidavits in evidence over objection, *Lacrabere v. Wise*, 141 Cal. 554, 556, 75 P. 185, or where the opposing party has no opportunity to object to their use. In *re Estate of Paulsen*, 35 Cal.App. 654, 656, 170 P. 855; *Reidy v. Collins*, 134 Cal.App. 713, 722, 26 P.2d 712. But this is a different situation in that the parties did not object to the use of affidavits in evidence, and both parties adopted that means of supporting their positions. Both having participated in such presentation of the evidence as a matter of convenience in view of the fact that both were nonresidents of this state, they cannot question the propriety of the procedure on appeal. In *re Estate of Reilly*, 81 Cal.App.2d 564, 569-570, 184 P.2d 922. Moreover, evidence which is admitted in the trial court without objection, although incompetent, should be considered in support of that court's action, *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal. 2d 157, 161, 195 P.2d 416; also *Parsons v. Easton*, 184 Cal. 764, 769, 195 P. 419, and objection may not be first raised at the appellate level. *Soares v. Ghisletta*, 1 Cal. App.2d 402, 404-405, 36 P.2d 668. The various disputed items of account must therefore be examined in the light of the opposing affidavits.

[6] Appellant first objects to the approval of the executor's claim for \$461.67 as reimbursement for advances made on behalf of the deceased. While she contends that such claim is vague and uncertain, "fictitious" and "padded," it appears that every

item, except for a small amount for postage, was supported by a receipt or cancelled check filed with the executor's affidavit. The court made its order settling these issues of fact after a review of the conflicting affidavits, and its implied findings as to the propriety of the contested items will not be disturbed on appeal. *Doak v. Bruson*, 152 Cal. 17, 19, 91 P. 1001; *Hall v. Bohannon*, 38 Cal.2d 458, 466, 241 P.2d 4; *Voeltz v. Bakery, etc., Union*, 40 Cal.2d 382, 386, 254 P.2d 553.

[7,8] Nor are appellant's objections well taken to certain items of expense listed in Schedule A and approved. These items consisted of expenses of administration, taxes, water bills, and gasoline costs for two trips made by the executor to California. At the hearing appellant only objected to the gasoline charges. One trip was for the executor's appearance in court resisting appellant's petition for his removal, and the other trip was for the executor's consultation some two months later with his attorney. The court allowed a portion of the gasoline expenses for the first trip and disallowed entirely such expenses for the second trip. Appellant now for the first time questions the propriety of the yearly water charges, contending that "for a year's time no water was used on the premises." There is nothing in the record which supports this statement, the matter was not in issue at the hearing, and the point may not now be raised. In passing upon the reasonableness and necessity of expenditures during administration, the court below is vested "with a broad discretion," which will not be disturbed on appeal except when abused. In *re Estate of Parker*, 186 Cal. 668, 670, 200 P. 619; In *re Estate of Lindauer*, 53 Cal.App.2d 160, 165, 127 P.2d 589.

[9,10] Appellant next objects to the allowance of \$200 for extraordinary attorney fees, and to the allowance of statutory fees for the executor and his attorneys. As the basis for the extraordinary attorney fees, the account and report sets forth the commencement of proceedings for the sale of

the real property in the estate (which were later discontinued at appellant's request), the successful representation of the executor on two separate court hearings required on appellant's motions for his removal, and the time spent, some thirty-seven hours, in performing these services. The allowance of extraordinary attorney fees for such professional services "rests largely in the discretion of the court in the first instance," *In re Estate of Parker*, 186 Cal. 671, 672, 200 P. 620, and it cannot be said here that there is no basis in the record for the extra compensation. *In re Estate of Gump*, 129 Cal.App.2d 783, 790, 277 P.2d 886.

[11] Nor can appellant prevail in her objections to the statutory fees allowed the executor and his attorneys. The computation was made on the basis of the full inventoried value of the assets of the estate as set forth in the amended inventory, which included a debt listed against appellant for \$900 and one against Shirley Smith, also the deceased's daughter, for \$375. Both alleged debtors denied, by affidavit, that they owed these sums. Appellant admitted that she had received \$900 as proceeds of a mortgage on the deceased's home through a bank loan but claimed that she had subsequently repaid it in full. Affiant Smith likewise admitted she had received from the deceased \$375 but claimed that such amount was only reimbursement for her payments on a mortgage for the deceased. Appellant refers to these two debts as endeavors of the executor to "pad" the inventory with false items. The executor requested the court for instructions as to whether he should file suit on these two claims, and the court directed him not to do so. Such instruction does not necessarily indicate the court's recognition of the invalidity of these two claims. Rather, the court may well have considered it economically impractical to litigate these debts in view of the conflicting affidavits, the requirements of their proof, and the resulting increase in family disputes as brother and sisters sought to resolve their differences. Moreover, appellant is substantially the sole beneficiary under the deceased's will

and enforcement of the estate's claim against her, with the accompanying court costs, would only ultimately operate to her economic disadvantage. There is no evidence of bad faith on the part of the executor in preparing the amended inventory, and there is implicit in the court's order settling the executor's account a finding that no such factor entered into his handling of the estate. Under the circumstances the record supports the court's determination, in the exercise of its discretion, that the statutory fees should be computed in conformity with the amended inventory's listing of the estate's assets; and the executor agrees that any commissions coming to him should be applied on his indebtedness to the estate. *In re Estate of Clary*, 203 Cal. 335, 346-347, 264 P. 242.

[12] Likewise there is no merit to appellant's objection to the court's confirmation of the sale of certain household furnishings to a son of the executor for \$60. These furnishings were part of the personal property in the deceased's home that were left to appellant by the will. The inventory was filed some six months after the sale, and the value of all household furnishings was listed at \$100. Appellant complains that the sale was made before the items were appraised and without notice to her. The executor, however, in his affidavit states that while the formal appraisal was not filed until later, the appraiser some four months prior to the sale made his findings of value on the property and a copy thereof, with summary of the estate's indebtedness, was sent to appellant's attorney; that appellant made no objection thereto; that it was necessary to pay certain administration expenses and obligations of the estate; that in correspondence with the executor's attorneys, appellant's attorney had previously indicated that appellant would "pay all of the expenses of administration and legitimate claims against the estate, and let the property be distributed to her at the end of the administration"; that in reply thereto, the executor's attorneys set a "deadline" for appellant to advance the necessary moneys so that no part of the property

would have to be sold; that some three months after the deadline had expired and having had no further word from appellant or her attorney, the particular items of household furnishings were sold to meet the estate's indebtedness as allowed by statute. Prob.Code, §§ 750, 751. Appellant does not question the amount of \$60 received for the items sold, which was more than half the total appraised value of all household furnishings, or that the remaining items, if sold, would reasonably produce at least a like amount. These were all matters for the court to reconcile in the exercise of its sound discretion upon consideration of the opposing affidavits; and its acceptance of the executor's sworn statements as the basis for its order confirming the sale of the household furnishings will not be disturbed. *Ex parte La Due*, 161 Cal. 632, 635, 120 P. 13.

[13, 14] Finally, appellant attacks the court's general approval of the executor's account current except as specifically noted, "thereby overruling the objections to said report made by this appellant." Coming within this category was appellant's argument concerning the rental possibility of the deceased's home. It is appellant's position that said home had a rental value of \$35 per month, that she had submitted to the executor the name of a person willing to pay such rent, but that the executor nevertheless elected to let the home stand vacant for over a year contrary to his duty to take charge of all property in the estate and account for available rents in the course of his administration. Prob.Code, § 581. In his affidavit, the executor referred to various attempts that he had made to rent the premises through a real estate agent "but was prevented from doing so by the actions of objector (appellant)"; that he did not feel that the tenant recommended by appellant would be satisfactory because such person had previously "used decedent's telephone for long distance calls," for which the estate was charged, and had failed to pay for the calls though demand therefor was twice made upon her by his attorneys.

Implicit in the court's order approving the executor's account is the finding that he had acted properly, with due diligence and in good faith in the administration of the estate. *In re Moore*, 96 Cal. 522, 525, 31 P. 584. Apparently, the court accredited the executor's stand in the matter, and the evidence sustains its conclusion. *Wolfson v. Haddan*, 105 Cal.App.2d 147, 149, 233 P.2d 145.

[15-17] Appellant further argues several factual issues relating to the alleged failure of the executor to account for certain moneys received by him for application to burial expenses for the deceased. These matters were not grounds of specific objection taken by appellant to the submitted account, but the first reference to them appears to have been made in the affidavits later filed by appellant and her sister Shirley Smith. The affidavits were served on the executor's attorney on the day of the hearing. It is the general rule that in the absence of an independent inquiry undertaken by the court, the issues for settlement are limited by the account and report on the one hand and the written objections on the other. *In re Estate of Boyes*, 151 Cal. 143, 147-148, 90 P. 454. Under the circumstances presented here, the executor neither had the opportunity nor was he required to submit evidence on the alleged accounting discrepancies tardily raised by appellant, they were not properly before the court for settlement, *In re Estate of Mallory*, 99 Cal.App. 96, 102, 278 P. 488; *In re Estate of Roberts*, 49 Cal.App. 2d 71, 81, 120 P.2d 933, and it did not undertake to pass upon them. Likewise they are not matters for consideration on this appeal.

In summary, the record indicates that the executor made such explanations of his administration as to impress the trial court with his honesty and good faith. The estate is relatively small and it unquestionably has provoked a great deal of unfortunate family feuding between brother and sisters. The trial court has apparently reconciled the differences fairly and reasonably, and

there appears no reason for intervention in its settlement by the reviewing court.

The portions of the order approving the account from which the appeal was taken are affirmed. The attempted appeal from the order denying appellant's motion for an order requiring the executor to produce for inspection the bank statements, cancelled checks, and diary of the deceased is dismissed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and McCOMB, JJ., concur.



47 Cal.2d 99

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles E. COLE, Defendant and Appellant.
Cr. 5852.

Supreme Court of California.
In Bank.
Oct. 5, 1956.

Rehearing Denied Oct. 31, 1956.

Defendant was convicted of first degree murder. The Superior Court, Solano County, Joseph M. Raines, J., entered judgment and defendant appealed therefrom and from order denying new trial. The Supreme Court, Gibson, C. J., held that the evidence was sufficient to support the jury's finding that defendant was possessed of a willful, deliberate and premeditated intent to kill.

Judgment and order affirmed.

Carter and Schauer, JJ., dissented in part.

Opinion, 292 P.2d 9, vacated.

1. Criminal Law Ⓒ476

In homicide prosecution, permitting pathologist who examined the body and

performed the autopsy to express his opinion as to whether the wound could have been self-inflicted was not abuse of discretion. West's Ann.Code Civ.Proc., § 1870 and subd. 9.

2. Criminal Law Ⓒ472

The decisive consideration in determining admissibility of expert opinion evidence is whether subject of inquiry is one of such common knowledge that men of ordinary education could reach conclusion as intelligently as the witness or whether the matter is sufficiently beyond common experience that opinion of expert would assist the trier of fact. West's Ann.Code Civ.Proc., § 1870 and subd. 9.

3. Criminal Law Ⓒ470

Expert opinion is not inadmissible merely because it coincides with an ultimate issue of fact.

4. Criminal Law Ⓒ469

Where expert opinion evidence is offered, much must be left to discretion of trial court.

5. Criminal Law Ⓒ494

In homicide prosecution, jurors were not bound by opinion of expert witness as to whether wound could have been self-inflicted but were free to determine the weight to which it was entitled and to disregard it if they found it to be unreasonable. West's Ann.Pen.Code, § 1127b.

6. Homicide Ⓒ232

In first degree murder prosecution, evidence, including that relating to defendant's taking of gun from an elderly widow and his implication of widow and his desire to rid himself of deceased so that he could marry widow, warranted jury's finding that defendant was possessed of a willful, deliberate and premeditated intent to kill. West's Ann.Pen.Code, §§ 187-189.

7. Homicide Ⓒ13

Where there is nothing showing provocation or justification for homicide, malice will be implied. West's Ann.Pen.Code, § 188.

8. Homicide ⚔️232, 269

In homicide prosecution, deliberation and premeditation may be inferred from proof of circumstances which will furnish a reasonable foundation for such an inference, and where the evidence is not in law insufficient the matter is exclusively within province of jury for determination. West's Ann.Pen.Code, § 189.

9. Homicide ⚔️232

A showing of motive indicating that the killing was planned was evidence tending to support a finding of deliberation and premeditation.

10. Homicide ⚔️268

In homicide prosecution, the question of complicity of another in the killing was a question of fact.

William E. Jensen and Kenneth K. Casper, Vallejo, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and F. G. Girard, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

A jury found defendant guilty of first degree murder and fixed his punishment at life imprisonment. The principal questions raised on this appeal are whether the trial court erred in ruling upon the admissibility of evidence and whether the evidence is sufficient to support the verdict.

The body of the victim, Mrs. Helen Roberts, was found near a road in Sutter County on the afternoon of November 15, 1954. Dr. Paxton, a pathologist, examined the body and performed an autopsy. He testified that Mrs. Roberts was an obese woman about 50 years of age, that her death was caused by a gunshot wound, and that the fatal bullet, which he removed from the body, had entered below the left armpit and had traveled across the thorax, with a slight deviation backward and upward, penetrating the heart, right lung, and soft tissue beneath the right shoulder and striking the humerus of the right arm three inches below the shoulder joint.

Defendant did not testify at the trial, and there is no substantial conflict in the evidence. In August of 1954 Mrs. Roberts abandoned her husband and began living with defendant in various motels under fictitious names. Late in the afternoon of November 14, defendant and Mrs. Roberts drove away in a station wagon from a Vallejo motel where they were then staying. About 6:30 p. m. they stopped in front of a grocery store which Mrs. Roberts entered. Later defendant got out of the car, and a young man named Shelton made a remark about the damp weather. Defendant drew an automatic pistol from his belt, pointed it at the sky, asked whether he should do something about the weather, replaced the gun under his coat and went into the store. Shelton testified that the gun looked like the weapon identified at the trial as the one which fired the shot killing Mrs. Roberts. When defendant and Mrs. Roberts left the store, they drove across the street to a service station, where, before leaving together, they talked to the attendant for approximately 20 minutes. In the course of this conversation, Mrs. Roberts was in good spirits, and defendant was solemn.

For several months prior to November 14, defendant intermittently occupied a room which he rented in Vallejo at the home of a Mrs. Hill, an elderly widow who had agreed to marry him. Early in the afternoon of that day, he came to visit Mrs. Hill and left after about two hours. He returned at 9:00 p. m., and, when Mrs. Hill opened the door, he exclaimed, "Helen shot herself, Helen shot herself." He told Mrs. Hill that Mrs. Roberts, while in the station wagon, took a gun out of the glove compartment, said, "I ought to shoot you and the dog and myself," pointed the gun at herself and fired the fatal shot.

Mrs. Hill and defendant went out to the station wagon in front of the house, and the body of Mrs. Roberts, which was still warm, was on the front seat. They drove to a point in Sutter County, where defendant left the body in high grass beside the road. Upon returning to Vallejo, they went to the

motel where defendant and Mrs. Roberts had been staying. Defendant awakened the motel owner in order to obtain a key, stating that "mama" had gone to the movies with another man and that, if she came back and wanted to reach defendant, he would be at Mrs. Hill's residence. After collecting his belongings, he drove with Mrs. Hill to her home.

Defendant cautioned Mrs. Hill not to reveal their activities of that evening and instructed her to say that he had left Mrs. Roberts at a theater, arranging to return for her at 9:00 p. m., but that, when he and Mrs. Hill went to the theater at that hour, Mrs. Roberts entered a car with another man and drove away. He gave Mrs. Hill a gun, requesting that she dispose of it, and she wrapped it up and asked one of her boarders to drop it in the bay. The boarder became suspicious and turned the gun over to the police. When questioned by the authorities, defendant stated that he and Mrs. Roberts left their motel in Vallejo on the afternoon of November 14, that, after stopping at a grocery store, he took her to a theater and that, when he returned for her, he saw her drive away with another man.

The gun which defendant gave Mrs. Hill after the death of Mrs. Roberts was introduced in evidence and was identified by a ballistics expert as the one which fired the bullet removed from Mrs. Roberts' body. Mrs. Hill testified that the gun looked like one which belonged to her. She said that about six weeks before the death of Mrs. Roberts she had given her gun to defendant to be cleaned and that he returned it in about a week. She placed it on the dresser in her bedroom, and later she noticed that it had disappeared. She could not say on what day she first became aware that it was missing but stated that it disappeared sometime during the week preceding Mrs. Roberts' death.

[1] The first question is whether the trial court erred in ruling on the admissibility of evidence. Upon being called as a witness, Dr. Paxton, who performed the autopsy, testified that he specialized in path-

ology and autopsy work to determine causes of death. Defendant stipulated to the qualifications of the witness. When the doctor was asked whether, in his opinion, the wound could have been self-inflicted, defendant objected on the grounds that no foundation had been laid as to the qualifications of the witness to form such an opinion and that the matter was not a proper subject for expert testimony. The objection was overruled, and the doctor testified that "This would be a very unusual pattern for a self-inflicted wound." In elaborating, he referred to the location of the wound, the course of the bullet and the obesity of the victim, and he stated that it would be difficult for a person, whether right-handed or left-handed, to hold the muzzle of a gun against himself in the position necessary to produce such a wound. He testified that his opinion was based on his training and experience, as well as the condition of the body, that he had examined suicide victims who had died of gunshot wounds and that he had never seen a self-inflicted wound "in this position."

[2] Many cases have set forth the general principles to be applied in considering the admissibility of expert opinion on the question whether a wound was self-inflicted. Although courts have not always used the same language, the decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. See *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 844, 205 P.2d 1037; *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 570-571, 147 P. 238; *Howland v. Oakland Consol. St. Ry. Co.*, 110 Cal. 513, 522, 42 P. 983; *Wells Truckways, Ltd. v. Cebrian*, 122 Cal.App.2d 666, 677-678, 265 P.2d 557; *Eger v. May Department Stores*, 120 Cal.App.2d 554, 558, 261 P.2d 281; *Manney v. Housing Authority*, 79 Cal. App.2d 453, 460, 180 P.2d 69; *Code Civ.*

Proc. § 1870, subd. 9;¹ 7 Wigmore on Evidence (3rd ed. 1940), § 1923, pp. 21, 22.

In two California cases a doctor's opinion that a fatal wound could not have been self-inflicted was relied upon in holding that there was sufficient evidence to establish the corpus delicti. *People v. Black*, 103 Cal.App.2d 69, 75, 229 P.2d 61; *People v. Coker*, 78 Cal.App. 151, 161, 248 P. 542. In a number of other jurisdictions it has been held that medical opinion as to whether a wound could have been self-inflicted was admissible. *State v. Lee*, 65 Conn. 265, 30 A. 1110, 1113-1114, 27 L.R.A. 498; *Everett v. State*, 62 Ga. 65, 71; *State v. Schneck*, 85 Kan. 334, 116 P. 823, 824; *State v. Sharp*, 145 La. 891, 83 So. 181, 182; *State v. Knight*, 43 Me. 11, 131; *Commonwealth v. Spiropoulos*, 208 Mass. 71, 94 N.E. 451, 452; *Miera v. Territory*, 13 N.M. 192, 81 P. 586, 588-589; *People v. Wilson*, 109 N.Y. 345, 16 N.E. 540, 543; *Commonwealth v. Puglise*, 276 Pa. 235, 120 A. 401, 402. The reasoning underlying these decisions is that the subject of self-inflicted wounds is not one of such common experience that laymen may not be assisted by the opinion of a doctor, who has special knowledge regarding anatomy and injuries to the human body.

[3] We are aware that cases in some jurisdictions have held that testimony of this type is not admissible. *Treat v. Merchants' Life Ass'n*, 198 Ill. 431, 64 N.E. 992, 994; *Knights Templars & Masons' Life Indemnity Co. v. Crayton*, 110 Ill.App. 648, 662-663; *Aetna Life Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S.W. 203, 205 [overruled on other grounds in *Inter-Southern Life Ins. Co. v. Hinkle's Adm'x*, 226 Ky. 724, 11 S.W. 2d 913, 914]; *State v. Carr*, 196 N.C. 129, 144 S.E. 698, 699-700; *State v. Gibson*, 69 N.D. 70, 284 N.W. 209, 217-218; *State v. Bradley*, 34 S.C. 136, 13 S.E. 315, 316-317; *State v. McCravy*, 133 Tenn. 358, 181 S.W.

165, 168; *Maynard v. State*, 154 Tex.Cr.R. 521, 229 S.W.2d 65, 67; *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex.Civ.App. 233, 109 S.W. 1120, 1123-1124; see *People v. Curtright*, 258 Ill. 430, 101 N.E. 551, 554. In our opinion, however, they do not represent the better view with respect to whether the trier of fact would ordinarily be in a position to determine, as intelligently as a doctor, whether a wound was self-inflicted. Moreover, some of these cases rest, at least in part, upon the ground that the opinion of the doctor would go to an ultimate issue of fact to be resolved by the jury, whereas in this state we have followed the modern tendency and have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact. *People v. Wilson*, 25 Cal.2d 341, 349, 153 P. 2d 720; *People v. King*, 104 Cal.App.2d 298, 304, 231 P.2d 156; see *People v. Martinez*, 38 Cal.2d 556, 564, 241 P.2d 224; *Wells Truckways, Ltd. v. Cebrian*, 122 Cal.App.2d 666, 678, 265 P.2d 557; 7 Wigmore on Evidence (3rd ed. 1940), §§ 1920, 1921, pp. 17, 18; 2 Morgan, *Basic Problems of Evidence*, p. 194 et seq.; 2 Wharton, *Criminal Evidence* (11th ed.), § 957, p. 1682.

[4, 5] A conclusion that the testimony complained of was inadmissible would amount to a holding that the jurors, although laymen whose experience with gunshot wounds and suicide was likely to be limited or nonexistent, could not have derived assistance from the opinion of a doctor who was an expert on those matters and had personally examined the body and performed the autopsy as a specialist on causes of death. Where expert opinion evidence is offered, much must be left to the discretion of the trial court, *People v. Haeussler*, 41 Cal.2d 252, 260, 260 P.2d 8, and we are satisfied that there was no abuse of discretion in permitting Dr. Paxton to express his opinion. The jurors,

1. Section 1870 of the Code of Civil Procedure provides:

"In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *

"9. The opinion of a witness respecting

the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein; * * *."

of course, were not bound by the opinion of the witness but were free to determine the weight to which it was entitled and to disregard it if they found it to be unreasonable, and they were so instructed. Pen.Code, § 1127b.²

The early cases of *People v. Farley*, 1899, 124 Cal. 594, 595, 57 P. 571; *People v. Milner*, 1898, 122 Cal. 171, 181, 54 P. 833; *People v. Smith*, 1892, 93 Cal. 445, 447, 29 P. 64, and *People v. Westlake*, 1882, 62 Cal. 303, 309, are readily distinguishable. They did not involve the question of suicide but held that a doctor may not give an opinion, based on the course of a bullet, as to the posture of a person shot by another or as to the relative positions of the victim and the one who fired the shot. As pointed out in the *Milner* case, it is impossible to determine those matters from the course of the bullet alone, since a number of variables might be involved, such as whether the victim was leaning forward or standing erect. See also *People v. Salaz*, 66 Cal.App. 173, 183, 225 P. 777.

[6] The next question is whether the evidence is sufficient to support the verdict of first degree murder. Section 187 of the Penal Code defines murder as the unlawful killing of a human being with malice aforethought, and section 189 of that code provides, in part, that all murder perpetrated by any kind of willful, deliberate and premeditated killing is murder of the first degree.

[7] The record clearly warrants a conclusion that defendant killed Mrs. Roberts, and there is nothing showing provocation or justification for the homicide. Under such circumstances, malice will be implied. Pen. Code, § 188.

2. Section 1127b of the Penal Code reads:

"When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:

"Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if

[8] Deliberation and premeditation may be inferred from proof of circumstances which will furnish a reasonable foundation for such an inference, and, where the evidence is not in law insufficient, the matter is exclusively within the province of the jury for determination. *People v. Gulbrandsen*, 35 Cal.2d 514, 519-520, 218 P.2d 977. There was evidence that defendant had secretly taken Mrs. Hill's gun from her dresser during the week preceding Mrs. Roberts' death, that he was carrying the weapon on his person about 6:30 p. m. on the evening she died and that he used it to kill Mrs. Roberts some time before 9:00 p. m. The jury could infer that defendant had taken the gun for the purpose of killing her.

Moreover, the evidence was sufficient to show that defendant planned to implicate Mrs. Hill so as to secure her assistance in concealing his guilt and that he had formed this plan before committing the crime. It was established not only that he took her gun and used it in the killing but also that he brought the body to Mrs. Hill's home, represented that Mrs. Roberts had shot herself and asked Mrs. Hill to accompany him on the trip to Sutter County where he left the body in high grass beside the road. Defendant also requested Mrs. Hill to dispose of the gun used in the killing and instructed her not to disclose their activities but to give such an account of events as would substantiate his subsequent claim that he had last seen Mrs. Roberts driving away from a theater with another man. Mrs. Roberts had been seen alive two hours before defendant brought her body, which was still warm, to Mrs. Hill's home. The taking of Mrs. Hill's gun during the preceding

any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

"No further instruction on the subject of opinion evidence need be given."

week and the speed with which defendant acted following the killing would support the conclusion that his plan to involve Mrs. Hill had been conceived before the crime was committed.

[9] There was also evidence that, while defendant was living with Mrs. Roberts, who was in financial distress, he planned to marry Mrs. Hill, who had a substantial bank account and owned a home and other property. During the period that defendant was living with Mrs. Roberts he borrowed money from Mrs. Hill, and on the day of the killing he represented to the owner of the motel where he was staying that property belonging to Mrs. Hill was owned by him and expressed a desire to ascertain the feasibility of locating a service station on it. The jury might have determined that defendant had become dissatisfied with the relationship existing between him and Mrs. Roberts and that he planned to kill her in order to remove her as an obstacle to his plan of obtaining Mrs. Hill's property through marriage. A showing of motive indicating that the killing was planned is evidence tending to support a finding of deliberation and premeditation. For example, in *People v. Gulbrandsen*, supra, 35 Cal.2d 514, 218 P.2d 977, where we held that deliberation and premeditation were sufficiently shown, we relied, in part, on evidence that the defendant's motive in killing the two victims was to get them out of the way so that he could force himself upon a woman. See also *People v. Werner*, 111 Cal.App.2d 264, 272, 244 P.2d 476.

The evidence is sufficient to support the jury's finding that defendant was possessed of a willful, deliberate and premeditated intent to kill.

[10] There is no merit in defendant's contention that the court erred in refusing to instruct the jury that Mrs. Hill was an accomplice as a matter of law. The question of complicity was one of fact, and its determination was left to the jury under instructions which fully and correctly set forth the rules of law to be applied.

The judgment and the order denying a new trial are affirmed.

SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (concurring in part and dissenting in part).

I agree that there was ample properly admitted evidence to support the finding that defendant murdered Mrs. Roberts wilfully, deliberately, and with premeditated intent to kill, and I find no miscarriage of justice. However, I disagree with the holding that in the circumstances of this case Dr. Paxton was properly allowed to testify, in answer to the question, "assuming that the bullet you took from the body * * * had come from a .32 caliber Colt automatic pistol, do you have an opinion as to whether or not that pistol could have been held by the deceased at the time the trigger was pulled and the gun was discharged?," that "I have an opinion * * * This would be a very unusual pattern for a self-inflicted wound." It seems obvious to me that the pertinent question here is not whether it was usual or unusual for persons who kill themselves to do so by shooting themselves in the manner in which deceased was shot, but whether this particular woman inflicted this particular wound upon herself. It appears to me that the doctor's testimony as to the frequencies of occurrences of this kind of wound and of other kinds of wounds among other persons committing suicide is irrelevant to any issue here.

The doctor (whose qualifications as a *pathologist* are not disputed) described the course taken by the bullet, indicated it on a photograph of deceased and sketched it on a blackboard. The bullet entered the body "anteriorally and laterally in the left chest" between the third and fourth ribs, traveled up through the heart and upper lobe of the right lung, and struck and shattered the humerus of the right arm about three inches below the shoulder joint.

Before the jury the prosecuting attorney asked, in various forms, if the doctor had an opinion as to whether the wound could

have been self-inflicted. This might have been a proper approach if a sufficient factual foundation had been laid; but such foundation had not been established, and, as subsequently appeared, did not exist. Defense counsel objected, and said, "I feel this is going into a matter that is for the jury to decide, and not called upon for any expert witness' testimony. I don't believe there has been *any foundation or ground* showing this doctor is an expert, whether a wound can be self-inflicted or whether inflicted by some other agency." (Italics added.) This objection raised, although not in a particularly apt manner, the question whether a sufficient *factual foundation* had been laid upon which this doctor or any doctor could be qualified to give an opinion that this woman could or could not have shot herself in the fashion in which she was shot. The prosecuting attorney said, "We feel the doctor is qualified, having seen this body; he has noticed the length of the arms of the deceased person and * * * has already testified to her obesity and so forth and so on; we feel he is in a position to tell us whether he thinks that person could have discharged a pistol into her own person as to cause this wound." But as hereinafter shown the doctor himself established the facts showing want of foundation for formation of an opinion entitled to be received as "expert opinion" on the pertinent issue.

There was further argument on the question outside the presence of the jury, during which defense counsel correctly pointed out that "as far as the testimony as to the length of the arm, or anything like that, those facts are not yet in evidence." The trial court commented, "if the question of death of this woman depends solely * * * [on] the expert or opinion testimony of Dr. Paxton, they would be on very weak ground. However, I am making no ruling on that at this time. I am now overruling the objection, however. * * * The value will go to the jury, its weight. You of course will have full opportunity to cross-examine Dr. Paxton in that respect." This ruling, in

my opinion, was error because the prosecution had not adduced evidence upon which the doctor could be qualified to either form or express an opinion that the wound in this case could or could not have been self-inflicted.

Before the jury the doctor then testified on direct examination that "This would be a very unusual pattern for a self-inflicted wound"; that he did not know whether deceased was right-handed or left-handed, but that (indicating upon himself with the pistol which inflicted the wound) it would be difficult to inflict such a wound upon himself with either hand. It appears to me that in the absence of showing some similarity or defined dissimilarity between the doctor's and the decedent's pertinent capabilities, the doctor's testimony concerning himself would be immaterial. On cross-examination the doctor testified that *he had not measured the deceased's arms*. The basis of the doctor's opinion that the wound was not self-inflicted was then brought out: he had examined by autopsy "perhaps twenty people" who died from gunshot wounds and seen "numerable cases in the emergency hospitals which I have worked in"; "I can form an opinion from my past experiences in examining the suicidal victims * * * and I would say that ninety percent of the suicidal victims I have examined have shot themselves in the head * * * And a majority of those are in the right temple * * * The next most common site is through the mouth * * * The next most common site is an attempt at the heart * * * and I have never seen one in this position. * * * The location in my opinion indicates that this is not self-inflicted."

The basis of the doctor's opinion as expressed in his testimony shows that there was not adequate factual foundation for, and that he was not qualified to express, the opinion above quoted. It was of no concern to the jury, and not helpful to them, to know that "ninety percent of the suicidal victims" examined by Dr. Paxton had "shot themselves in the head" rather than shot

themselves in certain other places, or it may be interpolated, had jumped off bridges or hit themselves over the head with axes. The case here concerned the woman who did die from the wound in the chest described above. The question for the jury was whether that particular wound was inflicted by decedent or by another person. Since the prosecution had not, before the doctor gave his opinion, shown a factual base upon which the doctor as a pathologist could intelligently and reasonably form and support the opinion that the wound here involved was not self-inflicted,¹ that opinion should not have been received in evidence. The error of receiving it became more apparent when on his cross-examination it developed that he had no basis for an opinion that this particular woman *could not* have shot herself as she was shot. However, as stated above, it does not appear to me, from an examination of the entire record, that the error resulted in a miscarriage of justice.

Accordingly I concur in the judgment and, generally, in the other propositions of law discussed in the opinion of the Chief Justice.

CARTER, Justice (concurring in part and dissenting in part).

In view of the record before us in this case, I am of the opinion that it was error to permit Dr. Paxton to express an opinion that the wound inflicted upon the victim of the homicide "would be a very unusual pattern for a self-inflicted wound." I think it is clear that, even conceding that the subject matter of the inquiry might be within the realm of expert testimony, sufficient foundation was not laid for the opinion of an expert on this subject. Ordinarily, expert testimony is based upon a full and fair statement of all of the pertinent facts relating to the problem on which the expert is called upon to give his opinion. Here, vital and material facts were omitted from the statement and were not

within the knowledge of the expert. These facts relate to the length of the victim's arms and the character and quality of the clothing, if any, worn by the victim at the time the shot was fired.

A basic objection to expert opinion evidence in a case such as this is, that the expert is called upon to answer the exact question which is to be determined by the trier of fact, and therefore invades its province. Obviously, if the wound here was self-inflicted, the defendant did not fire the shot, and would therefore not be guilty of the offense charged. If the wound were not self-inflicted, its infliction could be traced directly to defendant.

In my opinion the proper procedure in a case such as this would be for the prosecution to develop all of the facts with respect to the location of the point of entry of the bullet, its course through the body of the victim and the probable distance from the body of the muzzle of the gun at the time it was discharged together with physical facts relative to the size of the victim, clothing worn, length of her arms and ability to move her muscles, and leave the question as to who inflicted the wound for the determination of the trier of fact. It seems to me that upon the presentation of such a factual situation, any one familiar with the use of firearms is as capable of arriving at an opinion as to whether or not the wound was self-inflicted as a so-called expert in this field.

Notwithstanding my opinion that it was error to admit the testimony of Dr. Paxton on this subject, I am satisfied, after a review of the record, that defendant suffered no infringement of any of his substantial rights, and was not prejudiced thereby and that such error has not resulted in a miscarriage of justice. It is therefore my duty, by virtue of the provisions of section 4½ of Article VI of the Constitution of California, to concur in the affirmance of the judgment, and that is my conclusion.

1. The evidence contains no suggestion that the doctor was acquainted with the decedent in her lifetime and knew her char-

acter as evidencing a propensity to commit an act such as suicide in a conventional rather than unusual manner.

47 Cal.2d 82

TELEVISION TRANSMISSION, Inc., National Community Television Assoc., Inc., Petitioners,

v.

PUBLIC UTILITIES COMMISSION of the State of California, Respondent.

S. F. 19501.

Supreme Court of California.
In Bank.

Oct. 5, 1956.

Proceeding by community television antenna to review orders of Public Utilities Commission. The Supreme Court, Traynor, J., held that community television antenna which received television signals from available sources, amplified them and sent them through a coaxial cable to subscribers' sets by tapoff devices was not a telephone corporation and so was not a public utility subject to jurisdiction of Public Utilities Commission.

Orders annulled.

1. Public Service Commissions ⇨6.3

Although "includes" is ordinarily not a word of limitation, a legislative declaration that "public utility" includes those performing certain enumerated services is not a declaration that those performing other services, not encompassed by the services enumerated, are public utilities subject to control and regulation by Public Utilities Commission. West's Ann.Public Util.Code, § 216(a); West's Ann.Const. art. 12, § 23.

See publication Words and Phrases, for other judicial constructions and definitions of "Includes".

2. Telecommunications ⇨389

The Public Utilities Commission has no jurisdiction over community television antenna unless the antenna falls within one of the classes of public utilities enumerated in the statute. West's Ann.Public Util.Code, § 216(a); West's Ann.Const. art. 12, § 23.

3. Telecommunications ⇨389

Community television antenna which received television signals from available

sources, amplified them and sent them through a coaxial cable to subscribers' television sets by tapoff devices was not a "telephone corporation", an "electrical corporation" or a "telegraph corporation" and so was not a "public utility" subject to jurisdiction of Public Utilities Commission. West's Ann.Public Util.Code, §§ 216(a), 217, 218, 233-236; West's Ann.Const. art. 12, § 23.

See publication Words and Phrases, for other judicial constructions and definitions of "Telephone Corporation", "Electrical Corporation", "Telegraph Corporation" and "Public Utility".

Welch, Mott & Morgan, Washington, D. C., Hoey, Hall & Conti, Martinez, and E. Stratford Smith, Washington, D. C., for petitioners.

Everett C. McKeage, Roderick B. Cassidy, Harold J. McCarthy, Wilson E. Cline and Edward F. Walsh, San Francisco, for respondent.

TRAYNOR, Justice.

Petitioner Television Transmission, Inc. operates a "community television antenna" furnishing coaxial television antenna service to approximately 950 television sets in the Walnut Creek, Lafayette, and Martinez areas of Contra Costa County. Approximately 700 of the 950 television sets are in Martinez. To provide this service petitioner places a high-gain antenna at a point of higher elevation than the area to be served. The antenna receives television signals from available sources, amplifies them, and sends them through a coaxial cable to the subscribers' television sets by tapoff devices. Under an agreement with the Pacific Gas and Electric Company and the Pacific Telephone and Telegraph Company, petitioner uses poles owned jointly or separately by these companies for which it pays certain fixed charges per pole per year. Of the four television antenna systems in Martinez alone, petitioner is the only one that uses utility poles to provide

service. 'Subscribers' to petitioner's television antenna service pay an initial "connect" fee and a continuing monthly charge.

Residents of the area served by petitioner filed a complaint with the Public Utilities Commission alleging deficiencies in petitioner's service and requesting the commission to make an investigation and require petitioner to remedy the deficiencies or cease operating.

After a hearing the commission found that petitioner operates as a telephone corporation and is therefore subject to its jurisdiction. The commission then issued an interim order requiring petitioner to make a detailed survey of its facilities and to submit a written report within 90 days setting forth criteria for establishing reasonable standards of service. It also ordered that further hearings be had to receive evidence relating to the adequacy of petitioner's service. A petition for rehearing was denied, and in this proceeding petitioner seeks to have the foregoing orders annulled on the grounds that it is not a public utility and that the commission therefore acted without jurisdiction.

The commission is a regulatory body of constitutional origin and derives its powers from the Constitution and the Legislature. *People v. Western Airlines*, 42 Cal.2d 621, 634, 268 P.2d 723. Unless petitioner is a public utility, as defined in the Constitution or the Public Utilities Code, the commission was without power to issue the orders in question. Article XII section 23 of the Constitution provides:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any * * * plant or equipment within this State, for * * * the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power * * * either directly or indirectly, to or for the public, and every common carrier, is hereby de-

clared to be a public utility subject to such control and regulation by the * * * Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals *hereafter declared by the Legislature to be public utilities* shall likewise be subject to such control and regulation." (Italics added.)

In section 216(a) of the Public Utilities Code the Legislature has declared that

"'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

[1, 2] Although "includes" is ordinarily not a word of limitation, *People v. Western Airlines*, 42 Cal.2d 621, 639, 268 P.2d 723, a legislative declaration that "public utility" includes those performing certain enumerated services is not a declaration that those performing other services, not encompassed by the services enumerated, are public utilities. In *People v. Western Airlines*, supra, on which the commission relies, we were concerned with the scope of a business activity declared by the Legislature to be a public utility, not with the question of expanding that section to embrace additional classes of business not mentioned in the section. Thus, unless a community television antenna falls within one of the enumerated classes of public utilities, the commission has no jurisdiction over it.

[3] The only classes enumerated that could conceivably include petitioner are electrical corporation, telephone corporation, or telegraph corporation. The commission held that it could make no finding

that petitioner is an electrical corporation,¹ since there is nothing in the record to show that its community television antenna system is used " * * * in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, * * ." Nor did it find that petitioner is a telegraph corporation.² See *Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 276-277, 118 P. 796; *City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761, 773-777, 19 S.Ct. 778, 43 L.Ed. 1162. It did find, however, that petitioner operates as a telephone corporation³ and is therefore subject to its jurisdiction.

To be a telephone corporation petitioner must operate a telephone line. Pub.Util. Code, § 234. Although it may control, operate, or manage "conduits, ducts, poles, wires, cables, instruments, and appliances * * * real estate, fixtures, and personal property" Pub.Util.Code, § 233, and do so "in connection with or to facilitate communication" Ibid., it does not operate a telephone line and is therefore not a telephone corporation unless such control, operation, or management are in connection with or to facilitate communication "by telephone." Ibid. The crucial word

"telephone" is not defined in the code. Neither is the word "telegraph" as used in section 235. Yet the Legislature apparently regarded telephone and telegraph corporations as different from each other by providing separately for each, and this court has so regarded them. *Sunset Telephone & Telegraph Co. v. Pasadena*, supra, 161 Cal. 265, 276-277, 118 P. 796; see also *Richmond v. Southern Bell Telephone & Telegraph Co.*, supra, 174 U.S. 761, 773-777, 19 S.Ct. 778. Nor is there any evidence in the record as to activities, methods of operation, services, or anything else they may have in common on which a conclusion can be based that one also means the other or that either also means radio or television corporation. In common understanding telephone, telegraph, radio, and television corporations are each different from the other, and until the Legislature otherwise provides we must so regard them.

In *Pacific Telephone & Telegraph Company v. Los Angeles*, 44 Cal.2d 272, 281-283, 282 P.2d 36, on which the commission relies, the city attacked a declaration in a judgment that Pacific was entitled to use its lines to transmit telephone messages, telegraph messages, teletypewriter messages, telephotographs, program serv-

1. " 'Electrical corporation' includes every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this State, * * * ." Pub.Util.Code, § 218.

" 'Electric plant' includes all real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power." Pub.Util.Code, § 217.

2. " 'Telegraph corporation' includes every corporation or person owning, controlling, operating, or managing any telegraph line for compensation within this State." Pub.Util.Code, § 236.

" 'Telegraph line' includes all conduits, ducts, poles, wires, cables, instruments,

and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires." Pub.Util.Code, § 235.

3. " 'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State." Pub.Util.Code, § 234.

" 'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." Pub.Util. Code, § 233.

ices (including radio and television broadcasts) and any other communications service by means of transmission of electrical impulses. We held that section 536 of the Civil Code (now § 7901 of the Pub.Util. Code), which authorizes telephone corporations to construct their lines along public highways, places no restrictions upon what may be transmitted by means of electrical impulses over those lines. Pacific Telephone and Telegraph Company was unquestionably a telephone corporation, and it remained a telephone corporation and its lines remained telephone lines, even though they were incidentally used to transmit other forms of communication. The commission apparently reasoned that since section 7901 permits television broadcasts to be carried over telephone lines, any line erected to carry television broadcasts is a telephone line and that anyone who operates such a line is therefore a telephone corporation. It does not follow, however, that because telephone corporations are not prevented by law from using their lines, which are unquestionably telephone lines, for the transmission of television broadcasts, any corporation that uses poles, wires, et cetera to transmit such broadcasts is a telephone corporation. It is not enough that there be a transmission by the use of poles, wires, et cetera; the transmission must be "in connection with or to facilitate communication by telephone". Pub.Util.Code, § 233. Petitioner's community television antenna is not operated "in connection with or to facilitate communication by telephone" or "in connection with or to facilitate communication by telegraph" as those words are commonly understood, but simply to enable its subscribers to receive television broadcasts that might otherwise be inaccessible to them.

The commission urges that television is merely an advanced form of telephony, the

art of reproducing sounds at a distance. It is true that television and telephony have in common the transmission of voices, for sounds, including voices, usually accompany the pictures of the persons or things televised. Not only are the methods of transmission different in each art, however, but in telephony one may carry on a two-way communication by speaking as well as listening, and pictures of speaker and listener do not yet form a part of the communication. See *Re Edwin Bennett*, 89 P.U.R.,N.S., 149, 150. Telegraphy differs from both in that ordinarily neither voices nor pictures are transmitted. Each may have in common the use of electricity, conduits, ducts, poles, wires, cables, instruments, appliances, et cetera, but no one of them includes all of the features of the others. Furthermore, the service by television as well as radio is more akin to that of music halls, theaters, and newspapers than it is to that of either telephone or telegraph corporations. Thus, under the Communications Act of 1934⁴ those engaged in the telephone or telegraph business are regulated as common carriers,⁵ whereas television and radio broadcasting⁶ is recognized as a field of free competition. *F. C. C. v. Sanders Bros.*, 309 U.S. 470, 474-475, 60 S.Ct. 693, 84 L.Ed. 869.

The question whether a community television antenna is a public utility has been considered in at least two other states. In holding that it lacked jurisdiction because Congress had completely occupied the television field, the Wisconsin commission expressed "considerable doubt" whether a community television antenna was a telephone company. *Re Edwin Bennett*, supra, 89 P.U.R.,N.S., 149, 150. The Wyoming commission, however, determined that a community television antenna was a public utility. It is significant that the commission based its conclusion on the

as a form of radio communication. *Allen B. Dumont Laboratories v. Carroll*, 3 Cir., 184 F.2d 153, 155, certiorari denied 340 U.S. 929, 71 S.Ct. 490, 95 L.Ed. 670.

4. 47 U.S.C.A. § 151 et seq.

5. 47 U.S.C.A. §§ 201-222.

6. 47 U.S.C.A. § 153(b), which defines communication by radio, includes television

ground, not that a community television antenna was a telephone corporation, but that under the Wyoming statute public utilities also included plants, property, or facilities for the *transmission of intelligence by electricity*. *Re Cokeville Radio and Electric Co.*, 6 P.U.R.(3rd) 129, 133-134.

Since petitioner is not a telephone corporation or within any other class of public utility enumerated in section 216(a) of the Public Utilities Code, the commission had no jurisdiction to issue the orders in question.

The orders are annulled.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE, and McCOMB, JJ., concur.



47 Cal.2d 148

James H. TAYLOR, doing business under the name of Dimmitt and Taylor, Petitioner,
v.

SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Harry W. McVey, Real Party in Interest.
L. A. 24265.

Supreme Court of California,
In Bank.

Oct. 11, 1956.

Proceeding for writ of prohibition against Superior Court to stay proceedings therein pending final determination of jurisdiction by Industrial Accident Commission. The Supreme Court, Schauer, J., held that in personal injury action the pleadings, papers and proceedings which were before the Superior Court were sufficient to bring all essential facts concerning injured workman's prior proceedings before Industrial

Accident Commission to court's attention and to require court to stay proceedings pending final adjudication by Commission as to whether workman was injured within employment relationship.

Peremptory writ of prohibition granted.

1. Courts ⚡475(1)

Prohibition ⚡10(1)

Where two tribunals in same state have concurrent jurisdiction to determine jurisdiction, the question of which shall have exclusive jurisdiction should be determined by the tribunal whose jurisdiction was first invoked, and proceedings in the tribunal where jurisdiction was subsequently sought will, if not voluntarily stayed, be halted by prohibition until final determination of the jurisdictional question by the tribunal where jurisdiction was first laid.

2. Action ⚡69(7)

Where employer affirmatively defended superior court action by injured workman on the ground workman had previously instituted proceedings before Industrial Accident Commission based on same accident and that Commission had exclusive jurisdiction, superior court should have stayed proceedings until Commission had made final adjudication as to whether workman was injured during employment relationship.

3. Trial ⚡3

Where employer affirmatively defended superior court action by injured workman on the ground that workman had previously instituted proceedings before Industrial Accident Commission based on same accident and Commission had exclusive jurisdiction, and at pre-trial hearing moved superior court to proceed to trial on affirmative defense prior to trial of other issues, the pleadings, papers and proceedings before the superior court were sufficient to bring to court's attention and charge the court with knowledge of issues raised concerning court's lack of jurisdiction pending commission's determination of jurisdiction.

4. Workmen's Compensation \hookrightarrow 1792

A final adjudication by the Industrial Accident Commission as to whether workman injured within employment relationship, is conclusive on all parties.

5. Prohibition \hookrightarrow 9

Prohibition lies to restrain superior court from proceeding on merits in personal injury action brought by workman who had previously instituted proceedings based on same accident before Industrial Accident Commission which had not made an adjudication as to whether workman had been injured during employment relationship.

Roland Maxwell, Paul H. Marston and Richard W. Olson, Pasadena, for petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Asst. County Counsel, for respondent.

Robertson, Harney, Drummond & Dorsey and Robert P. Dorsey, Los Angeles, for Real Party in Interest.

SCHAUER, Justice.

[1] Petitioner seeks prohibition, pursuant to the rule laid down in *Scott v. Industrial Acc. Comm.* (Feb. 3, 1956), 46 Cal. 2d 76, 293 P.2d 18, to halt proceedings in the superior court in an action brought against petitioner to recover for personal injuries. The *Scott* case holds that where two tribunals in this state have concurrent jurisdiction to determine jurisdiction, the question of which shall have exclusive jurisdiction shall be determined by the tribunal whose jurisdiction was first invoked, and proceedings in the tribunal whose jurisdiction was subsequently sought will, if not voluntarily stayed, be halted by prohibition until final determination of the jurisdictional question by the tribunal where jurisdiction was first laid. We have concluded that the superior court is precluded from proceeding in the action before it, and that the writ sought by petitioner should issue.

The petition for the writ alleges, so far as here material, that on March 29, 1954, one McVey filed with the Industrial Accident Commission an "Application for Hearing" in which he named petitioner as his employer and alleged that McVey was injured on December 31, 1953, and had received compensation in the sum of \$169.50. At a commission hearing on November 5, 1954, all parties admitted that on December 31, 1953, McVey was employed by petitioner and sustained compensable injury; issues for hearing were stated; and the matter was continued.

[2] The petition further alleges that on December 28, 1954, McVey filed a superior court action against petitioner, "based on the same alleged accident as set forth in the Industrial Accident Commission proceeding." In the complaint in such action McVey alleges that on December 31, 1953, he was employed by the United States Forestry Service and was injured by the negligence of petitioner. Petitioner answered, alleging as an affirmative defense that the commission has "exclusive jurisdiction over * * * [the subject] matter." Although this plea, if substantiated, would constitute a defense in the superior court it is a defense which, under the *Scott* case and in view of the prior inception of the commission proceeding, could be finally determined only after the Industrial Accident Commission had ruled on the question. In the meantime, however, it would be incumbent upon the superior court to stay proceedings before it.

On February 23, 1955, at a commission hearing McVey's counsel stated that the above described superior court action had been filed by McVey against petitioner. On March 2, 1955, the commission ordered that the matter go off calendar subject to being reset, after notice, upon request of any party.

[3] Subsequent to the filing, on May 29, 1956, of the verified petition for the writ, which was served on the respondent court on May 25, 1956, and prior to the date this

court issued the alternative writ (August 10, 1956), a pre-trial hearing was held in the superior court action. Instead of ordering that the action abate until the Industrial Accident Commission had determined the question of jurisdiction as between the two tribunals, the superior court ordered the case set for trial on the merits for September 4, 1956. Thereafter McVey filed an answer to the petition for the writ, admitting that the superior court action arises out of the same accident as that involved in the commission proceedings and alleging that his employer at the time was the United States Forestry Service. Also, respondent superior court has filed a return herein alleging that after the pre-trial hearing petitioner moved the court "to proceed to trial before the trial of any other issues on the affirmative defense" that exclusive jurisdiction over the subject matter is in the commission, and that the motion was denied; that other than such motion petitioner has instituted no proceeding of any kind in the superior court to dismiss or abate the action upon the ground that the court lacked jurisdiction by reason of pendency of the commission proceeding; that the facts concerning the commission proceeding "were never brought to the attention of respondent Court by affidavit or otherwise." The return, however, does not disclose the substance of the proceedings at the pre-trial conference or how the facts pertinent to the jurisdictional issue could have escaped the attention of the court at such conference. The issue was raised by the affirmative defense. We must presume that the pleadings were before the court. The affidavit of the process server shows that a copy of the verified petition for the writ was left with the presiding judge of the superior court on May 25, 1956. The respondent court is charged with knowledge of the issues so raised and of the sworn averments in the petition. We think also that the most elementary of inquiries at the pre-trial hearing should have disclosed that the facts as to prior commencement of the Industrial Accident Commission proceeding were not disputed. (In truth, it appears

from the answer of the real party in interest, McVey, also served on the superior court, that he admits the essential allegations of the petition.) Notwithstanding the facts before it the court ordered the case to trial on the merits and subsequently denied a motion to consider the affirmative defense before the other issues.

[4] It is apparent from the above recited matters that McVey first invoked the jurisdiction of the commission and thereafter sought that of the superior court to adjudicate his claims as to the same injury, and that the question as to which tribunal has jurisdiction over the subject matter of the injury depends upon whether McVey was injured within an employment relationship with petitioner. Therefore, under the holding of *Scott v. Industrial Acc. Comm.* (1956), *supra*, 46 Cal.2d 76, 293 P.2d 18, the superior court should not try the case until the commission has made a final determination of the issue as to whether it or the court has jurisdiction to proceed; i. e., as to whether McVey's alleged injuries are covered by the workmen's compensation laws so far as concerns his claims against petitioner. Meanwhile, the commission should proceed to a determination of such issue. Its adjudication, when final, will be conclusive on all parties.

We note that respondent court suggests in the points and authorities accompanying its return that "Had the question been properly presented respondent court might have determined that it lacked jurisdiction of the action" and that "The case of *Scott v. Industrial Accident Commission* * * * would seem to be controlling upon the facts alleged in the petition herein, and the Superior Court action should abate by reason of the prior application to the Industrial Accident Commission."

[5] Although it would have been better practice for petitioner to have expressly moved in the superior court that that court abate all proceedings in the McVey action until the jurisdictional issue had been determined by the Industrial Accident Commission, and to have specifically alleged all

pertinent facts as to the inception and pendency of the commission proceeding, we conclude that the pleadings, papers and proceedings which were before the court at the times here involved were sufficient to bring all essential facts to its attention and to require it to stay further proceedings in the McVey action, pending further action by the Industrial Accident Commission, rather than to order the case to trial.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 89
Stephen C. VYN, Plaintiff and Respondent,

v.

NORTHWEST CASUALTY COMPANY (a corporation), Cross-Complainant and Respondent.

Norwich Union Fire Insurance Society (a corporation), Appellant.

St. Paul Mercury Indemnity Company (a corporation) et al., Cross-Defendants and Respondents.

S. F. 19518.

Supreme Court of California.
In Bank.

Oct. 5, 1956.

As Modified on Denial of Rehearing
Oct. 31, 1956.

Action by an alleged insured against public liability insurer to recover on basis of an alleged policy, wherein a cross complaint was filed. From a judgment of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., an insurer appeals. The Supreme Court, Carter, J., held that there was no contract of liability insurance between the insurer and the highway carrier and that where a reversal was required as to one defendant the portion of the judgment in

favor of the other defendants would have to be reversed even though the plaintiff did not appeal as to such defendants.

Judgment affirmed in part and reversed in part.

Vacating opinions, 293 P.2d 527; 294 P.2d 767.

1. Insurance ⇐124

The contract of insurance is purely a personal contract between the insured and the insurer.

2. Insurance ⇐130(1)

It is essential to making of a contract of insurance that there be an agreement or meeting of the minds of the parties thereto.

3. Insurance ⇐130(7), 136(2)

Where highway carrier informed solicitor from whom it had obtained public liability policy that it did not wish renewal but was glad to insure with another but that solicitor hoping to retain account had insurer issue new policy which solicitor tendered to the carrier but was refused, there was neither assent by the carrier to being bound by the new policy nor delivery thereof and negotiations did not form a contract between the insurer and the carrier. West's Ann. Insurance Code, § 22.

4. Insurance ⇐124

Filing with Public Utilities Commission by liability insurer of certificate reciting that it had issued policy to highway carrier after carrier had accident within period supposedly covered did not create contract between carrier and insurer rendering insurer liable to indemnify carrier for its liability arising out of accident when old policy was actually in force.

5. Appeal and Error ⇐1173(1)

Portion of a judgment in favor of certain defendants was required to be reversed even though the plaintiff did not appeal as to such defendants where the legal basis for such judgment was gone by the reversal as to another codefendant and the judgment on its face said nothing about the liability of such defendants but

was merely a judgment for plaintiff against the codefendant and for the other defendants to recover costs where defending the complaint.

Foley, Branson & Limpert and Francis N. Foley, San Mateo, for appellant.

Edward A. Friend, San Francisco, for plaintiff and respondent and for cross-defendant and respondent St. Paul Mercury Indemnity Co.

Millington & Dell 'Ergo, Wayne R. Millington and Robert J. Dell 'Ergo, Redwood City, for cross-complainant and respondent.

Keith, Creede & Sedgwick and Frank J. Creede, San Francisco, for cross-defendant and respondent Royal Indemnity Co.

CARTER, Justice.

Plaintiff, a highway common carrier, commenced an action alleging that one of his trucks was involved in an accident on June 5, 1951, in which two persons named Kuhwarth were killed; that at that time there were in effect, covering his truck, policies of public liability insurance issued by Northwest Casualty Company, Norwich Union Fire Insurance Society, Ltd. and St. Paul Mercury Indemnity Company; that the Kuhwarths' representatives commenced actions against him which he settled by paying a total of \$6,600; that St. Paul is willing to pay one-third of the amount. Only Northwest and Norwich were made defendants; he asked for judgment against them for their share of the \$6,600.

By order of court St. Paul and Royal Indemnity Company were made parties to the proceeding. Norwich and Northwest filed cross-complaints which were answered; plaintiff's complaint was also answered. The issues as joined presented mainly the question of which of the four insurance companies was liable for the settlement with Kuhwarths' representatives or what portion each should bear. It is conceded that Royal had no outstanding policy covering

plaintiff; judgment was in its favor, and no contention is made here for reversal.

The court rendered judgment concluding that plaintiff was insured with Norwich and it must pay all of the settlement because, although plaintiff also had insurance with Northwest and St. Paul, those policies had "other insurance" provisions under which they were not liable except to the extent that the claim exceeded the coverage offered by the Norwich policy which contained no such "other insurance" clause. Judgment was accordingly entered that plaintiff recover the \$6,600 from Norwich and for St. Paul against Northwest and Norwich for costs; that Northwest recover its costs of "defending the Complaint." Norwich, alone, appeals from the judgment, asserting the evidence is insufficient to support the judgment that it had an insurance contract with plaintiff and in any case plaintiff had no interest in the controversy because St. Paul rather than plaintiff had paid the \$6,600 Kuhwarth settlement.

It is undisputed that the Kuhwarth settlement was fair and reasonable. St. Paul alone defended plaintiff in the actions and negotiated the settlement. The policy of each of the three insurers, Norwich, Northwest and St. Paul, is in an amount more than sufficient to pay the settlement. The court found that all three insurance companies were notified of the Kuhwarth accident. When the Kuhwarth settlement was made, St. Paul paid plaintiff the amount thereof and plaintiff obtained a cashier's check for the balance which was paid to the Kuhwarths' representatives, and a loan agreement was made between St. Paul and plaintiff under which plaintiff was to pay the \$6,600 if and when he recovered it from the other alleged insurers.

Norwich asserts that there was no evidence that there was an insurance contract between it and plaintiff because the policy was not delivered to plaintiff nor accepted by him; that there was no meeting of minds. Plaintiff testified that at the time

of the Kuhwarth accident he did not "have" a Norwich policy; that he had never "ordered" any policy from Norwich; that no policy was tendered to him; that the only policy he had was with St. Paul; that he had notified Williams of Williams Insurance Center, insurance agent for Norwich and Northwest, prior to June 1, 1951, that he was not going to take any insurance from him and had placed his insurance elsewhere; that he placed his insurance with St. Paul through an agent other than Williams; that he did not give notice of the accident to any insurance carrier except St. Paul, to whom he handed the papers served on him in the Kuhwarth actions.

The uncontradicted testimony of Hazel Reed, the office manager of Williams Insurance Center, Norwich's agent, is in harmony with plaintiff's testimony and shows that Williams had been handling plaintiff's automobile insurance and had placed a Northwest policy for him which expired on June 1, 1951; that although they were told by plaintiff prior to June 1st that he was placing his insurance elsewhere and they had no request for insurance from plaintiff, they ordered Norwich and Northwest policies for plaintiff hoping to keep his business. When the Norwich policy arrived, they attempted to deliver it to plaintiff and to his bank which held a loan on his equipment but both refused the policy, plaintiff stating he had obtained insurance elsewhere; that being unable to deliver the policy they returned it to Norwich.

Plaintiff does not question this evidence but calls our attention to the following facts in the record: That at Williams' request Norwich issued, that is, executed, a policy to plaintiff to run from June 1, 1951, to June 1, 1952, and sent it to Williams; it also filed a notice with the state Public Utilities Commission that as required by the Public Utilities Code, it had insured plaintiff for the period in question. Norwich cancelled the policy in June after the accident, and on June 7, 1951, so advised the

Public Utilities Commission, to be effective on June 26, 1951. On April 11, 1952, Williams sent a bill to plaintiff on a Norwich form for premium for the policy from June 1, 1951 to June 24, 1951, and plaintiff paid the bill.

Accepting this undisputed evidence, there is no basis for liability under the Norwich policy where the premium was paid long after the loss (the accident) and St. Paul was negotiating a settlement of the claim arising out of the accident. It is said in *Hargett v. Gulf Ins. Co.*, 12 Cal.App. 2d 449, 457, 55 P.2d 1258, 1261: "Even though at the time the premium was paid to the Monarch Company the company had actual knowledge of the existence of the chattel mortgage, which fact does not appear to have been established, the property had already been destroyed. Plaintiff must rely entirely upon the doctrine of estoppel to foreclose the defenses interposed by this company; obviously no estoppel could have arisen after the destruction of the property. An estoppel arises when the assured, because of some act or conduct of the insurer, has been dissuaded from obtaining other insurance upon the property and has proceeded to rely upon the validity of the policies he holds. Plaintiff was not, nor could he have been, prejudiced in any way by the acceptance and retention of the premium by the Monarch Company after the destruction of the property. The evidence of plaintiff in the particulars we have pointed out falls far short of establishing an estoppel against any of the companies to rely upon the provisions of the policies, under which the property destroyed by the fire was not at the time covered by insurance." It is said in *Commercial Casualty Ins. Co. v. Columbia Cas. Co.*, 22 Tenn.App. 656, 125 S.W.2d 493, 495: "It appears that a policy covering this automobile was issued by the Columbia Casualty Insurance Company, but the evidence is unsatisfactory as to whether it was issued before the accident or afterwards. But whether a policy was ever issued, is not material in this case, as the evidence is uncontroverted that Carter did not apply

for the policy, had no knowledge of its issuance, never accepted it; that he was insured in the Commercial Casualty Insurance Company, which policy he had not cancelled; and that he refused to ratify the issuance of the policy in the Columbia Casualty Company after the accident. There was, therefore, no contract between Carter and the Columbia Casualty Company, even if a policy was issued dated September 26, 1928.

[1] "The contract of insurance is purely a personal contract between the insured and the insurance company. 32 C.J. 1092, sec. 175; 14 R.C.L. 1365, sec. 535; *John Weis, Inc. v. Reed* [22 Tenn.App. 90] 118 S.W.2d 677, 682; *Hackney Co. v. Wood*, 3 Tenn.App. 421.

[2-4] "The assent of insured obtaining a fire policy from one insurer to a policy from another insurer as a substitute for the first policy is essential to the existence of a completed contract evidenced by the second policy, and, where such assent is not procured until after (a loss), the second insurer is not bound." *Waterloo Lumber Co. v. Des Moines Ins. Co.*, 158 Iowa 563, 138 N.W. 504, 51 L.R.A.,N.S., 539." In *Byrne v. Prudential Ins. Co. of America, Mo.*, 88 S.W.2d 344, 346, the court said: "While a contract of insurance 'has some features which distinguish it from an ordinary commercial contract, yet in general respects it is like any other contract and is governed by the same rules.' 32 C.J. p. 1091. It is as essential to the making of a contract of insurance as it is to any other contract that there be 'an agreement, or meeting of the minds of the parties' thereto. 32 C.J. p. 1095. Here the action is based upon an alleged contract between Schockley and the defendant insurance company. The application is a request or proposal for insurance and also supplies the insurance company with the information necessary to enable it to pass upon the application. An acceptance by the company and the issuance and delivery of its policy of insurance in reliance upon and in conformity with the application completes the contract. Admit-

tedly Schockley did not make out or sign the application, was not present at the time, nor was it shown that he ever consented to the issuance of the policy of insurance on his life and in his name or had knowledge thereof. Absent any evidence tending to show that either before or at the time he consented to the taking of the insurance in his name or subsequent to the making of the application or issuance of the policy had knowledge thereof and either specifically or impliedly ratified same it seems to follow, in such situation, as a matter of law, that no contract was entered into or existed between Schockley and the insurance company." See, *Hicks v. Hicklin*, 187 S.C. 355, 197 S.E. 390; *Hicklin v. State Farm Mut. Automobile Ins. Co.*, 176 S.C. 504, 180 S.E. 666; *Mallard v. Hardware Indemnity Ins. Co.*, Tex.Civ.App., 216 S.W. 2d 263. Clearly, under plaintiff's theory there would not be an insurance contract, under the facts here presented, because the contingency was known to both plaintiff and Norwich when the premium was paid. "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." *Ins.Code*, § 22. "Except as provided in this article, any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code." *Id.*, § 250. The exceptions refer to lotteries, gaming and wagering, *Id.*, §§ 251-252. The notice to the Public Utilities Commission did not have the effect of creating a contract of insurance between the parties here involved, we are not concerned with a member of the public.

Reference is made to a letter written by counsel for Norwich on June 19, 1952. That is of no aid, for even though it stated that notice was given to the Public Utilities Commission by Norwich, it also stated that Norwich had issued no policy to plaintiff, but it was "collaborating" with St. Paul, which was plaintiff's insurer.

Cases such as *Hill v. Industrial Acc. Comm.*, 10 Cal.App.2d 178, 51 P.2d 1126, cited by plaintiff concerning the effect of the sending of a policy by the company to its agent and the payment of premium did not involve a situation such as we have here where plaintiff never ordered any insurance, informed the insurance agent he did not want any insurance and the payment of premium was made long after the loss and another insurer was actively handling the case for the insured.

[5] Inasmuch as the judgment against Norwich must be reversed for insufficiency of the evidence to show that it had insured plaintiff and only Norwich appeals, the question arises as to the disposition or effect on the remainder of the judgment. As heretofore stated the court found that plaintiff was insured by Norwich, *Northwest* and St. Paul but that only Norwich was liable because the policies of Northwest and St. Paul were to pay any loss over and above that covered by other insurance.¹ Since by reason of the reversal as to Norwich there is not other insurance insofar as Norwich would be the other insurance carrier, the basis for the judgment exonerating Northwest and St. Paul falls. This would mean that the question on retrial would be, which was liable of those two for the whole loss or some portion thereof.² It must therefore follow that the portion of the judgment in favor of Northwest and St. Paul will have to be reversed even though plaintiff did not appeal, because the legal basis for such judgment is gone by the reversal. The judgment as to them on that basis is so interwoven and dependent on the judgment against Norwich that that portion must be reversed even though no appeal was taken therefrom. *American Enterprise, Inc. v. Van Winkle*,

39 Cal.2d 210, 246 P.2d 935. It is still true, however, that in addition to that basis for the judgment, the court found that Northwest and St. Paul had policies in effect at the time of the Kuhwarth accident covering plaintiff which may appear to be severable and unaffected by the reversal of the Norwich judgment and destructive of the other insurance basis for exonerating them. However, the judgment must be reversed because, on its face it says nothing about the liability of Northwest or St. Paul. It is merely a judgment for plaintiff against Norwich and for St. Paul against Northwest and Norwich for costs; and that Northwest recover costs of "defending the Complaint." Hence a reversal, which is necessary, leaves no judgment as to St. Paul's and Northwest's liability. There is only the finding above mentioned that they carried insurance for plaintiff. Thus it follows that the whole matter is thrown open to reascertainment on retrial.

It may be mentioned that the evidence is probably insufficient to show that Northwest insured plaintiff because it is substantially the same as that with respect to Norwich but that is a matter which may be determined on retrial. It is unnecessary to consider Norwich's objection that plaintiff does not have a standing to sue because of its claim that he was paid by St. Paul and the "loan" arrangement whereby plaintiff agreed to repay the settlement money to St. Paul if it recovered from the other insurers, was not a true loan. Since the judgment must be reversed the matter is one subject for determination on a retrial, and in this connection it should be observed that all the parties are before the court for a determination of the amount if any to be borne by each insurer. See, *Fidelity & Casualty Co. v. Fireman's F. I. Co.*, 38

1. Northwest's policy says if there is other valid insurance the policy shall be void, except to the extent the limits of the policy are in excess of the limits in the other insurance in which case the excess is covered. St. Paul's policy says no insuring agreement thereof shall apply to any loss if the insured has other

insurance except as respects any excess beyond the amount which would have been payable under the other insurance.

2. This is assuming that no better case could be made than has been made to show plaintiff was insured with Norwich.

Cal.App.2d 1, 100 P.2d 364; discussion and cases collected, 5 Stan.L.Rev. 147.

The judgment in favor of Royal Indemnity Company is affirmed. The remaining portion of the judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.



145 Cal.App.2d 8

R. M. PEART and Margaret Peart, and Alfred Anderson, Petitioners and Appellants,

v.

The BOARD OF SUPERVISORS OF the COUNTY OF SANTA CLARA, State of California; and A. W. Brown, Sam P. Della Magglore, Ed R. Levin, J. M. McKinnon and Walter S. Gaspar, as members of the Board of Supervisors of the County of Santa Clara, State of California, Respondents.

No. 16820.

District Court of Appeal, First District,
Division 2, California.

Oct. 8, 1956.

Proceeding in mandamus alleging that the exclusionary act of the board of supervisors in excluding from a proposed city much of the land described in the petition for incorporation was arbitrary and seeking a peremptory writ annulling the acts of the board. Judgment for respondents in the Superior Court, County of Santa Clara, Edwin J. Owens, J., and the petitioners appealed. The District Court of Appeal, Draper, J. pro tem., held that in the absence of fraudulent or corrupt conduct, the determination by a board of supervisors of the boundaries, size and shape of a proposed city is not subject to review by the courts.

Judgment affirmed.

1. Constitutional Law ⇨68(1)

The Legislature not having exceeded constitutional limitations in conferring broad powers upon a board of supervisors in the incorporation of new cities with respect to the inclusion of land, the court cannot impose limitations, since the question to be determined by the board is legislative or political in essence, and is beyond the consideration by the courts. West's Ann. Gov.Code, §§ 34300-34332.

2. Municipal Corporations ⇨24

The power devolved on boards of supervisors to determine boundaries of a proposed municipality is legislative in its nature and is vested in the board. West's Ann.Gov.Code, §§ 34300-34332.

3. Municipal Corporations ⇨7

The question as to whether territory proposed to be included in new city should be brought under municipal control is to be finally determined by the board of supervisors. West's Ann.Gov.Code, §§ 34300-34332.

4. Municipal Corporations ⇨3, 7

The words "sound discretion" appearing in the statute respecting incorporation of new cities did not show the legislative intent to place a limitation upon the board in determining whether to incorporate new cities and the amount of territory to be included therein. West's Ann.Gov.Code, § 34312.

See publication Words and Phrases, for other judicial constructions and definitions of "Sound Discretion".

5. Constitutional Law ⇨70(3)

Whether it is good or bad policy to leave to supervisors a discretion with respect to incorporation of new cities so unguided that it may be exercised in an arbitrary manner where no vested right is involved is a question for the Legislature and not for the courts. West's Ann.Gov. Code, §§ 34300-34332.

6. Municipal Corporations ⇨12(12)

In the absence of fraudulent or corrupt conduct, the determination by a board of supervisors of the boundaries, size and

shape of a proposed city is not subject to review by the courts. West's Ann.Gov. Code, §§ 34300-34332.

Burnett, Burnett & Somers, San Jose, for appellants.

Spencer M. Williams, County Counsel, John R. Kennedy, Deputy County Counsel, San Jose, for respondents.

DRAPER, Justice pro tem.

Appellants and other owners of land in unincorporated territory of Santa Clara County filed a petition with the board of supervisors of that county for the incorporation of a new city to be known as the City of South San Jose. It is conceded that the petition complied with the statutory provisions for organization of new cities. Government Code, §§ 34300-34332. After hearings upon the petition, respondent board excluded from the proposed city much of the land described in the petition for incorporation, with the result that the boundaries of the proposed city included less than the required 500 inhabitants. The board then refused to call an election upon the issue of incorporation because of this deficiency in population.

Petitioners brought this proceeding in mandamus, alleging that the exclusionary act of the board was arbitrary, and seeking a peremptory writ "annulling said acts of the Board of Supervisors, and having the boundaries of the proposed City of South San Jose, as described in the petition for incorporation, filed with the Board of Supervisors; and ordering the Board of Supervisors to call an election * *." Respondents answered, denying the allegations of arbitrary and capricious action, and moved for judgment on the pleadings. The trial court filed a memorandum opinion expressing its view that the board's action could be reviewed only if it were fraudulent or corrupt, granted petitioners leave to amend their petition, and ordered that if there were no amendment the motion for judgment be granted. Petitioners declined to amend and judgment for re-

spondents on the pleadings was ordered. Petitioners appeal. The parties agree that the issue of the sufficiency of the petition is properly before us.

Appellants rely upon general statements in several decisions that the acts of the board in creating districts are judicial in character, and thus are subject to review by the courts. Respondents reply that these cases are distinguishable in that they deal with districts, rather than cities (an argument which we reject as too narrow), and rely upon general statements in a number of cases that the board's determinations, in creating cities or districts, are legislative in character, and thus are beyond the control of the courts. In our view, the claimed conflict in the two lines of cases cited is more apparent than real, and is fully resolved by a careful study of the acts sought to be reviewed and the statutes under which the several subordinate legislative bodies acted.

It is an oversimplification to group together all acts of a board of supervisors in the creation of a new city or district, and stamp all such acts, as a group, as either within or beyond the scope of court review. Rather, each statute authorizing such action places upon the subordinate legislative body some restrictions which are conditions for its exercise of jurisdiction, and which require finding of specified facts. Thus, a board's finding as to sufficiency of the notice of hearing, *Imperial Water Co. No. 1 v. Board of Supervisors*, 162 Cal. 14, 120 P. 780; *Wheatley v. Superior Court*, 207 Cal. 722, 279 P. 989, or of the petition, *Borchard v. Board of Supervisors*, 144 Cal. 10, 77 P. 708, whether such findings be termed "judicial," "quasi-judicial," or otherwise, are clearly subject to some review by the courts under sufficient pleadings in a proper form of proceeding.

Similarly, where the board is required by statute to act when certain facts are established, the courts will intervene when the required facts are clearly shown. *Inglin v. Hoppin*, 156 Cal. 483, 105 P. 582. Also, where the discretion to be exercised

by the board is itself limited by the statute, the courts may inquire whether the limitations have been recognized and properly honored by the board. Thus, where the statute limits inclusion in an irrigation district to lands irrigable from a proposed source of water, *Imperial Water Co. No. 1 v. Board of Supervisors*, supra, 162 Cal. 14, 120 P. 780, or the consolidation of school districts to lands within a fixed distance, *Broyles v. Mahon*, 72 Cal.App. 484, 237 P. 763, the courts may review the board's decision.

However, neither of these situations exists here. The parties concede that all conditions precedent to the hearing by the board were properly met. The sole complaint is as to the board's decision excluding from the proposed city a substantial part of the land described in the petition for incorporation. The board acted under Government Code, section 34312, which provides:

"Establishment of the boundaries and determination of the size and shape of a proposed city are matters for the sound discretion of the board of supervisors."

It is solely in the light of this language that we can consider whether the discretion exercised by the board is reviewable by the courts.

[1] This statute prescribes no limitation whatever upon the discretion of the board. No vested right is here involved to bring into play broad constitutional limitations. The only right of those seeking incorporation is to have the statute, including the grant of broad discretion to the board, applied to them. The legislature has not exceeded constitutional limitations in conferring broad powers upon the board of supervisors, *People ex rel. Russell v. Town of Loyalton*, 147 Cal. 774, 776, 82 P. 620, and it does not rest with the courts to impose limitations. Moreover, if a court sought to exercise jurisdiction, it could find in the statute neither guide-post, landmark nor sextant to plot a course toward any result to be reached by it. Clearly, the ques-

tion to be determined by the board is legislative or political in its essence, and is beyond consideration by the courts.

[2] "The power devolved on boards of supervisors * * * to determine boundaries of a proposed town is legislative in its nature, and is vested in the board, not as an indifferent party, but as the legislative body of the county whose territory is to be taken for the proposed town, and consequently as representing the interests of the people of the county at large as well as those of the town." *Vernon v. Board of Supervisors*, 142 Cal. 513, 515, 76 P. 253, 254, followed and approved in *Borchard v. Board of Supervisors*, supra, 144 Cal. 10, 77 P. 708.

[3] "The question as to whether territory proposed to be included should be brought under municipal control is left to be finally determined by the board of supervisors." *People ex rel. Russell v. Town of Loyalton*, supra, 147 Cal. 774, 778, 82 P. 620, 622. This decision also points out the lack of statutory limitation upon the powers of the board in fixing boundaries, and refers to "the broad words used in our statute." See also *People v. City of Riverside*, 70 Cal. 461, 9 P. 662, 11 P. 759; *People v. City of Belmont*, 100 Cal.App. 537, 280 P. 540.

The same rule has been applied to annexation cases. The principle "that it was exclusively a matter for the legislature to say [by] what tribunal or how these boundaries should be fixed, is equally applicable to the fixing of the boundaries of territory to be annexed to an existing municipality * * *. [T]he question of the extent and character of territory proposed to be incorporated is left * * * as the Legislature was authorized to leave it, exclusively to the board of supervisors * * * and * * * the courts have no control of the subject." *People ex rel. Peck v. City of Los Angeles*, 154 Cal. 220, 225, 97 P. 311, 313; see also *City of Burlingame v. County of San Mateo*, 90 Cal.App.2d 705, 203 P.2d 807.

[4] Some suggestion has been made that the words "sound discretion," appearing in Government Code, section 34312, place a limitation upon the board. Until 1937, the statute provided that, upon hearing, the board "shall make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries." Stats.1883, p. 93. In 1937, the statute was amended, leaving the language above quoted, but adding, with a number of other provisions, substantially the same language contained in the present section 34312. Stats.1937, p. 1811. There is nothing whatever to indicate a limitation upon the discretion long previously found by *Vernon v. Board of Supervisors*, supra, *Borchard v. Board of Supervisors*, supra, and *People ex rel. Russell v. Town of Loy-alton*, supra, to exist. The present provisions of the Government Code merely codify the long-existing statute, eliminating some repetitions, but substantially carrying into the new code the old provisions.

Appellant relies upon general language, to the effect that proceedings for the formation of an irrigation district, *Imperial Water Co. No. 1 v. Board of Supervisors*, supra, 162 Cal. 14, 120 P. 780, a bridge district, *Wheatley v. Superior Court*, supra, 207 Cal. 722, 279 P. 989, or for the alteration of school district boundaries, *Crane v. Board of Supervisors*, 17 Cal.App. 2d 360, 62 P.2d 189, are "judicial" in character, and thus subject to court review. As we have pointed out, many fact-finding functions are imposed upon the supervisors in all the statutes regulating proceedings of this type. The exercise of such functions is reviewable under certain circumstances and in a proper form of action, whether the facts are found by the board in ascertaining the conditions establishing jurisdiction, or in exercise of a discretion limited by the particular statute to fixed fact situations. In none of these three decisions is the board's exercise of discretion in fact revised or modified, and there is nothing to indicate that in any of them would the court have extended its broad

language to the precise situation here in issue.

[5] There is no more room for intervention of the courts here than in the decision by a board of supervisors as to the amount of land needed for a county hospital, *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 P. 465, or as to issuance of tax-anticipation notes. *Berkeley High School Dist. of Alameda County v. Coit*, 7 Cal.2d 132, 59 P.2d 992. Whether it is good or bad policy to leave to supervisors a discretion so unfettered that it may be exercised in an arbitrary manner is, where no vested right is involved, a question for the legislature and not for the courts.

[6] In the absence of fraudulent or corrupt conduct, the determination by a board of supervisors of the boundaries, size and shape of a proposed city is, under the present statutory grant of discretion, not subject to review by the courts.

The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



Claudine HERDA, Plaintiff and Appellant,
v.

Clarence HERDA, Defendant and
Respondent.*
No. 16849.

District Court of Appeal, First District,
Division 2, California.

Oct. 5, 1956.

Rehearing Denied Nov. 2, 1956.

Hearing Granted Nov. 28, 1956.

Proceeding on motion of former husband for termination of support and maintenance payments provided for in a divorce settlement agreement. The Superior Court, San Mateo County, Murray Draper, J., granted the motion, and former wife ap-

* Opinion vacated 308 P.2d 705.

pealed. The District Court of Appeal, Devine, J. pro tem., held that provision of settlement contract for monthly payments to former wife for support, properly construed, terminated upon the parties' minor children obtaining majority, and upon remarriage of former wife, and under provision of such contract providing that former husband should indemnify former wife for all expenses and cost in prosecuting or defending any motion affecting the agreement, former wife was entitled to counsel fees in connection with former husband's motion to terminate payments, including counsel fees for appeal from the granting of his motion, notwithstanding fact that order granting motion was sustained.

Order affirmed and cause remanded with directions.

Kaufman, J., dissented.

1. Divorce Ⓒ255, 309

An order of the Superior Court denying a husband's application for modification of a provision of a divorce decree awarding former wife \$250 a month support where one of the two minor children of the parties had reached majority did not determine whether former husband's duty to make such payments to wife continued after second child of the parties had reached majority and after wife's remarriage, and therefore was not *res judicata* as to such issue.

2. Contracts Ⓒ147(1)

The cardinal rule of interpretation of contracts is to find the intention of the parties, and in seeking that intention, the object to be attained is the principal factor. West's Ann.Civ.Code, § 1636.

3. Evidence Ⓒ448

If a contract is explicit, extrinsic evidence cannot be used to interpret it, but if it is ambiguous, extrinsic evidence is admissible.

4. Appeal and Error Ⓒ991

If an issue of fact, such as the intent of the parties to an ambiguous agreement, has been determined by the trial court upon

extrinsic evidence, the determination, if not unreasonable, will not be disturbed on appeal even though a contrary finding might be equally tenable.

5. Evidence Ⓒ450(2)

Where a divorce settlement agreement set forth no duration for support payments provided for wife, it was ambiguous, and extrinsic evidence was properly admissible to determine the duration for such payments.

6. Husband and Wife Ⓒ278(2)

A contract by a former husband to support a former wife even after remarriage is not against public policy.

7. Husband and Wife Ⓒ279(1)

Where a settlement contract incorporated by reference into a divorce decree merely provided that former husband was to pay \$250 monthly to former wife for support, without mention of the period for which such payments were to be made, the payments would be construed to have been for alimony and child support, rather than representing a part of an integrated property settlement agreement, with the duty to continue such payments terminating upon the parties' minor children obtaining majority, and upon remarriage of former wife. West's Ann.Civ.Code, § 139.

8. Husband and Wife Ⓒ279(1)

Where a settlement agreement incorporated by reference into a divorce decree specifically provided that former husband should indemnify former wife for all expenses and costs in prosecuting or defending any motion or proceeding in any manner affecting the agreement, former wife was entitled to counsel fees in connection with former husband's motion to terminate support payments under such agreement, including counsel fees for former wife's appeal from the granting of such motion, notwithstanding fact that order granting the motion was sustained.

Henry W. Schaldach, San Francisco, for appellant.

Chas. E. R. Fulcher, Los Angeles, for respondent.

DEVINE, Justice pro tem.

The main question presented on this appeal is whether or not the trial court's interpretation of a contract between spouses at the time of separation and divorce is to be sustained. (A lesser question, relating to allowance of counsel fees, is considered at the end of this opinion.) The agreement, drawn in 1938, provided, among other things, for payment of the sum of \$250 to the wife "as and for the support and maintenance of herself and the minor children of said parties, said payments to commence on March 1, 1938 and to continue monthly thereafter on the first (1st) day of each and every month thereafter." These provisions, with slight changes in wording, were contained in the divorce decrees, interlocutory and final, and the husband was ordered by the decrees to pay \$250 every month for the support of the wife and the children. The agreement as a whole was not copied into the decrees, but reference was made to it as an exhibit attached to the complaint. The trial court construed the agreement and the decrees as imposing an obligation on the husband to pay the stated sum for the support of the wife only until her remarriage. The wife appeals, contending that the sum of \$250, as reduced by such amount as should be apportioned for the children, must be paid to her every month without regard to her remarriage.

[1] There is no contention that further support is required for the two children of the parties, for both have attained majority and neither is under any disability. The husband paid the \$250 every month until the younger child had attained majority in 1954. One contention of appellant is that because the husband applied for a modification of the amount of support money in 1944 when the older child was about to enter the armed forces and after the wife's remarriage in 1943, and the modification was denied by the court, the matter is res

judicata, and it has been determined that the support money is a periodic payment upon a division of community property. However, nothing is before us to show the reasoning of the court when that application was made. The court may have decided that the sum should be paid without reduction for the continuing support of the children, and especially of the younger child, who was then 10 years old. In *Meek v. Meek*, 51 Cal.App.2d 492, 125 P.2d 117, it was held that the doctrine of *res judicata* could not apply where prior petitions for reduction of a support order had been denied, but a second child had become of age since the last denial, thus changing the facts sufficiently to prevent application of the doctrine.

We hold that the order based on the earlier application for modification did not determine the question now before us.

It is argued by the wife that the required payment was not in the nature of alimony, but was an inseverable part of an integrated property settlement agreement and was not subject to termination on her remarriage; and by the husband, that the award essentially was alimony, although that term was not used.

The agreement, it is to be observed, does not provide that the payments are to be for the lifetime of the wife, or for a specified time. Nor is there an award of a certain sum to be paid at the rate of \$250 a month until satisfied. The contract simply states that it is for support, and it is to be paid every month.

[2-4] In construing the agreement and in determining the nature of the periodic payments, there are basic principles of interpretation to be observed. The cardinal rule of interpretation of contracts is to find the intention of the parties, Civil Code, Section 1636, and in seeking that intention, the object to be attained is the principal factor. In *re City and County of San Francisco*, 191 Cal. 172, 177, 215 P. 549; *Miranda v. Miranda*, 81 Cal.App. 2d 61, 66, 183 P.2d 61. If a contract is explicit, extrinsic evidence cannot be used

to interpret it, but if it is ambiguous, extrinsic evidence is admissible. *Tuttle v. Tuttle*, 38 Cal.2d 419, 421, 240 P.2d 587. If an issue of fact, such as the intent of the parties to an ambiguous agreement, has been determined by the trial court upon such evidence, the determination, if not unreasonable, will not be disturbed on appeal even though a contrary finding might be equally tenable. *Weedon v. Weedon*, 92 Cal.App.2d 367, 207 P.2d 78; *Pearman v. Pearman*, 104 Cal.App.2d 250, 256, 231 P.2d 101.

[5] Applying these basic principles to the cause before us, we believe the trial court's order terminating support for the wife should be affirmed. Extrinsic evidence relating to the history of the settlement and the property of the parties was admitted, not over objection of appellant, but chiefly as presented by her. Although this followed the suggestion of the court that such evidence be produced, still appellant cannot complain (and does not) of its admission, and, in any event, the contract was ambiguous. It sets forth no duration for the payments.

[6,7] The history of the settlement shows that in 1938, the parties had very little community property to divide. The wife received a heavily encumbered home, its furniture and a life insurance policy. The husband received an automobile. He was earning between \$450 and \$500 a month. He paid the wife \$250, the same amount as appears in the agreement, for the support of the wife and children during the several months preceding the interlocutory decree. These facts may have led the court to conclude in the present proceeding that the periodic payment was intended as support money and was not integrated with a division of property. The agreement was drawn by counsel for appellant, who thus caused the ambiguity to exist. The object herein was to support the wife and the children. For how long? For the children, obviously, until they would become of age, partly because the agreement referred to them, at the time the provision

for them was made, as "the minor children", and partly because the law would not impose the duty of support on the father after the children had attained majority, unless they were ill or infirm. In the same way, it is reasonable to infer that the support for the "wife", as she was described as such in the agreement, would continue not until death, but until the duty of support would devolve upon another spouse. There is a certain incongruity in interpreting an indefinite contract for support of a wife as requiring a man to continue payments after another has undertaken the duty of support. Although a contract to support a spouse even after remarriage is not against public policy, nevertheless, in interpreting this agreement of uncertain duration, the trial court reasonably weighed the noted incongruity as a factor.

To construe the contract as requiring lifetime payments to the wife would allow her to collect from her former spouse's estate, should he predecease her, the then present value for her life expectancy of that part of the award which might be apportioned to her. *Miller v. Superior Court*, 9 Cal.2d 733, 735, 72 P.2d 868; *Anthony v. Anthony*, 94 Cal.App.2d 507, 211 P.2d 331. A clearer expression than was contained in the contract herein should be required in order to make necessary an interpretation which would impose so large a burden.

There remain to be discussed the chief cases cited by appellant relating to: 1. Integrated agreements generally; and 2. agreements which were held to survive remarriage. In the present case, the wife waives all support other than that agreed upon, and the contract recites that the parties intend to settle their rights, and that the wife accepts the support provisions in full satisfaction of her right to community property. These provisions may make the contract unmodifiable in that the periodic payments cannot be revised upwards or downwards. Such provisions are to be found in the contracts considered in *Et-*

tlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865; Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988, and Helvern v. Helvern, 139 Cal.App.2d 819, 294 P.2d 482. In all of those cases, the termination date of payments was expressed (usually, as death or remarriage) and there was no question of ascertaining the intention of the parties in that regard.

The expressions of finality were held, in those cases, to prevent increase or reduction in payments. We do not regard such expressions as necessarily requiring that payments continue for a lifetime where the contract does not say that they are to do so. In the absence of contract, the wife would have no right to such support after remarriage, and when this agreement was drawn, section 139 of the Civil Code provided that the husband's duty to support the wife (not only his duty as imposed by a decree of divorce but his general legal duty), ended with the wife's remarriage. Thus, the wife gave up no right to a larger amount of post-marital support for she had none. She could have gained a right to post-marital payment by contract, of course.

We come now to the subject of cases in which remarriage has been held not to terminate support provisions. In Rosson v. Crellin, 90 Cal.App.2d 753, 203 P.2d 841, 842, the contract expressly provided for payments to the wife "so long as you shall live," and in Landres v. Rosasco, 62 Cal. App.2d 99, 144 P.2d 20, and Harnden v. Harnden, 102 Cal.App.2d 209, 227 P.2d 51, the payments were to continue for an agreed period of years. In Lane v. Bradley, 124 Cal.App.2d 661, 268 P.2d 1092, the agreed payment of 40 per cent of the husband's net income was not described as for the wife's support; large property interests were held in escrow therefor and the agreement contained a provision referring

to the death of the wife as terminating the escrow giving evidence that it was to remain for her lifetime. In Taliaferro v. Taliaferro, 125 Cal.App.2d 419, 270 P.2d 1036, a going business was divided between the parties, a fact noted by the trial judge in the present case, and the wife in the Taliaferro case testified, under cross-examination, that she regarded the monthly payments as a share of rentals. The trial court's interpretation, based in part on extrinsic evidence, was upheld.

The case of Hopkins v. Hopkins, 46 Cal. 2d 313, 294 P.2d 1, does not require that the conclusion of the trial court be reversed. In that case, the parties had agreed that payments would end with remarriage and there had been no remarriage, so that there, again, the question of ending of payments upon remarriage was not the question. That case is authority for the proposition that where support money for wife and for children is lumped together in a property settlement agreement, the contract is not too uncertain to be enforced, but upon the arrival at majority of the children, the court should apportion the amount. In the present case, it is the remarriage of the wife which is the basis of respondent's petition; the attaining of majority of the younger child is the occasion for the petition, but not the basis of it.

[8] Counsel fees should have been awarded, and now should be allowed for this appeal. The agreement specifically provides that the husband shall indemnify the wife for all expenses, costs and expenses in prosecuting or defending any motion or proceeding in any manner affecting the agreement. Sufficient application for such fees was made at the commencement of the proceedings.

The order terminating monthly payments to the wife is affirmed but the cause is remanded with directions for the allowance of attorneys fees and costs in connection with the proceeding, including counsel fees for this appeal.

Costs on appeal to appellant.

NOURSE, P. J., concurs.

KAUFMAN, Justice.

I dissent.

I cannot agree with the majority opinion in the interpretation and application of the decisions of our Supreme Court in the cases of *Messenger v. Messenger*, 46 Cal. 2d 619, 297 P.2d 988 and *Hopkins v. Hopkins*, 46 Cal.2d 313, 294 P.2d 1. In my judgment these decisions applied to the facts of this case compel a reversal of the judgment with directions to the trial court as hereinafter specified.

The appeal herein is from an order of the Superior Court of San Mateo County granting respondent's motion to terminate support and maintenance payments in a divorce action. The trial court determined that the payments provided for in a Property Settlement Agreement were for alimony and child support and did not represent a division of the property.

Appellant, Claudine Herda, and respondent, Clarence Herda, were married on June 6, 1925 in Chicago, Illinois. There were two children of this marriage, a son born in 1926, and a daughter born in 1933. The family moved to California, and at the time of the divorce were living in Burlingame. On March 1, 1938, the parties entered into an agreement entitled "Property Settlement Agreement." On March 18, 1938, a divorce complaint was filed by Mrs. Herda, alleging extreme cruelty. It was alleged that there was community property, that the rights of the parties had been adjusted and a division of property rights made. A copy of the agreement was made a part of the complaint. In the next and final paragraph of the complaint it was alleged that in said agreement, defendant had agreed to pay plaintiff "as and for her support and maintenance and the support and maintenance of the minor children of the said parties the sum of Two Hundred Fifty Dollars (\$250.00) monthly."

An interlocutory decree of divorce was granted on April 18, 1938, the court order-

ing that "the contract of settlement between plaintiff and defendant, a copy of which is attached to plaintiff's complaint as 'Exhibit A' thereof, be, and the same is hereby approved, and each and every of the provisions thereof are hereby expressly incorporated herein by way of reference and made a part of this decree to the same extent as though expressly set out herein." The interlocutory decree restated several paragraphs of the property settlement agreement in substantially the same language used in the agreement. Paragraph Eighth of the Agreement read as follows: "The husband agrees in consideration of the premises and mutual covenants and agreements herein contained to pay to the wife the sum of Two Hundred Fifty Dollars (\$250.00) per month as and for the support and maintenance of herself and the minor children of said parties, said payments to commence on March 1, 1938 and to continue monthly thereafter on the first (1st) day of each and every month thereafter. * * *"

The interlocutory and final decrees of divorce provided:

"It is further ordered, adjudged and decreed that defendant be, and he hereby is, required to pay to plaintiff herein, as and for her support and the support, care and education of the minor children of said parties, the sum of Two Hundred Fifty Dollars (\$250.00) per month, which said payments to commence March 1, 1938, and continue monthly thereafter on the 1st day of each and every month."

In 1943 appellant remarried. On May 17, 1944, respondent filed a motion to modify the final decree of divorce, asking that he be relieved of paying anything further for plaintiff's support, and requesting that he be required to pay \$50 per month for the care, support and education of each minor child. The affidavit in support thereof stated that appellant had remarried, and that the minor, Robert Herda, was about to enter the armed forces. The motion was denied on May 22, 1944, the court

allowing appellant \$50.00 attorney's fees. At this time the children were eighteen and ten years of age.

On November 5, 1954, respondent filed his motion to terminate the \$250 monthly payments, Robert Herda was then 28 years of age and married. Joyce Herda was 21 years of age. Neither child was living with appellant. She was not contributing to their support, nor did they require any assistance from her.

On December 2, 1954, respondent's motion was argued and submitted. Appellant orally moved for attorney's fees for defending the matter. On December 8, 1954, the court rendered a tentative memorandum decision, and gave the parties the opportunity of introducing evidence and offering further argument and authorities as an aid to interpretation of the agreement and decree.

On March 17, 1955, the court made its order terminating the monthly payments.

Appellant contends that the order was erroneous because a court may not alter a decree for support based upon a property settlement agreement between the parties which provides for payment of support.

The first question to be determined is whether or not the court below correctly admitted extrinsic evidence to aid in the interpretation of the agreement and divorce decrees. It is clear that such evidence is admissible if there is any ambiguity upon the face of the agreement or decrees as to the nature of agreement. *Messenger v. Messenger*, 46 Cal.2d 619, 297 P.2d 988; *Fox v. Fox*, 42 Cal.2d 49, 52, 265 P.2d 881; *Flynn v. Flynn*, 42 Cal.2d 55, 60, 265 P.2d 865; *Tuttle v. Tuttle*, 38 Cal.2d 419, 420, 240 P.2d 587. The agreement herein was incorporated in the decree and made a part thereof by reference. The court did not specifically order the parties to comply with all of its terms and provisions. Only certain provisions of the agreement were set forth in the decree and the parties ordered to comply therewith, namely, provisions relating to household furnishings, a life insurance policy, the automobile, custody of

the children and visitation rights, monthly payments for support of the wife and support, care and education of the children, the right of the wife to move the family from the state at the expense of the husband, and payment by the husband of all bills, and budget accounts of the parties. There can be no question but that those provisions of the agreement have been merged in the decree, and it appears that the entire agreement was so merged by the incorporation therein. *Hough v. Hough*, 26 Cal.2d 605, 160 P.2d 15. But regardless of the merger, it must be determined whether the provision relating to the \$250 per month payments is on its face a provision for child support and alimony, or a provision that is at least in part a division of the property of the spouses.

The intention of the parties in entering into this agreement is expressed as follows therein:

"Whereas, it is the mutual wish and desire of said parties that a full and final adjustment of all their property rights, interests and claims be had, settled and determined by said parties in this Agreement, including the custody and maintenance of the minor children of said parties.

"Now, therefore, it is agreed that in consideration of the mutual promises, agreements, and covenants contained herein, it is covenanted, agreed, and promised by each party hereto, to and with the other party hereto, as follows:"

Other significant provisions of the agreement are as follows:

"First: That, except as hereinafter specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby release the other from any and all liabilities, debts or obligations of any kind or character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instru-

ment is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided."

"Fourth: The said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other and hereby release and waive all right to inherit under any will of the other and each of the said parties hereby waive any and all right of homestead in the real property of the other, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this Agreement to the end of the world said waiver of the other in the estate of the other party shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relation of such toward each other."

If the nature of the provision in question can be determined by an examination of the decrees and agreement, then extrinsic evidence could not be admitted to determine that question. The ambiguity which beset the trial judge was the confusion as to what part of the monthly payment was allocable to the children and what part to the wife. The trial court in a tentative memorandum decision shows that aside from the difficulty presented by the above provision, an examination of the agreement showed that it was an integrated agreement having all the indicia relied on in *Dexter v. Dexter*, 42 Cal.2d 36, 40, 265 P.2d 873. It is my view that the agreement before us is an integrated property settlement agreement and that the amount properly payable to the wife may not be denied her by the court.

Having decided that an ambiguity existed in the provision relating to the payments, extrinsic evidence was received relative to

the background of the agreement, the intention of the parties in entering into it, the nature and amount of property owned by the respective parties at the time of its execution. From this evidence the trial judge concluded that the parties understood this to be merely a support provision, and that it did not represent in any way a division of the property.

The most recent pronouncement of the Supreme Court in *Messenger v. Messenger*, 46 Cal.2d 619, 297 P.2d 988, holds that where the parties have included a waiver in a support provision in such an integrated agreement stating that they will not seek maintenance or support except as provided in the agreement, they are precluded from contending that the provision is for alimony, since an order allowing alimony is subject to revision at any time, and since the waiver is part of the consideration for the husband's agreement, he cannot seek a modification thereof without changing the property settlement agreement. And, see, *Helvern v. Helvern*, 139 Cal.App. 819, 294 P.2d 482. It is true that the court in the cited case [46 Cal.2d 626, 297 P.2d 992], follows this pronouncement with the statement that "In the absence of conflicting extrinsic evidence as to the meaning of the agreement, the trial court's interpretation of it is not binding on this court." The court then states that some extrinsic evidence was received on the division of the property but holds that the trial court's finding that defendant did not receive a greater part of the community property did not support its conclusion that the support provisions were not a part of the consideration for the division of property. The agreement was for a permanent and lasting division of all their property rights. Since the parties could not know how the court would settle property and support rights the amicable adjustment of all doubtful questions would supply sufficient consideration to support the entire agreement. Furthermore since plaintiff in the *Messenger* case, as in the case herein, secured her divorce on the ground of extreme cruelty, had the parties not settled their rights by

agreement, the court could have awarded plaintiff all of the community property, and less alimony. Hence, it was said the fact that the community property was in the cited case divided equally, had "no bearing on the validity of the provision of the agreement whereby both parties waived all rights to support and maintenance other than as provided herein."

The trial judge, at the time he was endeavoring to solve the problem in this case did not have the benefit of the above decision, nor of that in the recent case of *Hopkins v. Hopkins*, 46 Cal.2d 313, 294 P.2d 1, which appears to involve a question almost identical with that herein. In the *Hopkins* case there was a provision for a monthly payment of \$150 for support and maintenance of the wife and minor children as a part of an integrated property settlement agreement. It was held that the provision contained a latent ambiguity which could be solved both by reference to other provisions of the decree and by taking evidence of the subsequent acts and declarations of the parties to arrive at a proper division of the amount. Plaintiff wife in the cited case had not remarried, and was held entitled to receive her proportionate share of the \$150 per month under the agreement, since in that case the agreement provided that payments to her were to cease upon her remarriage.

I hold that the trial court should follow the procedure in the *Hopkins* case, *supra*, and limit the extrinsic evidence to the solution of this question.

In the present case the wife has remarried. The agreement herein did not provide for that contingency, and it might be argued that the parties contracted in regard to the support provision with section 139, Civil Code, as an inherent part of the agreement for support, but since the installments as to the wife's share are part of the consideration for the agreement as a whole, they cannot be modified. This court in *Lane v. Bradley*, 124 Cal.App.2d 661, 665, 268 P.2d 1092, held that in such an agreement where it is not expressly or

implicitly provided that such payments cease upon remarriage, section 139, Civil Code, will not apply to effect such termination.

Appellant argues that the minute order of May 22, 1944, denying respondent's motion for modification was *res judicata* that the decree herein was one for continuous payments as an integrated part of a property settlement agreement. No appeal was taken from that order. That motion for reduction was based not only on the fact that the wife had remarried, but also on the fact that the son, who was still a minor, was about to enter the service. He was then 18 years of age. The son had not yet entered the service, and in May, 1944, there was no way of predicting that if he did, he would remain in the army for three years until he reached majority. Both children were minors, and the court could judicially notice that the cost of living had advanced considerably since this decree was made in 1938. The order does not show on what ground it was denied. It may very well have been denied on the ground that \$250 was only an adequate allowance for the needs of the two minors. Section 1911, Code of Civil Procedure provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." And, see, *Johnston v. Ota*, 43 Cal.App.2d 94, 110 P.2d 507; *Beronio v. Ventura County Lbr. Co.*, 129 Cal. 232, 61 P. 958.

Finally, appellant contends that she was erroneously denied attorney's fees in defending this action. It appears that under the terms of the divorce decree appellant is entitled to payment of counsel fees in defending a suit for modification by the husband, and that her ability to pay has no bearing on the matter. The motion for fees was placed before the court, and the court indicated that it would reserve its decision till later. Since the decree provides that the husband is to pay and indemnify the wife for fees and costs in such

action, the court should, in the absence of any evidence offered by the appellant as to what the fee actually was, include a reasonable attorney's fee in the order.

I would reverse the judgment with directions to the trial court to take evidence bearing on the question as to what portion of the \$250 payment is allocable to child support as of the date of the decree and to then enter an order modifying the decree by reducing said payment by that amount.

I would order the trial court to enter an order allowing appellant a reasonable attorney's fee for defending the motion here involved.



145 Cal.App.2d 44

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

James RODIS, Defendant and Appellant.
Cr. 2668.

District Court of Appeal, Third District,
California.
Oct. 10, 1958.

Defendant was convicted of burglary in the second degree. The Superior Court, Colusa County, Ben R. Ragain, J., rendered judgment, and defendant appealed. The District Court of Appeal, Peek, J., held that since proof of identity of perpetrator of burglary depended largely upon circumstantial evidence and narcotics had been taken from burglarized drug store, district attorney was properly permitted to question defendant on cross-examination as to whether he was or had been a user of narcotics and to introduce for purposes of impeachment evidence that defendant had stated to sheriff that he had been addicted

to use of narcotics, but had used no narcotics for eight months.

Judgment affirmed.

1. Burglary ☞41(1)

Evidence, including defendant's fingerprint on the outside of rear window of burglarized store, more than nine feet above the ground, was sufficient to sustain conviction for burglary in the second degree.

2. Criminal Law ☞552(1)

Facts relating to the guilt of an accused may be established by circumstantial as well as direct evidence.

3. Criminal Law ☞1159(2)

Drawing proper inferences from the evidence is a function of jury, and so long as its conclusions do not do violence to reason or challenge credulity, reviewing court is without power to substitute its finding of the ultimate fact.

4. Criminal Law ☞342

Where proof of identity of perpetrator of burglary depended largely on circumstantial evidence, the issue of motive was important, and where narcotics had been taken from special, locked compartment in burglarized drug store, evidence that defendant was or had been a user of narcotics was relevant on issue of motive.

5. Criminal Law ☞369(2)

Where proof of identity of perpetrator of burglary depended largely on circumstantial evidence and narcotics had been taken from special, locked compartment in burglarized drug store, permitting district attorney to ask defendant on cross-examination, over objection of his counsel, whether defendant was or had been a user of narcotics was not improper, even though such question called for an answer which might indicate other criminal offenses.

6. Witnesses ☞390

Where narcotics had been taken from special locked compartment in burglarized drug store and defendant, on cross-ex-

amination, denied that he was or had been a user of narcotics, evidence that in conversation with sheriff following arrest, defendant stated that he had been addicted to use of narcotics, but had used no narcotics for eight months, was admissible for purpose of impeachment.

Peter M. Koutchis, George E. Paras, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction of the crime of burglary in the second degree.

On the evening of June 7, 1955, when LaMotte H. Stinson left his drug store in Arbuckle, all of the doors and windows were intact and locked. The following morning when he opened the store he discovered that several radios, electric shavers, pens, cigarette lighters and watches were missing. He then examined the separate case where the narcotics were kept under lock and found that it had been opened and the contents taken. The safe had also been opened and approximately \$600 to \$700 was missing. The total value of all of the property taken amounted to approximately \$1,500, the narcotics being valued at approximately \$500. One or two of the panes in a window at the rear of the store had been previously broken and cardboard inserted in place of the broken panes. This window was covered with a screen on the outside and was approximately nine feet above the ground. The screen showed that it had been torn off from the outside and that entry into the drug store had been made by removing some of the cardboard. The lock on the back door had been broken from the inside. A deputy sheriff of Colusa County investigated the scene on the morning of June 8 and found a fingerprint on the outside of the window. The fingerprint

was removed by a process known as "transo-lift" which consists of dusting the fingerprint with a powder, placing a piece of Scotch tape over the print and then removing it. Following the arrest of the defendant his fingerprints were taken and were compared by a technician in the State Bureau of Criminal Identification who testified he had found them to be identical. One of the radios was recovered in a pawn shop in Sacramento and traced to two individuals who were in no way connected with the defendant herein, nor were they prosecuted. The defendant's mother, brother and sister-in-law all testified that on the night in question defendant stayed at the home of his brother and sister-in-law in Sacramento; that he was last seen at approximately 2 a.m.; that he was still asleep at the hour of approximately 6 a.m.; and that he could not have left the house without the knowledge of the brother or sister-in-law. The defendant testified in his own behalf and denied ever having been in Arbuckle. Upon cross-examination he was asked by the district attorney if he had ever been addicted to the use of narcotics. Over the objection of his counsel, the prosecution was allowed to introduce a conversation with Sheriff Mayfield in which the defendant stated that he had once been an addict but had used no narcotics for approximately eight months. At the close of the prosecution's case, the defendant moved for a directed verdict, and at the close of defendant's case a similar motion was made, both of which were denied.

It is defendant's contention that the evidence was insufficient to justify the verdict; that the court committed prejudicial error in admitting over his objection evidence relative to his prior addiction; and that the court erred in denying his motion for a new trial.

[1] Defendant's argument in support of his first contention is essentially that the mere showing of a fingerprint on the outside of the rear window of the store is insufficient to sustain a conviction of

burglary in the second degree. It is true, as he contends, that in each of the cases cited and relied upon by the State, something more than fingerprints of the defendant was presented. But that is also true in the present case. Here the print appeared upon the outside of a window at the rear of the drug store, which window was more than nine feet from the ground and protected by a screen on the outside; therefore, to gain access to the store through that window it was necessary for the person so doing to first obtain a ladder or other means to reach that height, and then to remove the screen before the window could be opened. Certainly such a factual circumstance removes the case from one wherein the fingerprints in question appeared upon an object more readily accessible than a window more than nine feet from the ground. Likewise such a situation is entirely different from that presented in the case of *People v. Flores*, 58 Cal.App.2d 764, 137 P.2d 767, the sole case cited and relied upon by defendant. It follows that under such circumstances the jury was entitled to draw the inference that the fingerprint left on the outside of the window was made by the defendant in burglarizing the store.

[2,3] It is well settled that a fact or facts relating to the guilt of an accused may be established by circumstantial as well as by direct evidence. The right to draw proper inferences from the evidence is a function of the jury, and so long as its conclusions do not do violence to reason or challenge credulity, an appellate court is without power to substitute its finding of the ultimate fact. *People v. Richards*, 74 Cal.App.2d 279, 168 P.2d 435.

[4-6] Defendant's second contention is equally without merit. Specifically he was asked, "Are you or have you been a user

of narcotics?" Counsel's objection to the question was overruled, and the defendant testified, "No, sir." Thereafter, for the purpose of impeachment and as noted above, the prosecution introduced evidence that the defendant in the course of a conversation with Sheriff Mayfield following his arrest, stated that he had been addicted to the use of narcotics, but that he had quit eight months before. We find no error in such interrogation by the district attorney. Here the evidence showed that a narcotic had been taken from a special, locked compartment; hence proof of the fact that defendant was or had been a user of narcotics would be evidence of the value of the drug to him as a user or as a seller, and hence was relevant on the issue of motive. The fact that such a question as was propounded by the district attorney called for an answer which might indicate other criminal offenses, did not of itself render the question improper or the evidence irrelevant. Again, as the court noted in the *Richards* case, the issue of motive is important, particularly in a case where the identity of the perpetrator of the offense is based largely on circumstantial evidence. The court there stated, "While motive constitutes no element of the crime itself, it must be conceded that in cases where circumstantial evidence is largely relied upon for conviction, as in this case, then motive becomes a matter of most earnest inquiry. 74 Cal.App.2d 279, 289-290, 168 P.2d 435, 442. Although such evidence as was elicited herein might be subject to argument as to remoteness, it cannot be said that under all of the circumstances it was irrelevant, or that the court erred in allowing its admission.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

145 Cal.App.2d 25

**In the Matter of the ESTATE of Jack
H. GREEN, Deceased.****Civ. 21848.****District Court of Appeal, Second District,
Division 1, California.****Oct. 8, 1956.**

Proceeding on objection to compromise which settled action against estate. The Superior Court, Los Angeles County, Harold P. Huls, J., made its order approving agreement of compromise and objectors appealed. The District Court of Appeal, Doran, J., held that record supported trial court's action in approving compromise by which plaintiffs agreed to pay \$300 to estate and to secure release of claim of grantors against estate and to release plaintiffs' claim against estate in exchange for conveyance of property valued at from \$12,500 to \$15,000.

Order affirmed.

1. Executors and Administrators ⇐269

Approval of a compromise is within discretionary power of administrator and of probate court and upon appeal judgment will not be disturbed unless an abuse of discretion is clearly shown.

2. Executors and Administrators ⇐269

In proceeding on objection to compromise which settled action against estate to enforce a resulting or express trust in property held in decedent's name and by which plaintiffs agreed to pay \$300 to estate and to secure release of claim of grantors against estate and to release plaintiffs' claim against estate in exchange for conveyance of property valued at from \$12,500 to \$15,000, evidence supported trial court's action in approving compromise.

Thomas A. Reynolds, Los Angeles, for appellants.

Ernest R. Mortenson, Pasadena, for respondent.

DORAN, Justice.

The record discloses substantial evidence to the effect that on May 11, 1950, the decedent, Jack H. Green, acquired by grant deed certain vacant property in Arcadia, California, from a brother and sister-in-law, William and Letha Green. The purchase price was \$2,500, instalment payments thereon being made by Martha and Stanley DeGroof, and not by decedent. At the time of decedent's death on December 3, 1954, there remained an unpaid balance of \$1,289.60.

Construction loans were secured by the decedent and later paid off by the proceeds of a California Department of Veterans purchase contract, instalment payments thereon being made by Martha and Stanley DeGroof, which payments included principal, interest, taxes, and the premium on a policy of life insurance policy on decedent's life. At the decedent's death a balance of \$6,937.60 was paid off in full by the life insurance, and on June 10, 1955 the Department of Veterans Affairs conveyed the property to "The Heirs or Devisees of Jack H. Green, Deceased".

It appears that the decedent had executed a purported "Last Will and Testament" which, however, was invalid, having been notarized instead of being attested by witnesses. In this document, introduced in evidence, the decedent states that "The house and lot known as 1600 So. 6th Ave., Arcadia, Calif, although in my name is in fact the property of Constant and Martha DeGroof (who has been my constant companions for a number of years because all monies invested in construction, repair, upkeep, insurances, etc. have been paid by the DeGroofs with not one cent invested by me. The time I have invested in this project was and is a gift to them as a token repayment of care and kind consideration of me by them. Household furnishings are also included on above."

An action was filed by the DeGroofs to enforce in the alternative a resulting or an express trust in the property. The time for the administratrix, decedent's daughter

Annetta Green Whiting, to answer or otherwise plead to this action was extended by stipulation in view of pending negotiations for compromise; no pleading was ever filed by the administratrix and a compromise agreement eventually was executed. Appellants, Gladys L. Green, a creditor, and Ernest Green, an heir at law, appeared as objectors at the hearing for approval of the compromise. The matter was thereafter taken under submission, written points and authorities were filed, and the compromise ultimately approved.

In approving the compromise, the trial court found that the value of the property in question was between \$12,500 and \$15,000; that the DeGroofs had "made payments on the purchase of said property believing that they were the owners of said property", and that Jack L. Green, deceased, "intended to hold title to the real property for the benefit of Stanley and Martha DeGroof". The court further found that "It is to the advantage and benefit of the estate and the parties interested in the estate that the suit (by the DeGroofs) against the Administratrix be compromised and settled", and that the proposed compromise "provides for a fair and reasonable settlement for said litigation".

The compromise thus approved, and which is objected to by appellants, provides that the DeGroofs shall pay to the Estate of Jack H. Green, the sum of \$300, and that the administratrix shall convey the property by grant deed to the DeGroofs. It is further provided that the DeGroofs shall hold the estate "harmless from any and all liability to William and Letha Green or for their account which * * * may have arisen by reason of the purchase of said property and * * * shall be required by secure * * * a full and complete release by said parties of any and all claims that said parties have filed against the estate". The DeGroofs "further release their Creditor's Claim heretofore filed against the estate".

It is appellants' contention that before a compromise is approved, it must appear that it is "of advantage and benefit to the Estate and those interested therein, that the administratrix in proposing it is exercising good sound business judgment and is not actuated by sentiment". More specifically, appellants argue that the consideration received "should be adequate and when it appears that the Estate is to receive \$300 for clear property having a value of from \$12,500 to \$15,000, the inadequacy of such consideration in and of itself is sufficient to reverse the order approving such a compromise".

Appellants further affirm that "The power to compromise does not include the power to make presents"; that in the present case, "under the guise of compromise", the administratrix is merely seeking to carry out the provisions of "decedent's abortive will". In this connection it is said that the administratrix did not sufficiently investigate or "impartially appraise the DeGroof's litigation"; that the court "did not evaluate" such litigation, and that "it is apparent that said action could be successfully defended".

[1,2] In view of the state of the record, the appellants' contentions must be deemed untenable. As stated in *Re Estate of Vedder*, 121 Cal.App.2d 402, 406, 263 P.2d 59, 62, the approval of a compromise "is within the discretionary power of the administrator and of the probate court, and upon appeal the judgment will not be disturbed unless an abuse of discretion is clearly shown". In the instant case, no such abuse of discretion has been shown. On the contrary, the record affords substantial evidence in support of the trial court's action.

The situation is not, as appellants contend, a mere matter of giving away estate property valued at from \$12,500 to \$15,000 for the small sum of \$300, which would, indeed, shock the conscience. If, as the proof indicates, the property in question was paid for by the DeGroofs, and because of such payment was considered by

the decedent to be "in fact the property of Constant and Martha DeGroof", it was not in equity and good conscience a proper asset of the decedent's estate but, as the trial court found, a situation where the decedent "intended to hold title to the real property for the benefit of" the DeGroofs. As pointed out in the respondent's brief, in the case of a resulting trust or an express trust, defense to the DeGroof's action would be difficult if not impossible.

The trial court had before it and considered both oral and documentary evidence; a fair and full hearing was had, and it cannot be said that the order approving the compromise was unreasonable or arbitrarily entered.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.



144 Cal.App.2d 735

Norwood S. TRONSLIN, Plaintiff and Appellant,

v.

CITY OF SONORA, a Municipal Corporation of the Sixth Class, Defendant and Respondent.

Civ. 8797.

District Court of Appeal, Third District, California.

Sept. 28, 1956.

Rehearing Denied Oct. 23, 1956.

Hearing Denied Nov. 21, 1956.

Suit to enjoin city from collecting annual service charge for sewer use. The Superior Court, Tuolumne County, J. A. Smith, J., denied the relief sought, and plaintiff appealed. The District Court of Appeal, Peek, J., held that, construed in light of record, judgment declaring landowner residing outside city limits to be entitled to make "connections" with city sewer line traversing his property "free

and clear of any costs, charges, taxes or license fees" entitled landowner to "use" system as well as to "connect" therewith; and held that even though no charge for use of system (as distinguished from connection charge) was being made prior to time when such judgment was entered, it was conclusive against city's right to make use charge under ordinance thereafter enacted.

Reversed and remanded with directions.

1. Constitutional Law ☞121(2)

Municipal Corporations ☞120

County residents not living within corporate limits of city did not constitute a class amenable to any ordinance passed by city council; and city, having agreed to allow such a county resident right to connect with sewer system, in exchange for right of way, could not, by ordinance, impair contract.

2. Judgment ☞524

Every judgment must be construed with relation to particular matter before court for adjudication.

3. Declaratory Judgment ☞390

Construed in light of record, judgment declaring landowner residing outside city limits to be entitled to make "connections" with city sewer line traversing his property "free and clear of any costs, charges, taxes or license fees" entitled landowner to "use" system, as well as to "connect" therewith; and even though no charge for use of system (as distinguished from connection charge) was being made when such judgment was entered, it was conclusive against city's right to make use charge under ordinance thereafter enacted.

Ross A. Carkeet, Sonora, for appellant.

William C. Coffill, Sonora, for respondent.

PEEK, Justice.

On April 18, 1936, plaintiff's predecessor in interest granted to the defendant city a right-of-way through grantor's land for a

distance of approximately 1,800 feet for the purpose of installing the main sewer line to defendant's primary treatment plant. Among other things, the agreement provided that as a part of the consideration for the granting of the right-of-way, the city would construct, at its expense, two "Y" branches, one near the grantor's home and the other at whatever point on his property he might select, each branch to be sufficient in size to service as many dwellings as could reasonably be expected to be built upon the premises. At the time of the execution of the agreement it was the practice of the city to charge the one sum of \$50 for any sewer connection made outside of the city limits. Subsequently this charge was progressively raised until it reached the sum of \$300 per connection. During this same period, however, no monthly or other periodical charge was made by the city for use of the system.

Approximately five years after the right-of-way agreement was executed, a dispute arose between plaintiff and defendant concerning the provisions of said agreement, and plaintiff filed an action seeking a declaration of the rights and obligations of the parties thereunder. At the conclusion of the hearing upon the issues so raised, the court specifically found that in consideration of the grant of right-of-way, the city was to install two connections of sufficient size as necessary to care adequately for such amount of sewage as might reasonably be expected to result from such number of houses or dwelling quarters as might reasonably be built "within a reasonable service area." The court then concluded that by virtue of the right-of-way agreement, the grantor became entitled to the "use" of two "Y" connections "for the purpose of disposing of the sewage which might reasonably be expected to result from" the houses that might reasonably be built on the land, "said sewage to flow into the city main sewer line" through said connections. The judgment which was thereafter entered followed generally the findings and conclusions and held that "the right of plaintiff to make such connections and service

such number of dwellings through each of said two six-inch 'Y' connections" was "independent of and free and clear of any costs, charges, taxes, or license fees levied by the resolutions, laws or ordinances of said defendant City of Sonora, a Municipal Corporation, for the connection of sewer lines from dwelling houses lying outside the corporate limits of the said City of Sonora, a municipal corporation, to the sewage disposal system of said defendant city; and subject only to the requirement that no lateral line shall be connected to either of said two six-inch 'Y' connections * * *" except upon notice in writing to the clerk of said city.

Thereafter plaintiff installed lateral lines and connected the same to the defendant's main line in accordance with the agreement as found by the court. Although numerous houses were thereafter built in said area and so connected, no charges were made or collected by the defendant for the use of said system from August 26, 1941, the date the judgment was entered, until June 15, 1953. On that date, by resolution, the defendant city adopted an ordinance wherein it was provided that an annual charge of \$24 would be levied against each user occupying a one-family dwelling outside of its corporate limits. Plaintiff thereupon filed his present action for an injunction, and from the judgment which was thereafter entered in favor of defendant he now appeals.

Plaintiff, in his attack upon the judgment, contends that a valid contract was entered into between the defendant city and his predecessor in interest by which the one granted a right-of-way across his lands in consideration of the right to connect with and use the system, and that the judgment in the prior action was a complete adjudication of such rights and obligations of the parties under the contract. In answer to plaintiff's contention, defendant first relies upon the rule that the building and maintenance of a sewage system by a political body is an exercise of its police power which cannot be bartered away, and second that in any event it was only the *right to connect* with the system as distinguished from the

right to use the system that was adjudicated in the prior proceeding, and hence the city was free to levy the service charge as it did.

[1] While in the abstract it may be said that defendant's first argument is a proper generalization of the rule, nevertheless we find no such question involved in the present proceeding. Although the installation of the sewage system was quite obviously an exercise of the police power of the defendant city for the public health and welfare of its residents, that is not to say that it was a like proceeding for the benefit of those persons residing outside of its corporate limits. Paraphrasing what we said in *Hobby v. City of Sonora*, 142 Cal.App.2d 457, 298 P.2d 578, neither plaintiffs nor all other residents of Tuolumne County constitute a class amenable to any ordinance passed by the Sonora City Council. The defendant city could no more compel plaintiff here, as a resident of the county, to connect with the sewer than could plaintiff compel the city to extend its lines into county territory and allow county residents to connect therewith. The system is wholly owned by one political subdivision, the city of Sonora; the plaintiff is a resident of another, the County of Tuolumne. The right-of-way across plaintiff's land could only have been acquired in one of two ways—either by condemnation or by contract. In the present case it may have been that the city, in lieu of condemnation of the property of plaintiff and payment to him of the damages which necessarily would have flowed therefrom or for one of many other reasons, decided in its discretion to escape what might have been a long and costly proceeding and to accomplish the same purpose by an agreement, i. e., that for the right to possess and use a way across plaintiff's land for the construction and maintenance of its sewer, it would give to plaintiff the right to connect with and to use the sewer. Its act in so doing could in no sense be said to have been an invalid exercise of its power to contract. And having entered into a valid contract, it could not,

by ordinance, impair the same. *City of Los Angeles v. Los Angeles City Water Co.*, 61 Cal. 65.

[2,3] Our conclusion as to the first contention necessarily points up defendant's second contention; that is, even if the contract was valid it only contemplated the right to connect with the system—not to the use of the system for the flowage of sewage therein; that such was the conclusion of the trial court in the prior case, and hence the defendant city could validly levy the charge here in question. The uncertainty, if it be such, in the present case would appear to stem from use of the word "connect" in the judgment in the prior action. However reference to what we have heretofore quoted from that proceeding would appear to dispel that uncertainty. Furthermore, the rule is well established that "* * * every judgment must be construed with relation to the particular matter before the court for adjudication." *Newport v. Superior Court*, 192 Cal. 92, 94, 230 P. 168, 169. It is the further rule that when a question of interpretation of a judgment has arisen, reference may be had to the whole record. 28 California Jurisprudence 2d, Sec. 77, page 713. Here the court found that plaintiff was entitled to connect with the system and concluded this meant the use of the two "Y" connections for the disposal of sewage which could reasonably be expected from the building of the houses contemplated, and the judgment declared that the right so granted by the easement was "free and clear of any costs, charges, taxes, or license fees, levied by the resolutions, laws or ordinances" of the defendant city.

Necessarily, therefore, since the contract was a valid exercise of the city's right of contract to provide adequate sewage facilities for its residents; and since the city could not impair its valid contract by ordinance, *City of Los Angeles v. Los Angeles City Water Co.*, 61 Cal. 65; and further since the rights of the parties to that contract were previously adjudicated by a judgment long since become final, this court is bound by the determination made therein.

The judgment is reversed, and the cause is remanded with instructions to enter judgment in favor of plaintiff as prayed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



145 Cal.App.2d 69

The PEOPLE of the State of California,
Plaintiffs and Respondents,

v.

Raymond MAAS, Defendant and Appellant.
Cr. 5625.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1956.

Defendant was convicted of feloniously burning grass, woods, brush-covered land, and slashing, which were not his property. The Superior Court of San Luis Obispo County, Charles F. Blackstock, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to establish the corpus delicti, so as to warrant the introduction of defendant's confession, that evidence sustained conviction, and that testimony of experts to effect that fire was of incendiary origin was properly admitted over objection that such testimony invaded the province of the jury.

Judgment and order affirmed.

1. Criminal Law ☞517(4)

In prosecution for feloniously burning grass, woods, brush-covered land, and slashing, which were not defendant's property, only slight evidence of the corpus delicti was necessary to warrant introduction of confession of defendant.

2. Criminal Law ☞517(4)

In prosecution for feloniously burning grass, woods, brush-covered land, and slashing, which were not defendant's property, evidence of the corpus delicti was not required to connect defendant with the crime in order to warrant introduction of defendant's confession.

3. Criminal Law ☞517(4)

In prosecution for feloniously burning grass, woods, brush-covered land, and slashing, which were not defendant's property, it was necessary only that facts reasonably showed that fire was of incendiary origin in order to prove the corpus delicti so as to warrant introduction of defendant's confession.

4. Criminal Law ☞517(4)

In prosecution for feloniously burning grass, woods, brush-covered land, and slashing, which were not defendant's property, neither a showing as to the identity of the author of the crime nor the method by which the fire was started was an essential of the corpus delicti, so as to warrant introduction of defendant's confession.

5. Criminal Law ☞517(4)

In prosecution for feloniously burning grass, woods, brush-covered land, and slashing, which were not defendant's property, evidence was sufficient to establish the corpus delicti, so as to justify admission of defendant's confession.

6. Fires ☞5

Evidence sustained conviction for feloniously burning grass, woods, brush-covered land, and slashing, which were not the property of the defendant.

7. Criminal Law ☞470

In prosecution for feloniously burning grass, woods, brush-covered land, and slashing, which were not defendant's property, testimony of experts to effect that fire was of incendiary origin was properly admitted over objection that the admission of such testimony invaded the province of the jury.

Fred A. Schenk, Jr., Cayucos, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

Appeal by defendant from a conviction of having feloniously burned grass, woods, brush-covered land and slashing which were not his property, and from the order denying his motion for a new trial. His application for probation having been denied, he was remanded to the custody of the sheriff pending his acceptance by the Youth Authority.

He bases his appeal on two propositions, to wit:

(1) Prejudicial error in the court's refusal to exclude the testimony of the witness Erhart as to appellant's confession prior to a demonstration of the *corpus delicti*; (2) prejudicial error in allowing expert witnesses to usurp the functions of the jury by allowing such witnesses to testify that in their opinions the fire in Toro Creek Canyon on November 4 was not of accidental origin.

Appellant's Behavior

Before considering the first assignment it is pertinent to observe defendant's contradictory situations resulting from his extrajudicial utterances and his testimony on the stand. Ten days after the fire he made a free and voluntary statement concerning his movements on the day of the fire to Mr. Henry Erhart and the deputy district attorney. He told them that on November 3 in the fifteen-cent store at Atascadero he purchased two candles, took them home and burned one to see how long it would endure; that on the morning of the fourth, about eight o'clock, he drove his car to Toro Creek Canyon, placed one of his candles in the brush and grass, wrapped paper around it, fifteen feet from the road, lighted it and returned home where he remained until ten o'clock; he then visited his grandmother's home where he picked apples until 12 noon when he saw smoke rising at the place he had set the candle.

Appellant accompanied Mr. Erhart, Mr. Dresser, a ranger, and Deputy Sheriff Miller to Atascadero in quest of the variety of candle he had used in Toro Creek Canyon to start the fire. He pointed to orange-colored candles, 18 inches long, two in a box. They returned to his grandmother's place and walked toward the locale of the fire. He finally designated the scene of his crime and told the officers he had set fire to the grass with the candle because he was mad at his uncle. He said the fire was on Baldwin's land.

Appellant conferred with Deputy Probation Officer Woods prior to the opening of the trial. At Woods' request, the boy told the officer that he left his work, drove to the canyon, set the candles in the bush, returned to his grandmother's and picked apples until he saw the smoke; that he then vainly attempted to communicate with the fire station at Santa Margarita; that he jumped on one of the trucks and went to the fire and fought it. He described to Woods how he took a piece of newspaper, punched a hole through it, poked it down in a bush on Baldwin's land so that, as the candle burned down, it would ignite the paper; that he did it to get even with Baldwin who had made him promises but never did "come across with them."

Appellant had been a companion of Francis Tillman as fire fighter in the State Forestry Service at Santa Margarita Station. On four or five occasions during their joint operations, appellant told Tillman that he liked to start fires; liked to see them burn and make the job last longer; that he said a candle might be used to start a fire so that one might have four hours to get out. All such conversations preceded November 4, 1955, but the witness thought he "was just kidding."

Corpus Delicti Was Proved

Such confessions or admissions and statements were resisted when offered by the prosecution on the ground that the *corpus delicti* had not been established. A review of the circumstances of the fire discloses that a crime was committed in

Toro Canyon on November 4, 1955, and that the conduct of appellant and his admissions connect him with that crime.

While it is true that appellant at his trial denounced his admissions made to the officials and to Tillman, and explained that he had admitted his guilt because he was getting homesick and could not get in touch with anybody, yet, the conflicts in his admissions and his testimony are not material in view of the fact that the sufficiency of the evidence to support the judgment is not an issue.

In the absence of direct testimony to prove that a crime was committed on November 4, 1955, in Toro Canyon, it is necessary to detail the movements of appellant on the day of the fire as well as the facts relating to the climatic and atmospheric conditions obtaining in the vicinity of Toro Canyon November 4, 1955.

Mute Evidences

Appellant resided with his parents in Toro Canyon. Their home was upstream from that of Mrs. Baldwin, mother of Mrs. Maas, who lived with her son Richard, and below them was the Manuel Roza ranch home. November 3rd and 4th were appellant's days off from his place of employment by State Division of Forestry at the Santa Margarita fire fighting station.

Noel Dodd who worked for the Standard Oil Company went to Toro Canyon at 5:30 a. m. on November 4 to check pressure on the oil line. He remained at one place about 20 feet from the road until noon. He saw no automobiles enter the area but he believed Mrs. Maas' car left it.

Manuel Roza had two dogs that always barked at strange cars on the adjacent roadway, but there was no such incident on the morning of the 4th. About noon Manuel noticed the smoke from the burning area. He rode a horse to the fire, saw no one and returned home. At the same time, Jack Batson, a fire fighter with the Federal Forest Service, was notified that there was a fire. He arrived at the scene at 12:45 p. m. on the northwest side of Toro

Creek road, found no one near but observed that about one hundred acres had burned. Robert Righetti of the Federal Forest Service arrived at Toro Creek at 1:00 p. m. On his way he saw appellant at his grandmother's ranch about a quarter of a mile from the fire, standing by a blue automobile. Righetti parked his conveyance near the truck which had been driven to the scene by Jack Batson and drove the truck down the canyon in search of a bulldozer to operate on the ridge tops. He observed fresh tire tracks on the road made by a common, commercial tire unlike the tires used by the Forest Service cars. In driving down the canyon to Roza's place, Righetti found the two gates closed and he observed that the three-mile area south of the fire was rugged, steep and covered with luxuriant brush through which people do not ordinarily travel.

When Mr. Dalen, Assistant for the United States Forest Service, arrived at the fire about 1:00 p. m., he concluded that the fire had originated in the flat area adjacent to the Toro Creek Road.

The facts that Mr. Dodd saw the Maas car leave the premises, that both Mr. and Mrs. Maas testified they had not gone down the canyon past the Baldwin ranch that morning, and Mr. Dresser opined that only one car had been present before Mr. Batson arrived at 1:00 p. m. are persuasive evidence of appellant's having preceded the fire fighters to the area of the vicinity of the fire which was rough, rocky and inaccessible.

Appellant knew the territory intimately. He saw smoke rising from the Toro Canyon about noon. He telephoned his mother on the Baldwin-Maas local wire, went some distance for a telephone to call his father, then tried to call Santa Margarita Station (which had closed for the season), then made his way to the fire where he spent the rest of the day fighting the blaze. But on the 14th of November he confessed to the witness Erhart that he had started the fire.

Atmospheric and Topographical Evidence

That a fire could not have started from a cigarette stump, a cinder from an exhaust or from sunlight through a glass is a reasonable conclusion from the facts given in evidence. It was established that the temperature in the canyon was 74 degrees and the humidity was 33. No lightning had occurred that day or during the two days preceding; the fire danger index of the San Luis Obispo area on November 4, 1955, was 15 which means that a fire could not have started easily. Competent witnesses who were there about 1:30 p. m. testified that the fire had not resulted from accidental means but had been caused by human agency. It was proved that in a rough, isolated area, with climatic conditions as they were, it would have been extremely difficult for a fire to start in the grasses and brush from any ordinary, accidental cause. Searches were vainly made at the fire's origin for burnt matches, cigarette stumps and glass.

It was the opinion of Maurice L. Davis, Forest Fire Dispatcher for the California Division of Forestry, that the temperature and humidity of the Toro Creek are basically the same as that of the City of San Luis Obispo Fire Station during November. Records are kept by the United States Forest Service at San Luis Obispo for the purpose of determining a fire danger index. They are used to ascertain existing conditions. The index is based upon the wind, its temperature and the humidity content of the fuel. The index rating is made out every day of the fire season, and that included November 4. The fire danger index for Toro Creek was 14 on November 3, 1955, which was a medium fire danger. On November 4, the fire danger index was 15, under which condition a fire does not start easily from accidental means. While the temperature and humidity at Toro Creek were not taken on November 4, Mr. William T. Dresser, Chief Ranger, was there. He testified that at 1:30 p. m. he observed the general weather conditions and was of the opinion that the

fire had not resulted from accidental means but had its origin with human agency; that it was in an isolated area, not generally used, was topographically inaccessible and the humidity was relatively high, which rendered it difficult for a cigarette stump or a spark to ignite the living or dead grass or thicket. Nolan O'Neal, a university graduate who had worked for the Forest Service of California for twenty years, was familiar with Toro Creek Canyon, and testified that with a humidity of 33 and a temperature of 74 a lighted cigarette stub would not have ignited the grasses and light brush; that they would have absorbed enough moisture to require an open flame to start a fire.

Admission of Confession Not Error

Appellant vainly insists that it was prejudicial error to admit evidence of his confession prior to the receipt of proof of the corpus delicti. The answer to such contention is that the record abounds in competent proof of a burning of the grasses and thickets in Toro Canyon on November 4, 1955, by a human agency. Since it could not have resulted from accident, it necessarily was the fruitage of purpose and appellant came forth to say that he was the author of the holocaust at the designated time and place.

[1-4] It requires but slight evidence of the corpus delicti to warrant the introduction of a confession and it need not connect the accused with the crime. *People v. Day*, 71 Cal.App.2d 1, 3, 161 P.2d 803; *People v. Fierro*, 58 Cal.App.2d 215, 220, 136 P.2d 94; *People v. Seymour*, 54 Cal.App.2d 266, 275, 128 P.2d 726; *People v. Hubbell*, 54 Cal.App.2d 49, 57, 128 P.2d 579. It is necessary only that the facts reasonably show that fire was of incendiary origin. *People v. Hays*, 101 Cal.App.2d 305, 311, 225 P.2d 600. Such crimes are usually established by circumstantial evidence. *People v. Hays*, *supra*; *People v. Sherman*, 97 Cal.App.2d 245, 249, 217 P.2d 715. Also, neither the identity of the author of the crime is an essential of the corpus delicti, *People v. Chan*, *Chaun*, 41

Cal.App.2d 586, 589, 107 P.2d 455, nor is the method by which the fire was started. *People v. Hays*, supra.

[5,6] In view of the proof that no lightning had struck in the canyon for three days, that the atmospheric conditions there rendered accidental ignition of the grass by a spark, a cast-off match or stub utterly improbable, that the fire started in an isolated, rough area, it would be unreasonable not to find that the fire had its genesis in the mind and from the hand of a purposeful human being. Moreover, the testimony of Mr. Maas that he left home at 7:00 a. m. by the upper road out of the Toro Canyon, of Mrs. Maas that she had not gone past the Baldwin place the morning of the fire, of Richard Baldwin that he left Toro Canyon at 6:45 a. m., of Mr. Roza who lived nearest to the site of the initial fire and testified that he was in his home painting and that his alert dogs did not bark prior to noon, of the Standard Oil employee who testified that he went to work at 5:30 a. m. at a point within 20 feet of the road and continued there until noon without seeing any car come into the area—only the Maas car go out, the stage is set and all the props are in order to view the advent of the villain. Proof of his identity by circumstantial evidence is unnecessary. He marches to the center of the stage and announces that he is Raymond Maas; that he started the fire in Toro Canyon, that he was resentful toward his uncle and by his arson had evened the grudge. The confession was properly admitted and it completed the circle of proof and warranted the judgment of conviction.

[7] Appellant insists that the testimony of the experts to the effect that the fire was of incendiary origin invaded the province of the jury and was error because it was concerning a matter upon which persons of common understanding could have formed an intelligent judgment. In *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 843, 205 P.2d 1037, 1044, it was held that the "possible causes of warehouse fires are sufficiently beyond the common experi-

ence of the ordinary judge or juror to justify the admission of expert opinion testimony on that issue." It is not likely that a juror has had sufficient experience to gauge the probabilities of natural combustion solely by reason of information relative to the material burnt, the temperature and humidity of the area and to its topographical features.

The judgment and the order denying the motion for a new trial are affirmed.

FOX and ASHBURN, JJ., concur.



145 Cal.App.2d 29

Allen WALCHEL, Plaintiff and Appellant,
v.

CORONADO MARINE WAYS, a limited
partnership, Warren H. Powers, Irwin
Powers, et al., Defendants,

Warren H. Powers, doing business as Coro-
nado Marine Ways, Defendant and
Respondent.

Civ. 5439.

District Court of Appeal, Fourth District,
California.

Oct. 8, 1956.

Action for personal injuries sustained by plaintiff when he fell off 28 inch high scaffold after defendant started a winch and moved a ship which plaintiff was painting. The Superior Court, San Diego County, William A. Glen, J., entered judgment for plaintiff and he appealed, requesting a new trial on the element of damages only. The District Court of Appeal, Griffin, J., held that an award of \$500 damages to plaintiff who suffered sickness of the stomach, pain in the neck and lower spinal region, contusions of his back and shoulders, inability to do heavy work, and \$149 in

doctor, hospital and X-ray bills, was not grossly inadequate.

Judgment affirmed.

1. Trial ☞89

Where there was no attempt on part of counsel for plaintiff to have a doctor attempt to segregate injuries caused by other accidents in which plaintiff was involved from the injuries sustained in the accident for which suit in which doctor was testifying was brought, and there was no indication that the doctor could segregate such injuries, doctor's testimony was properly stricken.

2. Damages ☞130(4)

Award of \$500 damages to a man who suffered sickness of the stomach, pain in the neck and lower spinal region, contusions of his back and shoulders, inability to do heavy work, and \$149 in doctor, hospital and X-ray bills, was not grossly inadequate.

Clinton F. Jones, Escondido, for appellant.

McInnis, Hamilton & Fitzgerald, San Diego, for respondent.

GRIFFIN, Justice.

This is an appeal by plaintiff from a judgment against defendant Warren H. Powers, doing business as Coronado Marine Ways, in the sum of \$500, on the ground that the damages awarded were grossly inadequate. Plaintiff requests that a new trial be granted on the element of damages only.

Defendant operated a yard wherein boats were towed from the water on cradles by means of a rail and a power-operated cable winch. Just prior to June 4, 1951, plaintiff's fishing boat (46 ft. in length) was resting on a scaffold on the ways in defendant's yard, on a day-rental basis. He was painting the name on the stern by standing on a scaffold erected on horses 28 inches high. This scaffolding was not visible from the winch. On June 4, 1951, the

owner of defendant company, apparently without warning plaintiff, started the winch and plaintiff fell to the ground but landed on his feet, causing some injury to him.

It appears that on November 4, 1951, about five months later, plaintiff was again involved in a serious automobile accident and sustained severe injuries resulting in a Federal Court judgment in his favor in the sum of \$12,312.94. It also appears that plaintiff, in 1936 or 1937, was involved in an automobile accident which pulled his shoulder loose and necessitated surgery, i. e., bits of muscle were taken from his leg, holes were bored in his shoulder, and the bones were tied together with the muscle; that in 1949, in Detroit, he fell to the floor across a sawhorse while working on a scaffolding plastering a ceiling. He severely injured his back and was seven weeks in the hospital. He then came to California. In 1951, he was treated by a surgeon in Long Beach and fitted with a back brace. While working on his boat on June 4, 1951, he had been wearing this brace three to four days a week. After the fall on that day he saw a Dr. West or a Dr. Carpenter, who examined him. The doctor stated that there were contusions of his shoulders and back but no treatment was given. He was referred to another doctor for physical therapy for some period but did not complete the course of treatments prescribed. In September, 1952, he was hospitalized in Long Beach as a result of a fall on his fishing boat causing his right leg and right hip to swell. He was later sent to a Marine hospital in San Francisco and was not able to walk or stand. He was paralyzed from the waist down and could not raise his arms. He left the hospital on crutches.

The injuries described by plaintiff, as a result of his fall on June 4, 1951, were sickness of the stomach, coughing causing pain in the neck and lower spinal region, contusions on his back and shoulders, headaches, instability of his right leg, dizziness, impairment of hearing, etc., and inability to do heavy work.

He stated that just before June 4, 1951, he felt well enough to go back to work, had applied for a Union card, and after the claimed accident he went fishing during the summer months but claimed this was with considerable pain. The special damages here claimed were \$149 in doctor, hospital and X-ray bills.

The only medical testimony produced by plaintiff as to the particular injury on June 4, 1951, was one doctor who testified that on August 27, 1951, plaintiff came to his office and claimed that his arms felt numb and his shoulders would "crunch and grind", his neck "popped", the grip in his hands was weaker than before the injury, and that upon turning his head "shock" would go down both arms and his back; that the left leg was getting number all the way down; and that he limped on that side. This doctor said X-ray pictures were taken and he found no pathology at all and no change that he could attribute to the injury of June 4, 1951; that plaintiff was worried but did not appear to be in any acute pain; that he observed an old scar on the surface of his right shoulder from a former injury but the shoulder, reflexes, elbows and hands were normal; that plaintiff complained of pain in his back and its motion was limited in all directions about 50 per cent but an electromyelogram was taken and it reflected no nerve disease involving the lower extremities; that he felt there was nothing for him to offer plaintiff so he referred him to a Dr. Werden for examination and opinion; and that he had a report from him on January 7, 1952. Dr. Werden was not called as a witness for plaintiff.

[1] Plaintiff called as his witness a Dr. Greenwood, who never saw plaintiff until April 7, 1954, nearly two and a half years after the automobile accident in November, 1951. He testified in full as to what he found in reference to plaintiff's condition at that time, i. e., plaintiff gave a history of his previous accidents and the doctor was asked the result of his tests. Objection was made because it was impossible for

such a witness to testify that the condition found was the result of the boat injury on June 4, 1951. Considerable argument ensued (out of the presence of the jury) and it was conceded that this doctor testified to these same proffered findings in the Federal Court where plaintiff received a judgment for \$12,312.94, without the witness endeavoring to segregate the portion of the injuries claimed to have been caused by that automobile accident and that claimed to have been caused by the other accidents. By consent, a limited amount of testimony was allowed as to plaintiff's present condition as disclosed by the examination of Dr. Greenwood. He concluded his testimony with the opinion that plaintiff was then totally disabled and that the only thing that might improve him was a spinal fusion of the two lower vertebrae and that he so testified in the Federal Court without endeavoring to segregate the possible causes of the present condition of plaintiff. The doctor was not asked by counsel for plaintiff if he could so separate the portion of plaintiff's claimed injuries caused by the accident here involved. Thereafter, on a motion to strike this doctor's testimony, the court concluded that from this testimony there was no possible means, except by speculation, by which the jury or the court could segregate them and granted the motion, informing the jury as to his reasons.

The main attack on this appeal is directed to this ruling. Plaintiff cites such authorities as *Katenkamp v. Union Realty Company*, 36 Cal.App.2d 602, 98 P.2d 239; *Ash v. Mortensen*, 24 Cal.2d 654, 150 P.2d 876; and *California Orange Co. v. Riverside Portland Cement Co.*, 50 Cal.App. 522, 528, 195 P. 694.

We conclude, under the circumstances of this case, that the ruling of the court was proper. There was no attempt on the part of counsel for plaintiff to have the witness attempt to segregate the injuries caused by the other accidents from the one here involved, and there is no indication that he could do so. From the injuries described by the doctor, another verdict in the same

amount allowed in the Federal Court for the same injuries, may well have been returned. To base a verdict upon the testimony of this medical witness as to the amount of the injuries caused by the accident here involved would, indeed, be speculative. The jury was told, in its instructions, that its verdict must be based on competent evidence and it is not allowed to speculate, either on the question of liability or damages.

[2] There was some medical evidence presented, as well as testimony of the plaintiff, as to the injuries he claimed resulted from the instant accident. The jury and the trial judge, on a motion for new trial, fully considered the amount of the award based upon this evidence. Their finding in this respect, from the evidence produced, cannot be disturbed on appeal. *Miller v. Pacific Constructors, Inc.*, 68 Cal.App.2d 529, 157 P.2d 57; *Lay v. Pacific Perforating Company, Ltd.*, 62 Cal.App.2d 233, 144 P.2d 395. Judgment affirmed.

BARNARD, P. J., concurs.



145 Cal.App.2d 92

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Darnes JOHNSON, Defendant and
Appellant.
Cr. 1088.

District Court of Appeal, Fourth District,
California.

Oct. 11, 1956.

Defendant was convicted by the Superior Court of San Diego County, John A. Hewicker, J., for statutory rape, and appealed. The District Court of Ap-

peal, Griffin, J., held that evidence was sufficient to support conviction.

Judgment affirmed.

1. Rape \S 261(1)

In prosecution for statutory rape, fact that victim made no complaint or outcry was not determinative of issue of defendant's guilt, but only a circumstance to be considered by trial court. West's Ann.Pen.Code, \S 261, subd. 1.

2. Criminal Law \S 572

Evidence was sufficient to support conviction of statutory rape and justify rejection of defendant's purported alibi by trial court. West's Ann.Pen.Code, \S 261, subd. 1.

Alpha L. Montgomery, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant (colored and aged 23 years) was charged with committing statutory rape, Sec. 261, subd. 1 Penal Code upon a white girl, aged 13 years, in two separate counts on two separate occasions. He was convicted by the court sitting without a jury only on one count, i. e., on the date of November 6, 1955, and sentenced to State's prison. The only question presented is the sufficiency of the evidence to support the finding.

The complaining witness claimed that an act of sexual intercourse took place between them on the evening of November 6, 1955, at her home, while her mother was away; that on that occasion she returned a brown leather jacket to him that he had loaned to her on a previous occasion; that previously, on October 14, 1955, she had a similar act of sexual intercourse in defendant's car near Torrey Pines. She testified that another boy (white) now deceased, came to her mother's home to pick her up, and told the mother he was

Darnes Johnson; that she and the boy later met the real Darnes Johnson, defendant herein, and the complaining witness and defendant went out together on occasions and would drink white wine. A pelvic examination on November 30, 1955, indicated an old laceration of the hymen but there was no evidence of a fresh injury. The complaining witness testified she made no complaints about these occurrences until approached by a school official about defendant, and the official asked if she had been out with defendant and had intercourse with him; that she first denied it and later she thought defendant had told everything so she did too. She admitted calling defendant on the telephone at his home on several occasions.

The mother of the complaining witness testified she did not know her daughter was going out with defendant but believed it was a white boy who was introduced to her as Darnes Johnson; that the white boy came to her house and picked up her daughter on several occasions; that on one occasion she saw her daughter wearing a brown leather jacket which was not hers.

Defendant produced a witness who testified he was with the defendant on October 14th at a football game at the time indicated by the complaining witness, and that the complaining witness was not there. Other witnesses testified in support of this claimed alibi. Defendant denied having sexual intercourse with the complaining witness and said that he had never been in her house and did not know where she lived; that she was in his car on one occasion, with others, in September, 1955; that after she called him on the telephone, which was a common occurrence, on one occasion he suggested they go to a beach party in La Jolla; that he did not take her home; that he had no brown leather jacket but he had a brother-in-law who did, and he wore it sometimes; that he had an address book with her address in it; and that on November 6, 1955, he had been separated from his wife for a short time and on that evening had taken his two children over to his wife's residence from

his mother's residence and then returned to his home.

Defendant's wife testified in his behalf and said the complaining witness had called defendant on a dozen occasions; that she called the complaining witness' mother and complained; and that defendant owned a leather jacket in the month of June.

The mother of the complaining witness testified that a voice called over the telephone for the complaining witness on many occasions; that the name given was Darnes; that believing he was the white boy she had met she allowed her daughter to go out on several occasions; that after the preliminary hearing this same voice called and told her if she testified at the trial she would be sorry; that she received a call from one whose voice sounded like Mrs. Johnson, and she was asked if she knew her daughter was going out with defendant, her husband; that she told the mother he was colored and had two children; that the complaining witness' mother complained to the police and they came to see her about it.

Another witness testified he was present in a car with defendant when he picked up the complaining witness and one Lee Evans, a white boy; that he had seen a white girl with defendant on four or five other occasions; and that he just assumed it was the complaining witness.

[1,2] The fact that the victim made no complaint or outcry is not determinative of the issue. It was only a circumstance to be considered by the trial court. Although corroboration is not required, there are surrounding circumstances pointing to the guilt of defendant. There was sufficient evidence to support the conviction and to allow the court to reject the purported alibi of defendant. *People v. Meraviglia*, 73 Cal.App. 402, 238 P. 794; *People v. MacDonald*, 167 Cal. 545, 140 P. 256; *People v. Stangler*, 18 Cal.2d 688, 117 P.2d 321.

Judgment affirmed.

BARNARD, P. J., concurs.

145 Cal.App.2d 33

Norman Karl SPURGEON, Plaintiff and
Respondent,
v.

Susie Mitchell SPURGEON, Defendant and
Appellant.
No. 16873.

District Court of Appeal, First District,
Division 1, California.

Oct. 9, 1956.

Action for divorce. From an order of the Superior Court, City and County of San Francisco, William T. Sweigert, J., denying cross motions by the plaintiff to modify a divorce decree to eliminate support requirement and by the defendant to modify the decree to increase the support of children and to obtain attorney's fees and costs the defendant appealed. The District Court of Appeal, Bray, J., held that wife was not denied due process of law on the ground that she was deprived of the right to produce evidence in support of her motion and that the refusal to modify the decree was not an abuse of discretion under the evidence.

Order affirmed.

1. Constitutional Law ⇨314

On cross motion by husband to modify divorce decree for payment of \$50 per month alimony and by wife to modify the decree to increase the support for children, wife was not denied due process on the ground that she was allegedly deprived of the right to produce evidence in support of her motion.

2. Divorce ⇨296, 312.6(4)

The granting and refusing of support in divorce actions is largely in the discretion of the trial court, and before the appellate court will interfere it must clearly appear upon the face of the entire record that such discretion has been abused.

3. Divorce ⇨309

Evidence did not establish an abuse of discretion by the trial court in refusing to modify the decree of divorce by increas-

ing the support for children awarded to the wife.

4. Divorce ⇨188, 223

The awarding of attorney's fees and costs in divorce actions is largely in the discretion of the trial court. West's Ann. Civ.Code, § 137.5.

5. Divorce ⇨223, 312½

On motions in divorce action to modify provisions of decree respecting support of children of the parties, denial of attorney's fees and costs to the wife was not an abuse of discretion. West's Ann.Civ. Code, § 137.5.

Phil F. Garvey, San Francisco, for appellant.

P. J. Kearns, San Francisco, for respondent.

BRAY, Justice.

The trial court denied cross motions (1) by the plaintiff to modify a decree of divorce granted December 15, 1953, by eliminating therefrom the requirement that he pay defendant \$50 per month alimony, and by transferring the physical custody of the two minor children of the parties to him (the legal custody is in both parties), and (2) by defendant to modify the decree to increase the support of each child from \$55 to \$75 per month and to obtain attorney's fees and costs. Defendant appeals.

Questions Presented.

1. Was defendant denied due process of law?

2. Did the court abuse its discretion in denying (a) the increase in support, (b) attorney's fees and costs?

1. Due Process.

There is no merit to this contention. The hearing of both motions began by the court suggesting that plaintiff's motion be heard first. (It was filed first.) Defendant made no objection. Plaintiff without objection examined defendant as to her income and living situation. De-

fendant's counsel then examined her on the same subject. Plaintiff was then examined in his own behalf and cross-examined by defendant. A couple of times during this cross-examination the court stated that it appeared from the testimony of the parties that plaintiff was not in a position to pay more money for the support of the children. In each instance, however, the court said his statement was without prejudice to further examination of plaintiff by defendant or the introduction of further evidence. Defendant did further examine plaintiff. When the cross-examination of plaintiff by defendant was concluded, the court stated it was prepared to rule. Both parties testified as to their respective financial situations. The court said, " * * * we have got the picture, I think, don't you think so?" "Now, the wife, as I understand it, the wife has a motion here to increase?" All defendant said was that she would like to further cross-examine plaintiff. She did so. Plaintiff submitted the matter. Defendant said nothing. The court then ruled. Defendant did not object to the fact of ruling, nor offer any further evidence, nor request the opportunity to present more evidence or even to argue the matter. The statement in defendant's brief that she was deprived of the right to produce evidence in support of her motion is not borne out by the record. Apparently defendant contends that the court should have ruled first on plaintiff's motion and then heard the evidence all over again on defendant's motion. There is no such requirement of law, and were there, defendant's acquiescence in the court's ruling on both motions without any request for further hearing would prevent her from claiming error. A reading of the record clearly shows that the court and both parties understood that the testimony was to, and did, apply to both motions. There was no deprivation of due process.

2. Discretion.

(a) Support.

Plaintiff's income since the date of the divorce decree has increased only \$4 per

month. His take home pay is \$311 per month. His expenses each month, including the \$160 he has regularly paid defendant and the insurance premiums ordered by the decree equal \$307 per month, leaving \$4.19 per month. He owes debts of approximately \$1,300 accumulated during the marriage. He remarried in December, 1953. His present wife earns approximately \$190 per month take home pay plus an \$18.75 bond every six weeks. He pays part of the rent of their home and of the grocery bills, as does she.

Defendant, at the time of the decree, was unemployed. She now earns \$25 per week. She and the children are living in the home awarded her in the decree. She pays \$31 per month on an F.H.A. loan for repairs on the house, also \$47.32 per month on the lien, subject to which the house was awarded her. One of the children needs orthodontia.

[1-3] That the granting and refusing of support is a matter which lies largely in the discretion of the trial court and that before the appellate courts will interfere, it must clearly and affirmatively appear upon the face of the entire record that this discretion has been abused, is so well settled as not to require the citation of authority. Defendant concedes this by citing *Baldwin v. Baldwin*, 28 Cal.2d 406, 413, 170 P.2d 670. The evidence here shows one of those unfortunate situations which occur when parties having children are divorced and there just isn't enough money to meet the needs of the children and the parents living separately. It should be pointed out, too, that as far as plaintiff is concerned there has been no appreciable change in his financial situation from what it was at the time of the granting of the decree. Defendant, on the other hand, is now employed. With a \$4.19 margin per month with which to meet outstanding bills, we cannot say that the court should have ordered him to pay more support, even though the combined total of defendant's earnings and plaintiff's support payments hardly meet the require-

ments of two growing children. We see no abuse of discretion here.

(b) Attorney's Fees and Costs.

[4,5] As in the case of support, the awarding of attorney's fees and costs is likewise largely in the discretion of the trial court. Civ.Code, § 137.5. What we have said concerning the absence of enough money to go around to meet an increase in support, applies here. Neither side can afford the payment of attorney's fees and costs. Shortly before this proceeding, plaintiff had made an effort to get sole custody of the children and a court had ordered him to pay defendant \$300 attorney's fees and \$73 costs in resisting that effort. Apparently the court took this fact into consideration, as well as plaintiff's present inability to pay. We see no abuse of discretion.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



144 Cal.App.2d 827

Joseph TRACY and Marlan Tracy, Plaintiffs
and Appellants,

v.

Anton J. FERRERA and Rena Ferrera et al.,
Defendants and Respondents.

No. 16887.

District Court of Appeal, First District,
Division 2, California.

Oct. 5, 1956.

Trespass action. From judgment of Superior Court, City and County of San Francisco, Frank T. Deasy, J., resulting from suspension of defendants' demurrer to amended complaint without leave to amend, and from granting of defendants' motion for judgment on the pleadings, plaintiffs

appealed. The District Court of Appeal, Draper, J. pro tem., held that where certain counts of complaint alleged that, within past three year period, defendants, upon their own land, had maintained their premises without proper gutters or drainage, so as to deflect rain water from defendants' premises upon those of plaintiffs, and had maintained pipes and furnaces so as to cause emission of noxious odors and fumes upon plaintiffs' property, counts were sufficient, in view of fact that three year statute of limitations did not bar relief, and despite their vulnerability to demurrer for uncertainty.

Judgment reversed with directions.

1. Trespass ⇨40(4)

Where complaint alleged that between certain period, while plaintiffs were absent, defendants had erected walls, foundations, pipes and vents upon plaintiff's property, cause of action was in trespass.

2. Limitation of Actions ⇨55(5)

Where original complaint in trespass action was not filed until more than three years after defendants had allegedly erected walls, foundations, pipes and vents on plaintiffs' property, and such fact appeared from complaint itself, applicable three-year statute of limitations would bar relief. West's Ann.Code Civ.Proc., § 338, subd. 2.

3. Limitation of Actions ⇨55(6)

Where encroachments of a permanent nature are erected upon one's land, remedy is by action in trespass for all damages suffered, past as well as prospective, and entire cause of action accrues when trespass occurs. West's Ann.Code Civ.Proc., § 338, subd. 2.

4. Nuisance ⇨48

Waters and Water Courses ⇨126(1)

Where certain counts of complaint alleged that, within past three year period, defendants, upon their own land, had maintained their premises without proper gutters or drainage, so as to deflect rain water from defendants' premises upon those of plaintiffs, and that defendants had so main-

tained pipes and furnaces as to cause emission of noxious odors and fumes upon plaintiff's property, counts alleged maintenance of nuisance. West's Ann.Civ.Code, § 3479.

5. Limitation of Actions ⇨178

Where complaint, which alleged maintenance of nuisance by adjoining landowners, alleged that acts occurred within past three year period, statute of limitations was not, on face of complaint, a bar to causes of action so asserted. West's Ann.Code Civ.Proc., § 338, subd. 2; West's Ann.Civ.Code, § 3479.

6. Judgment ⇨606

Where landowner maintained his premises without proper gutters or drainage so as to deflect rain water from his premises upon those of adjoining landowner, and also so maintained pipes and furnaces as to cause emission of noxious odors and fumes upon adjoining landowner's property, adjoining landowner could treat other's use of his land as a continuing nuisance, and bring successive actions until it was abated. West's Ann.Civ.Code, § 3479; West's Ann.Code Civ.Proc., § 338, subd. 2.

7. Nuisance ⇨48

Waters and Water Courses ⇨126(1)

Where certain counts of complaint alleged that, within past three year period, defendants, adjoining landowners, upon their own land had maintained their premises without proper gutters or drainage, so as to deflect rain water from defendant's premises, upon those of plaintiff, and had so maintained pipes and furnaces as to cause emission of noxious odors and fumes upon plaintiff's property, counts were sufficient to state cause of action, despite their vulnerability to demurrer for uncertainty. West's Ann.Code Civ.Proc., § 338, subd. 2; West's Ann.Civ.Code, § 3479.

8. Pleading ⇨343

Issue of res judicata arising from judgment for defendant in prior action involving comparable causes of action, could not be raised upon motion for judgment on the pleadings, where amended complaint con-

tained no reference to any other action, and record contained nothing to show nature of any such action.

9. Pleading ⇨350(3)

On motion for judgment on the pleadings, the court cannot consider any matter outside the complaint.

10. Pleading ⇨225(2)

Though demurrers for uncertainty appeared, at least in part, to have been well taken, where plaintiffs could amend complaint to state proper cause of action, it was abuse of discretion for trial court to sustain special demurrer without leave to amend.

Everett H. Roan, Kenneth L. Johnson, San Francisco, for appellants.

Alfred Del Carló, San Francisco, for respondents.

DRAPER, Justice pro tem.

Defendants' demurrer to the forth amended complaint was sustained without leave to amend, and their motion for judgment on the pleadings was granted. Plaintiffs appeal from the resulting judgment.

[1-3] Appellants and respondents own homes on adjoining city lots. Appellants' first cause of action alleges that between April 1 and July 31, 1950, while appellants were absent, respondents erected walls, foundations, pipes and vents upon appellants' property. This cause of action clearly is in trespass. The original complaint was filed November 3, 1953. The demurrer specified Code of Civil Procedure, section 338, subdivision 2, as one of its grounds. That section fixes three years as the statute of limitations for such an action. Where encroachments of a permanent nature are erected upon one's land, the remedy is by an action in trespass for all damages suffered, past as well as prospective, and the entire cause of action accrues when the trespass occurs. *Bertram v. Orlando*, 102 Cal.App.2d 506, 227 P.2d 894, 24 A.L.R.2d 899. The demurrer upon the ground of the statute of limitations was therefore properly sustained as to the first count.

[4-6] The three remaining counts of the complaint, however, are based upon different allegations. In these, appellants allege that, within three years last past, respondents, upon their own land, maintained their premises without proper gutters or drainage, so as to deflect rain water from respondents' premises upon those of appellants, and also so maintained pipes and furnaces as to cause the emission of noxious odors and fumes upon appellants' property. Here there is no allegation of trespass. Rather, the offending structures are alleged to be upon respondents' land, and complaint is made, not of their location, but of the use to which they are put. Clearly these counts allege the maintenance of a nuisance by respondents; *Dauberman v. Grant*, 198 Cal. 586, 246 P. 319, 48 A.L.R. 1244; *Willson v. Edwards*, 82 Cal.App. 564, 256 P. 239; Civ.Code, § 3479. The statute of limitations is not, on the face of the complaint, a bar to these three causes of action, because it is alleged that the acts occurred within three years. Even if this were not alleged, appellants might treat respondents' use of their own land as a continuing nuisance, and bring successive actions until it was abated. *Spaulding v. Cameron*, 38 Cal.2d 265, 239 P.2d 625.

[7] Each of the last three counts of the complaint, whatever its vulnerability to demurrer for uncertainty, appears to state facts sufficient to constitute a cause of action. Respondents do not seriously contend to the contrary, but rely upon the statute of limitations to justify the sustaining of the demurrer. As pointed out, the statute does not bar these three causes of action. Thus the general demurrer was improperly sustained as to them.

[8,9] The motion for judgment on the pleadings raised the issue of *res judicata*. Respondents contend that a 1950 judgment was entered in their favor upon facts comparable to those set forth in one of the causes of action of the present complaint, and that counts comparable to the other causes of action of the present complaint were thereupon dismissed with prejudice.

But such an issue cannot be raised upon a motion for judgment on the pleadings. On such a motion, the court cannot consider any matter outside the complaint. *Douglass v. Dahm*, 101 Cal.App.2d 125, 224 P.2d 914. The amended complaint here contains no reference to any other action. Further, the record before us contains nothing to show the nature of any such action. The motion for judgment on the pleadings was improperly granted.

[10] The demurrers for uncertainty appear, at least in part, to be well taken. However, as to three counts, we have pointed out that appellants can amend so as to state a proper cause of action. In these circumstances, it is an abuse of discretion to sustain the special demurrer without leave to amend. *Guilliams v. Hollywood Hospital*, 18 Cal.2d 97, 114 P.2d 1.

The judgment is reversed as to the second, third and fourth causes of action, with directions to the trial court to grant appellants leave to amend as to these counts of their complaint.

NOURSE, P. J., and KAUFMAN, J.,
concur.



144 Cal.App.2d 739

Herman H. WADLER, Petitioner and
Appellant,

v.

JUSTICE'S COURT OF MERCED JUDICIAL DISTRICT, County of Merced,
State of California, Respondent.
Civ. 8940.

District Court of Appeal, Third District,
California.

Sept. 28, 1956.

Rehearing Denied Oct. 23, 1956.

As Corrected Oct. 26, 1956.

Hearing Denied Nov. 21, 1956.

Prohibition proceeding. The Superior Court, Merced County, R. R. Sischo, J., denied a writ, and the petitioner appealed. The District Court of Appeal, Schottky, J.,

held that question as to whether justice court exceeded its jurisdiction in modifying probation order was one of law, and superior court, determining such question in prohibition proceeding, was not required to make findings of fact.

Affirmed.

1. Criminal Law ⇨982

There is no constitutional or statutory right to hearing preceding revocation of probation, and if such hearing is held, it is not governed by rules concerning formal criminal trials, but on contrary court may revoke probation solely on basis of probation officer's report, there being no right to present witnesses; and constitutional right to have counsel in criminal prosecutions is likewise not applicable, since probation proceeding is not part of a "prosecution". West's Ann.Const. art. 1, § 13.

2. Criminal Law ⇨83

"Jurisdiction" is usually construed to mean power of court to hear and determine or power to act in a certain manner.

See publication Words and Phrases, for other judicial constructions and definitions of "Jurisdiction".

3. Prohibition ⇨29

Question as to whether justice court exceeded its jurisdiction in modifying probation order was one of law, and superior court, determining such question in prohibition proceeding, was not required to make findings of fact. West's Ann.Code Civ. Proc. § 632; West's Ann.Pen.Code, § 1203.3.

Mellis & Stockton, Modesto, for appellant.

F. A. Silveira, City Atty., by William L. Garrett, Deputy City Atty., Merced, and Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment of the Superior Court of Merced County denying a writ of prohibition.

Appellant Herman Wadler was found guilty after a jury trial on two counts of a violation of Penal Code section 415 (disturbing the peace). The Justice Court on February 15, 1955, pronounced "judgment" on each count as follows:

"Wherefore, it is by the Court Ordered and Adjudged that the said defendant H. H. Wadler is guilty of the crime of misdemeanor, to wit: violation of Section 415 of the Penal Code of the State of California and that for said offense, the said defendant is granted probation for the term of one year on the following conditions: 1. That he serve sixty days in the County Jail which sentence is suspended. 2. Obey all laws. 3. Keep honorably employed. 4. That he pay a fine in the sum of \$100. * * *

An appeal was taken from the "judgment."

On April 23, 1955, one Antone J. Borba made a citizen's arrest of Mr. Wadler. At the time of the arrest Borba made a charge that Wadler was disturbing the peace, and Wadler was booked on the charge. On April 25, 1955, Mr. Borba signed a complaint charging Wadler with a violation of section 1203.2 of the Penal Code which deals with re-arrest and revocation of probation. A demurrer to the complaint was filed, and Mr. Wadler entered a plea of not guilty to the charge. On May 23, the Justice Court sustained the demurrer and ordered the proceeding stayed to be set at a later date for hearing. After the appeal on Mr. Wadler's original conviction was affirmed, notice was received by Mr. Wadler of a hearing to determine the violation of his probation. At this hearing on June 29, 1955, Mr. Wadler, through his attorney, made certain motions:

1. To dismiss the original charge (under Penal Code, sec. 415) on which he was arrested by Mr. Borba.

2. To dismiss the complaint based on section 1203.2 because a demurrer to the complaint was sustained and no amended pleading was filed within the time provided

by sections 1007 and 1008 of the Penal Code, and therefore the court had no jurisdiction to continue.

3. To dismiss the complaint on the ground that the arrest was illegal since section 1203.2 does not provide for arrest by a private citizen.

4. To dismiss the complaint because there was no arrest as provided by the section.

These motions were denied and a hearing was held at which both sides presented evidence.

The record shows that the court then made the following order:

"The Court states that having heard the evidence presented in this matter and studying the Exhibits the finding at this time is that the defendant is guilty of violating Section 1203.2 of the Penal Code in that there was a disturbance in violation of the terms of probation heretofore granted and the probationary terms are changed and the sentence to be imposed upon the defendant is as follows and is pronounced at this time: Probation for the term of one year: 1. Defendant is to serve sixty days in the County Jail on each of the two charges heretofore suspended, which sixty days are to run consecutively. 2. Obey all laws. 3. Keep honorably employed."

Prior to the execution of the sentence Mr. Wadler applied to the Superior Court for a writ of prohibition. An alternative writ issued. The City Attorney of the City of Merced filed an answer on behalf of the respondent Justice Court. Petitioner moved that this answer be stricken because, as he alleged, the City Attorney was without authority to represent respondent. This motion was denied.

Following a hearing on the order to show cause the court made the following order: "The Court orders Writ of Prohibition is denied and further orders that the proceedings in the lower court have been regular and legal."

As grounds for a reversal of the judgment of the Superior Court denying his application for a writ of prohibition, appellant makes the following major contentions:

1. The complaint charging violation of section 1203.2 of the Penal Code should have been dismissed for failure to comply with the provision of sections 1007 and 1008 of the Penal Code;

2. That the complaint for violating Penal Code section 1203.2 failed to state a public offense;

3. That the arrest was not made in conformity with the provisions of section 1203.2;

4. That petitioner did not violate the terms of his probation;

5. That petitioner was never arraigned for judgment;

6. That the judgment contained illegal conditions;

7. That the Superior Court should have granted petitioner's motion to strike respondent's answer;

8. That the judgment of the Superior Court is void because it is not supported by findings of fact or conclusions of law.

Before discussing these contentions we think it well to point out that section 1203.2 of the Penal Code provides in part as follows:

"At any time during the probationary period of the person released on probation in accordance with the provisions of these sections, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, rearrest any person so placed on probation under the care of a probation officer, and bring him before the court, or the court may in its discretion issue a warrant for the rearrest of any such person and may thereupon revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have rea-

son to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, * * *."

and that section 1203.3 provides in part:

"The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence."

[1] As stated by our Supreme Court in *In re Levi*, 39 Cal.2d 41, at page 44, 244 P.2d 403, at page 404:

"There is neither a constitutional nor a statutory right to a hearing preceding revocation of probation. In *re Davis*, 37 Cal.2d 872, 873-874, 236 P.2d 579. If a hearing is held, it is not governed by the rules concerning formal criminal trials. The court may revoke probation solely on the basis of the probation officer's report. In *re Dearo*, 96 Cal.App.2d 141, 143, 214 P.2d 585. There is no right to present witnesses. *People v. Hayden*, 99 Cal. App.2d 97, 99, 221 P.2d 221. The constitutional right to have counsel in 'criminal prosecutions' Art. I, § 13, is not applicable since a probation proceeding is not a part of a 'prosecution.' In *re Dearo*, supra, 96 Cal.App.2d 141, 143, 214 P.2d 585; *People v. Fields*, 88 Cal.App.2d 30, 33, 198 P.2d 104."

While it must be stated that proceedings in the Justice Court with regard to the revocation or modification of the terms of probation were somewhat unusual and in large part superfluous, it is also true, as is clear from the authorities hereinbefore cited, that no rights of appellant were invaded in any manner by the procedure in the Justice Court. Section 1203.3 of the Penal Code gives the court authority at any time during the term of probation to revoke, modify, or change its order. Under section 1203.3 the court had authority to do what it did, so the fact that it purported to act under another section is immaterial in a probation proceeding. Section

1203.3 does not require that a probationer be convicted of any crime. The section says the court shall have authority at any time during the term of probation to revoke, modify or change its order. The court in this instance held a hearing at which appellant was represented by counsel and during which evidence was produced from which it could determine that a modification of the probation order was proper.

[2, 3] Appellant also contends that the judgment of the Superior Court is void because it is not supported by findings of fact and conclusions of law. The petition in the Superior Court was for a writ of prohibition. The question presented was whether the Justice Court exceeded its jurisdiction which is a question of law. Section 632 of the Code of Civil Procedure, which is the section which provides for findings of fact and conclusions of law, begins: "In superior courts: * * *, upon the trial of a question of fact by the court * * * the facts found and the conclusions of law must be separately stated * * *." If jurisdiction were a question of fact the superior court would have committed error. But jurisdiction is usually construed to mean the power of a court to hear and determine or power to act in a certain manner. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715. A determination of whether the Justice Court could modify the probation order is not the determination of a question of fact within the meaning of section 632 of the Code of Civil Procedure. By its judgment the Superior Court determined the only question before it, namely, whether the Justice Court exceeded its jurisdiction. No findings are required where no issue of fact is decided. In *re Estate of Kearns*, 129 Cal.App.2d 832, 278 P.2d 85; *Wheeler v. Board of Medical Examiners*, 98 Cal.App. 267, 276 P. 1119.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

145 Cal.App.2d 14

Marle L. FLEISCHER, Plaintiff and Appellant,

v.

Anna H. COSGROVE and William T. Cosgrove, Defendants and Respondents.

Civ. 16966.

**District Court of Appeal, First District,
Division 2, California.**

Oct. 8, 1956.

Action to recover damages after purchasers repudiated contract to purchase motel property. From a judgment of the Superior Court, San Mateo County, A. R. Cotton, J., vendor appealed. The District Court of Appeal, Kaufman, J., held that trial court's finding that the market value of the property did not change between the date of first contract and date of resale and vendor suffered no damage, was amply supported by competent and admissible evidence in the record.

Judgment affirmed.

1. Appeal and Error ⇨843(2)

Where trial court's finding that market value of motel property, in a suit to recover damages after purchasers' repudiation of contract, had not declined from the time of the sale to purchaser through the period of a little more than six weeks until the date of the resale, was supported, such finding supported judgment denying relief against purchasers and if other findings were not supported they could be disregarded.

2. Vendor and Purchaser ⇨330

The measure of damages for breach of contract to buy real property is the difference between the contract price and the market price. West's Ann.Civ.Code, § 3307.

3. Vendor and Purchaser ⇨329

In vendor's action to recover damages after purchasers repudiated contract to buy motel property for \$117,000, where vendor did not offer proof of any damage other than the difference between the contract price and resale price to subsequent pur-

chaser for \$109,796.96, and there was evidence that there had been no decline in real estate values, and that property was not overpriced at \$117,000, while each sale price is evidence of value to the owner at the time of each sale, sale prices were not conclusive evidence binding on the trial court, and trial court could draw its own inferences from the evidence.

4. Evidence ⇨142(1)

In vendor's action to recover damages after purchasers repudiated contract to purchase real property, evidence of sales of the identical property was admissible as an indication of value of real property.

5. Appeal and Error ⇨931(6)

On appeal where numerous rulings of the trial court on the admissibility of evidence were objected to and the trial was by the court, it will be presumed that the findings were based on competent evidence, if there was such competent supporting evidence in the record.

6. Vendor and Purchaser ⇨329

In vendor's action to recover damages after purchasers repudiated contract to purchase motel property for \$117,000 which was subsequently resold for \$109,796.96, finding that the market value of property did not change between date of first contract of sale and date of resale and vendor suffered no damage, was supported by evidence.

Roy W. Seagraves, Redwood City, David Freidenrich, San Francisco, for appellant.

Crist, Peters & Donegan, Elton F. Martin, Palo Alto, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment rendered in favor of defendants and respondents and against plaintiff and appellant for costs of court.

Respondents Anna H. Cosgrove and her son, William T. Cosgrove, signed a written contract for the sale and purchase of the Camino Hacienda Motel in Redwood City on March 14, 1954, for a price of \$117,000.

A deposit of \$1,000 was made by the purchasers. Thereafter, respondents refused to consummate the transaction, and notice of their repudiation was given to David Freidenrich, appellant's assignor, through their attorney on or about March 24, 1954. Letters dated March 31, 1954, were mailed on that day by Freidenrich to respondents advising them that he was ready to perform, and that if they did not do so they could expect to be sued for specific performance and for damages. Receiving no reply to these letters, Freidenrich relisted the property for sale with the same broker at the same price as it had been previously listed, that is, for \$117,000. He instructed the broker to remit one-half of respondents' \$1,000 deposit to him which he retained.

On April 13, 1954, the broker, Rose Realty Company, sent a letter to respondents in which the broker said that Freidenrich had demanded forfeiture of the \$1,000 deposit and urged them to reconsider and go through with the transaction. Freidenrich testified that he had not authorized this letter. The broker did not testify in regard to the matter.

A new contract for the sale of the motel property was entered into with a new purchaser in the latter part of April, 1954, for a sum of \$109,796.96. Freidenrich stated that his opinion of the fair market value of the property at the time of the breach was \$109,796.96, the price obtained for the property within 30 days after the breach. Freidenrich, who was an attorney, stated that he was not an expert on real estate values.

Robert G. Rose was the real estate broker here involved. It was stipulated that on the question of value of the property he would testify substantially the same as Mr. Freidenrich did; that in his opinion the value of the property at the date of the breach was the exact amount which it was sold for about a month later, and that he was basing his opinion on the subsequent sale price, that it wasn't based upon any rise or fall in the market.

The trial court held that appellant was entitled to no relief against respondents, and that respondents were not entitled to the return of their \$1,000, for which they had filed a cross-complaint.

Appellant contends that under the contract in this case he had the right to retain the deposit and sue for additional damages caused by the breach, and that the provisions of the deposit receipt did not deprive him of that remedy. It is provided in that document: "That in event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, time being of the essence of this contract, the amount of said deposit shall at the option of the seller, be forfeited as liquidated damages, or the seller may apply said deposit on account of said purchase price and institute suit against the purchaser to compel the specific performance of this contract." Respondent takes the position that the contract provision for forfeiture of the deposit is a binding limitation on the amount of damages the seller can recover.

The trial court found that all the allegations of respondents' second, third and fourth answers were true. The second defense alleged that respondents mistakenly believed and plaintiff led them to believe that the agreement limited their liability in case of default to forfeiture of the deposit or an action for specific performance, and that on April 13, 1954, they were informed by the seller's broker that the seller had declared a forfeiture of the deposit and had made his election to pursue that remedy; that if they had known that there was an additional remedy by way of suit for damages available to the seller, they would not have signed the agreement. The third defense alleged mutual mistake, in that the seller as well as the buyer believed that there were only two possible remedies available under the contract, forfeiture of the deposit or a suit for specific performance.

The allegations of the separate defense of estoppel was found to be true; namely,

that the seller prepared the agreement sued upon and represented that the only remedies available to seller were forfeiture of the deposit or specific performance; that respondents changed their position in reliance thereon, in that they made the deposit of \$1,000 upon the understanding that that would be the limit of their loss if the contract were not specifically enforced.

The trial court also found that on March 14, 1954, the market value of the property to be sold under the deposit receipt was \$117,000, that said market value did not change between March 14, 1954 and May 5, 1954, and as a conclusion of law determined that appellant had not been damaged in any sum whatsoever by respondent. It also found that the resale price of \$109,796.96, was not obtained because of a fall in the market value of said property between March 14, 1954 and May 5, 1954.

[1] If the finding is supported that the market value of the property had not declined from the time of the sale to respondents through the period of a little more than six weeks till the date of the resale, such finding would be sufficient to support the judgment, and if the other findings attacked by appellant are unsupported by the evidence they may be disregarded. *Sands v. Eagle Oil & Refining Co.*, 83 Cal. App.2d 312, 321, 188 P.2d 782; *Colorado Corp. v. Smith*, 121 Cal.App.2d 374, 377, 263 P.2d 79.

[2] The measure of damages for breach of a contract to buy real property is the difference between the contract price and the market price. Civil Code, sec. 3307; *Royer v. Carter*, 37 Cal.2d 544, 549, 233 P.2d 539; *Employees' Participating Ass'n v. Pine*, 91 Cal.App.2d 299, 301, 204 P.2d 965. Appellant's assignor, Mr. Freidenrich, an attorney, who stated that he was not an expert in real estate values, testified that the resale price which was obtained some three weeks after the breach by respondents, was the fair market value of the property. It was stipulated that the testimony of the real estate broker, Robert G. Rose, would be substantially the same as

that of Freidenrich. Freidenrich stated that he knew of no general drop in real estate values in that area, that his opinion of value was based on the resale price. He also testified that on March 14, 1954, the date of the agreement with respondents, the property was not overpriced at \$117,000. It was about ten days later that he learned through an attorney that respondents did not intend to go through with the transaction. On April 13, 1954, Rose the broker wrote to respondents telling them that it was a big mistake not to go through with the sale as this property "is a good money maker and is doing better than most other motels in this area."

[3] Appellant did not offer proof of any damage other than the difference between the contract price and resale price, except the \$500 paid the broker out of the deposit. He contends that the evidence supports his claim to this amount of damage, and that there is no evidence to support the trial court's finding of no damage. Clearly from the testimony reviewed above there is some evidence to support the finding that the resale price obtained was not a consequence of a drop in market value of the property. It is true, as appellant says, that there was no conflicting *opinion* evidence relating to value of the property at the time of breach. Freidenrich, as the owner, could give an opinion, though admittedly not an expert. Rose could testify as an expert, and his opinion was stipulated to be the same as that of Freidenrich. There was evidence that there was no decline in real estate values in the area. There was the evidence that the property was not overpriced on March 14, 1954, at \$117,000. If there was no decline, and the property was not overpriced at \$117,000 on that date, that is certainly some evidence of value close to the time of the breach. Each sale price is evidence of value to the owner at the time of such sale but neither is conclusive evidence binding on the trial court. The trial court could draw its own inference from this evidence. *Royer v. Carter*, *supra*; *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 757,

192 P.2d 935; *Roloff v. Hundebly*, 105 Cal. App. 645, 652, 288 P. 702.

[4] Appellant argues that the market price at the date of the first sale is irrelevant and immaterial. However, evidence of sales of the identical property is admissible as an indication of value of real property. 18 Cal.Jur.2d 624-626, sec. 164; *Bagdasarian v. Gragnon*, supra; *Eatwell v. Beck*, 41 Cal.2d 128, 134, 257 P.2d 643. It is said in 18 Cal.Jur.2d 627, sec. 166, that "evidence of value for short periods before or after the date in question may be allowed in the discretion of the court, as to either real or personal property." And, see, *Stroman v. Lynch*, 91 Cal.App.2d 406, 205 P.2d 409; *Hanscom v. Drullard*, 79 Cal. 234, 21 P. 736.

There was evidence that \$500 was paid by appellant to the broker, and since respondents were not allowed to recover the deposit of \$1,000 for which they cross-complained, appellant has been compensated for that expense and retains the remaining \$500. Respondents have not appealed from the judgment against them on the cross-complaint.

[5,6] Since the evidence sufficiently supports the trial court's finding of the market value of the property at the time of the breach it becomes unnecessary to determine whether or not the provision in the present contract must be interpreted according to appellant's view as not precluding the additional remedy of retaining the down payment and suing for the price. It also becomes unimportant whether the findings on respondents' separate defenses are conflicting or unsupported by the evidence. Numerous rulings of the trial court on the admission of evidence are objected to, but since the trial was by the court, it will be presumed that the findings were based on competent evidence if there is such competent supporting evidence in the record. The evidence reviewed above which supports the finding of reasonable value at the time of breach was admissible and competent.

We conclude that the trial court's finding that appellant suffered no damage finds ample support in the record before us.

Judgment affirmed.

NOURSE, P. J., and DRAPER, Justice pro tem., concur.



144 Cal.App.2d 838

J. C. MILLETT CO., a corporation, and **The Northern Glass Company**, a partnership consisting of **J. C. Millett and Lori Podesta**, Plaintiffs and Respondents,

v.

LATCHFORD-MARBLE GLASS CO., a corporation, **Latchford-Marble Package & Supply Co.**, **Latchford-Marble Container & Supply Co.**, **Edwin E. Balling, Jr.**, **Reuben J. Ingold**, **William J. Latchford**, **W. Baird Marble**, **William B. Marble**, **John E. McCandless**, **J. N. Pettker**, **William Simkins et al.**, Defendants and Appellants.

Civ. 16819.

District Court of Appeal, First District,
Division 1, California.

Oct. 8, 1956.

Action brought in San Francisco against three corporate and eight individual defendants for breach of contract and an accounting. From an order denying motions for change of venue in the Superior Court, City and County of San Francisco, **Frank T. Deasy, Jr.**, corporate and individual defendants appealed. The District Court of Appeal, **Peters, P. J.**, held that the individual defendants were entitled to a change of venue to Los Angeles.

Order reversed.

1. Venue ◀68

Plaintiff is entitled to the presumption that he has brought the action in a proper

county, and the burden to secure a change of venue is on the defendant. West's Ann. Const. art. 12, § 16.

2. Venue ☞68

Where complaint alleged that defendants breached a contract not to compete with plaintiffs in the sale of bottles in Northern California, and it was a reasonable inference that the breach occurred in Northern California, plaintiff bringing the action in City and County of San Francisco was entitled to the presumption that he had brought the action in the proper county. West's Ann. Const. art. 12, § 16.

3. Venue ☞41

When a corporation is properly sued at other than at its residence on a transitory cause of action, and individual defendants are joined who, if sued alone, would be entitled to be sued in the county of their residence, plaintiff waives his right against the corporation, and the individual defendants are entitled to a change of venue to the county of their residence. West's Ann. Code Civ. Proc., § 395.

4. Venue ☞41

A plaintiff cannot, by joining a corporation as a defendant, impair the rights of an individual defendant to remove the cause to the county of his residence.

5. Venue ☞41

Where action was brought in San Francisco against three corporate and eight individual defendants for breach of contract and the corporate defendants probably were properly sued, on a ground other than their residence, in San Francisco, and individual defendants considered separately were entitled to be sued in Los Angeles, the individual defendants were entitled to a change of venue to Los Angeles. West's Ann. Code Civ. Proc., § 395; West's Ann. Const. art. 12, § 16.

6. Venue ☞68

In action brought in San Francisco against three corporate and eight individual defendants, change of venue to Los Angeles, the residence of the individual defendants, was not precluded on the ground

that there was evidence that one of the corporate defendants maintained its residence in San Francisco, consisting of a San Francisco telephone directory listing where the listing did not show even by inference, that the "principal" place of business of the corporation was in San Francisco.

George H. Emerson, Los Angeles, for appellants.

Leon A. Blum, J. Albert Hutchinson, San Francisco, for respondents.

PETERS, Presiding Justice.

This is an appeal by the corporate and individual defendants from an order denying their motions for a change of venue.

The action was brought in San Francisco by a San Francisco corporation and partnership against three corporate and eight individual defendants. The action is for breach of contract and an accounting, the contract having been executed in 1950 between the Latchford-Marble Glass Company as seller and the plaintiffs as buyers, whereby the seller agreed to furnish the buyers with beverage bottles, and to give the buyers the exclusive right, with certain exceptions, to market such bottles in Northern California. It is alleged that the Glass company organized the other two corporate defendants as subsidiaries of the Glass company, enticed several of plaintiffs' employees into the employ of these subsidiaries, and then offered for sale and sold glass containers in Northern California in competition with plaintiffs and in violation of the contract.

The three corporate defendants and the eight individual defendants filed separate motions for a change of venue to Los Angeles County, averring that the corporate defendants were residents of that county, with their principal places of business there, and that all eight individual defendants reside in that county. In addition, all defendants averred that the contract was made and to be performed in Los Angeles, that the obligation arose there, and the

breach, if any, occurred there. Plaintiffs filed no counter-affidavits. The trial court denied the motions. Defendants appeal.

[1,2] It may be conceded that, under Article 12, Section 16 of the Constitution, the action, so far as the three corporate defendants are concerned, was properly filed in San Francisco. The complaint alleges that defendants breached a covenant not to compete with the plaintiffs in the sale of bottles in Northern California, and it is a reasonable inference that the breach of this covenant occurred in Northern California. San Francisco is, of course, in Northern California. Plaintiff is entitled to the presumption that he has brought the action in a proper county, and the burden, to secure a change of venue, is on the defendant. *Chase v. South Pacific C. Railroad Co.*, 83 Cal. 468, 23 P. 532; *Konig v. Associated Almond Growers*, 37 Cal.App.2d 360, 99 P.2d 678; *Pacific Bal Industries v. Northern Timber*, 118 Cal.App.2d 815, 259 P.2d 465.

We may assume, therefore, that as to the corporate defendants the place of performance or the place of breach of the contract was alleged to be San Francisco, and that as to these defendants the action was properly filed in that city and county.

It is equally clear, however, that the individual defendants, all of whom are admittedly residents of Los Angeles, were entitled to a change of venue. Section 395 of the Code of Civil Procedure provides: "In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * *. When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper

county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *"

It is quite apparent that, since the individual defendants are not parties to the contract here involved, the first sentence of the section is applicable, and that under it the individual defendants were entitled to be sued in the county of their residence.

Thus, the problem involved arises out of the fact that the corporate defendants probably were properly sued, on a ground other than residence, in San Francisco, and the eight individual defendants, considered separately, were entitled to be sued in Los Angeles.

[3] The solution to this problem is clear. When a corporation is properly sued other than at its residence on a transitory cause of action, and individual defendants are joined who, if sued alone, would be entitled to be sued in the county of their residence, the plaintiff waives his right against the corporation, and the individual defendants are entitled to a change to the county of their residence. The proper rule is stated as follows in 1 Witkin, *California Procedure*, page 764: "A special problem arises in joinder of individual and corporate defendants when the plaintiff sues in a county in which neither defendant resides, but which is one of the four other places in which a corporation may be sued * *. The *individual defendant may obtain a change*. The theory is that though the plaintiff may sue a corporation on a transitory cause where the contract is breached or the liability arises, etc., he loses or 'waives' this privilege when he joins an individual defendant. Joinder of the individual restricts the plaintiff to *residence venue*: the residence of either defendant."

In *Hale v. Bohannon*, 38 Cal.2d 458, 473, 241 P.2d 4, 12, the Supreme Court stated the rule as follows: "However, this application of section 395 involves the right of an individual defendant apart from that of

the corporate defendant. A suit brought in the county where the corporation has its principal place of business is one commenced in a proper county under the constitutional provision. The individual defendant joined with the corporation may not secure a change of venue in such circumstances because, under section 395, 'some' of the defendants reside in the county where the action was commenced. Where the action is not commenced in the county of any defendant's residence, the individual defendant then is entitled, under section 395, to secure a change of venue to the county where some or all of the defendants reside. This rule is not a holding that section 395 is applicable in determining the venue of an action commenced solely against a corporate defendant."

[4] This court recently summarized the rule in *Pacific Bal Industries v. Northern Timber*, 118 Cal.App.2d 815, 828, 259 P.2d 465, 473, in the following language: "A plaintiff cannot by joining a corporation or corporations as defendants, under the circumstances of this case, impair the right or thwart the exercise of the right of an individual defendant to remove the cause to the county of his residence. In effect, by joining the individual defendants, neither of whom resides in Marin County, plaintiff has waived whatever procedural rights were granted him by article XII, § 16, of the Constitution, to bring his action against the corporate defendants in Marin County. [Citing cases.]"

[5] Thus, it is quite clear, that on the motion of individual defendants, the trial court should have granted the motion for a change of venue to the county of their residence, unless it was made to appear that at least one of the corporate defendants had its principal place of business or resided in the City and County of San Francisco. The complaint did not allege such residence. The plaintiffs failed to file any counter-affidavits. The affidavits of defendants alleged that the corporate and individual defendants all resided in Los Angeles. So far as the clerk's tran-

script is concerned, it is obvious that plaintiffs were relying, so far as venue is concerned, on their allegations that the contract was to be performed by the corporate defendants in Northern California, and that the breach occurred there. As already pointed out, these allegations might have supported an order denying the motion for a change of venue to Los Angeles so far as the corporate defendants are concerned, but when individual defendants residing in Los Angeles were joined, this amounted to a waiver so far as the corporate defendants were concerned, and the motion should have been granted.

[6] Plaintiffs, in their memorandum of points and authorities filed in the trial court and in their brief filed in this court, contend that there was "evidence" of which the trial court could take judicial notice that at least one of the corporate defendants maintains its residence in San Francisco. The "evidence" relied upon is that the San Francisco telephone directory lists the Latchford-Marble Glass Co. and the Latchford-Marble Container & Supply Co. with a San Francisco address and phone number. The classified section of the telephone directory lists the same two corporations and their address and phone number and also contains this information:

"for information call *Main Office*
"Latchford-Marble Container & Supply Co.
"1823 Egbert Ave. JU 5-1005."

Plaintiffs contend that the trial court and this court can take judicial notice of this listing, and that it indicates that the *principal* office of the container corporation was in San Francisco. Assuming, without deciding, that judicial notice can be taken of the directory, it is clear that all it shows is that the "main" San Francisco office of the company was at a certain address. It does not show, even by inference, that the "principal" place of business or residence of the corporation was in San Francisco. Thus, the directory does not contradict the positive averment in the affidavit of the container company that at the time of the filing of the action and of making the affi-

davit it had its principal place of business in, and was a resident of, Los Angeles.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur,



Jessie L. REID and Robert W. Reid, Plaintiffs, Cross-Defendants, Respondents,

v.

VALLEY RESTAURANTS, Inc., a California corporation, et al., Defendants, Cross-Complainant, Appellant.*

Civ. 21626.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1956.

Rehearing Denied Nov. 9, 1956.

Hearing Granted Dec. 5, 1956.

Action by landlords in unlawful detainer for restoration of premises, damages, attorneys' fees, costs and a declaration that purported tenant had no interest in the premises. Tenant cross-complained for costs and attorneys' fees. The Superior Court, Los Angeles County, Louis H. Burke, J., entered judgment disallowing attorneys' fees and costs to tenant and it appealed. The District Court of Appeal, Moore, P. J., held that where judgment entered by trial court under a stipulation wherein the parties agreed to a settlement of their differences did not award any of the relief as prayed for by landlords, tenant was the "successful party," and under provision of lease providing successful litigant should recover costs, and under statute providing that costs be awarded to defendants as to whom action is dismissed, tenant was entitled to an award of reasonable attorneys' fees and costs.

Judgment affirmed in part, and reversed in part with instructions.

* Opinion vacated 311 P.2d 473.

1. Costs ⇐10, 32(2)

Where judgment entered by trial court pursuant to stipulation did not award landlords any of the relief prayed for in landlords' complaint, and stipulation entered into by the parties in settlement of their dispute did not demand recovery of any of relief sought by landlords, tenant was the "successful" party within provision of lease providing that a successful litigant should recover costs, and under statute providing that costs be awarded to the defendant as to whom the action is dismissed, and under such lease provision, tenant was entitled to an award of reasonable attorney's fees. West's Ann.Code Civ.Proc., § 1032(b).

2. Costs ⇐48

Dismissal and Nonsuit ⇐80

Dismissal of an action with prejudice is a final decision, terminating the action and entitling the defendant to costs.

3. Dismissal and Nonsuit ⇐75

A dismissal of an action pursuant to a stipulation in open court intended finally to determine the dispute between the litigants is, in effect, a dismissal with prejudice.

Albert E. Isenberg, Don Lowry, Beverly Hills, for appellant.

Girard F. Baker and John W. Erpelding, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment disallowing attorneys' fees and costs to defendant.

Respondents leased a restaurant to appellant corporation for a fifteen-year term. The lease provided, *inter alia*, that no assignment of the premises was to be made by the lessee without the consent of the lessors; rents were to be payable on the basis of gross receipts; lessee would prepare detailed financial statements for the inspection of the lessors; and in the event a dispute between the parties should result in litigation, the "successful party" would be awarded reasonable attorneys' fees and costs.

After a year and a few months of the term had elapsed, respondents brought this action in unlawful detainer and to quiet title alleging on information and belief that lessee had violated covenants of the lease by assigning the lease on the premises without lessors' consent and by improperly accounting for rents. Attached to the complaint was the notice previously served demanding possession within three days of service. No specification of the alleged breaches of the covenants in the lease was set out in the notice nor was the lessee given the alternative of correcting the defects. The complaint prayed for restoration of the premises, damages in excess of \$100,000, attorneys' fees and costs, and a declaration that appellant has no right, title or interest in the restaurant. Appellant answered and cross-complained for costs and attorneys' fees.

It appeared from respondents' opening statement that there had been an assignment of the term without respondents' consent; that appellant had failed to provide sufficient financial statements as required by the lease; and that it had fraudulently transferred certain secret pie recipes used by respondents to another restaurant owned by appellant without recording the receipt of compensation.

Appellant then moved for judgment upon the opening statement, and upon denial of such motion, objected to the introduction of any evidence upon the ground that the notice to quit was not in the alternative as required by Code of Civil Procedure, section 1161, subsections (2) and (3); that is to say, appellant was not put on notice of its failure to pay rent and of its improper assignment and was not accorded the alternative of correcting the situation or of quitting possession. After argument, the trial court decided to exclude evidence relative to nonpayment of rent since the notice was not in the alternative and the defect was correctible, but offered to hear evidence of the improper assignment to determine whether it was a *fait accompli* that could not have been corrected even had the notice been proper.

After the ruling of the trial court, respondents' counsel stated that he deemed a continuation of the action to be fruitless since, even though he were successful, defendant would be able to obtain relief from forfeiture of the lease under Code of Civil Procedure, section 1179. Furthermore, one of his clients was too ill to undergo the ordeal of a protracted trial. He then made this offer to stipulate: "** * * we now offer to reinstate the lease and dismiss the action upon payment of the back rents and the accounting for the other rents. * * * The only question then would be the question of attorneys' fees * * * if each party bore their own attorneys' fees, that would be proper.*"

Appellant accepted the offer as to the dismissal of the complaint, reinstatement of the lease, payment of back rents and the accounting, but insisted that the court should proceed to determine the issue of attorneys' fees raised by its cross complaint. Thereupon, the two lawyers reached an agreement, as follows: both the liability for the fees and their amount would be left to the court on the basis of the lease, the file and depositions already submitted.

In the subsequent judgment rendered pursuant to the stipulation, the court recited that the parties had stipulated to the reinstatement of the lease, payment of back rent, payment of costs by each party, and a determination by the court whether attorneys' fees were to be awarded and, if so, their amount. The court declined to include in the submitted judgment that appellant had indeed violated the lease by an assignment not consented to by respondents and that proper notice had been given; but it was ordered that the lease be reinstated, back rent be paid, that defendants take nothing by their cross complaint for fees, and neither party recover costs against the other.

Appellant's position now is that the judgment improperly failed to dismiss the complaint in accordance with the stipulation of the parties; that had such been done, the action would have terminated in ap-

pellants' favor. *Gagnon Co., Inc., v. Nevada Desert Inn*, 45 Cal.2d 448, 455, 289 P.2d 466. Thus, appellant was the "successful" party and entitled to attorneys' fees as provided for in the lease. *Cirimele v. Shinazy*, 124 Cal.App.2d 46, 51, 268 P.2d 210. On the contrary, respondents contend that, regardless of the dismissal of the complaint, (1) the question of whether or not attorneys' fees should be awarded was left to the sole and unreviewable discretion of the trial judge; (2) the stipulation amounted to a compromise of the litigation so that neither party could be characterized as "successful."

In *Steele v. Steele*, 132 Cal.App.2d 301, 303, 282 P.2d 171, 173, the parties entered into a stipulation that certain property was separate and that the trial court should determine the character of the balance. One of the stipulators appealed the determination that it was community. But it was held that after "knowingly entering into such a definite stipulation in open court * * * it does not stand in the mouth of either party to dispute its terms or to contend that the judge should have done something other than that provided by the stipulation." Thus, respondents here contend that the parties stipulated for the trial court's determination of the question of fees and "it does not stand in the mouth of either party" to dispute his conclusion. However, whatever may have been the state of the record in the *Steele* case, the stipulation between the litigants here was not for submission of the question to plenary arbitration by the judge. The parties merely desired to avoid the necessity of a lengthy hearing of testimony relative to the fees. Rather the court was to determine the issue on the basis of "the files in this case, depositions and the lease." The court was vested with the duty of deciding whether or not defendants were "successful" and should succeed on their cross complaint, but was not relieved from the responsibility of rendering a correct judgment.

[1] Was the offer by respondents to stipulate, as accepted by appellant, a "compromise" of the dispute, or tantamount to total abdication of their legal position? As noted, the complaint prayed for restoration of the premises, damages, attorneys' fees, costs and a declaration that the purported lessee have no interest in the premises. The judgment awarded not one particle of this relief to respondents, nor did they by their offer to stipulate demand recovery of any of the relief sought as a condition of dismissal. Respondents demanded merely "payment of back rents and the accounting for the other rents which, I assume, there would be no difficulty about." Indeed, the latter assumption was well-founded. The back rents referred to were those which had accrued since service of the notice to quit. All such sums had been previously tendered by appellant. Appellant's counsel had in his possession checks sufficient immediately to pay those rents. As to the "accounting," the complaint included no request for an accounting of rents, nor did the stipulation provide for a judicial accounting. The purport of the agreement was only that the parties would secure through their own devices a settlement of their disagreement over the extent of past gross receipts upon which the rent obligation was based. Therefore, since the action was, or should have been, dismissed without attainment of any of the relief prayed for or any substantial external concession on the part of appellant, the latter was indeed the "successful" party and should have been awarded its fees.

[2,3] The judgment incorrectly recited that the parties had stipulated that each pay his proportionate share of the costs. Actually, the term "costs" never appeared in that portion of the record wherein the oral stipulation was recorded. Therefore, since the lease provided also that the successful litigant should recover costs, the award should have been to appellant. Furthermore, regardless of the provisions of the lease, Code of Civil Procedure, section 1032(b), requires that costs be award-

ed to "the defendant * * * as to whom the action is dismissed." Dismissal of an action with prejudice is a final decision, terminates it, and entitles the defendant to costs. *Fisher v. Eckert*, 94 Cal.App.2d 890, 894, 212 P.2d 64. A dismissal pursuant to a stipulation in open court intended finally to determine the dispute between the litigants is, in effect, with prejudice. *Gagnon Co., Inc., v. Nevada Desert Inn*, supra, 45 Cal.2d 448, 455, 289 P.2d 466.

The judgment for the reinstatement of the lease, the payment of back rentals, and defendant's right to possession under the lease is affirmed, but in all other respects the judgment is reversed with instructions to dismiss the complaint, award costs and to determine and award reasonable attorneys' fees to defendant, based upon the lease, the depositions, and the file.

FOX and ASHBURN, JJ., concur.



145 Cal.App.2d 48

Lorenzo PUCCINELLI and Cecilia Puccinelli, his wife, Plaintiffs, Cross-Defendants and Appellants,

v.

Bernard NESTOR and Dona Hine Nestor, his wife, Defendants, Cross-Complainants and Respondents.

Civ. 16877.

District Court of Appeal, First District,
Division 1, California.

Oct. 11, 1956.

Hearing Denied Dec. 5, 1956.

Action for dissolution of a partnership and declaratory relief, wherein a stipulated agreement to arbitrate the controversy was filed and defendants thereafter filed application for an order confirming the award of arbitrators. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered an order confirming the

award and judgment thereon, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that since copies of all the papers, required by statute to be attached to application for confirmation of award, were in the file of action, which trial judge had examined, and basic documents were incorporated by reference into application for confirmation order, there was substantial compliance with West's Ann. Code Civ.Proc., § 1291, and failure to physically attach copies of required documents to application did not deprive court of power to entertain such application.

Order and judgment affirmed.

1. Arbitration and Award ⇨69, 72

The purpose of statute requiring applicant for an order confirming, modifying or correcting an award to attach copies, of specified papers to such application was to make certain that trial judge had access to arbitration agreement, names of arbitrators and the award. West's Ann.Code Civ.Proc., § 1291.

2. Arbitration and Award ⇨72

Where copies of arbitration agreement, award, etc., which applicant for confirmation of award was required by statute to attach to application, were all in the file of action, which trial judge had examined, and the basic documents were incorporated by reference into application, there was substantial compliance with statute and failure to physically attach copies of required documents to application did not deprive court of power to entertain application for confirmation order, particularly in absence of showing that other parties to arbitration objected in trial court to failure to attach required documents or that they were prejudiced by such failure. West's Ann.Code Civ.Proc., § 1291.

3. Arbitration and Award ⇨69, 72

Substantial compliance with statute requiring applicant for confirmation or modification of award to attach copies of specified papers to application is all that is required. West's Ann.Code Civ.Proc., § 1291.

Albert Picard, San Francisco, for appellants.

Gupta & Gupta, San Francisco, for respondents.

PETERS, Presiding Justice.

The plaintiffs appeal from an "Order Confirming Award of Arbitrators and Judgment of the Same." The appeal is on a minimum clerk's transcript. The only point raised is that the order and judgment were entered in a proceeding in which the applicants for the order failed to attach physically to their application the supporting documents required by section 1291 of the Code of Civil Procedure. That section provides:

"Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith in the court wherein said application was filed.

"The party applying for an order confirming, modifying, or correcting an award shall attach to such application copies of the following papers, to wit: the agreement; the selection or appointment of the arbitrator or arbitrators and the umpire, if any; the selection or appointment, if any, of any additional arbitrator or umpire; each written extension of the time, if any, within which to make the award; and the award.

"The judgment when rendered by the court shall be docketed as if it were rendered in an action."

The facts as disclosed by the clerk's transcript are as follows: On April 29, 1955, the respondents filed an application for an order confirming the award of arbitrators. This application, so far as pertinent here, alleges that appellants, on April 19, 1954, filed an action against respondents for the dissolution of a partnership and for declaratory relief, and respondents filed an answer thereto; that on December 28, 1954, the parties entered into a stipulated agreement to arbitrate the controversy, which agreement was "filed here-

in by the parties in these proceedings on March 17, 1955, which is incorporated by reference as if set forth in *haec verba*"; that pursuant to this agreement named arbitrators were appointed by the parties; that the agreement provided that the parties would comply with the terms of the award within 14 days after it was made, and that the determination of the arbitrators was to be binding; that the arbitrators made their award on February 21, 1955, and delivered the same to the parties; that an acknowledged copy of the award "was filed in this action in this court on April 5, 1955, and is made a part hereof by reference as if set forth in *haec verba*"; that more than 14 days have passed since the award was made, but appellants refuse to perform even though respondents are willing to perform.

The trial court issued its order and judgment confirming the award on May 12, 1955, the order reciting that the application for the confirmation order incorporated "copies of papers included in the file of this action," and had been properly served on all parties.

[1-3] Appellants' sole contention is that the documents mentioned in section 1291 of the Code of Civil Procedure were not physically attached to the application for the confirmation order, and therefore, so it is argued, the court was without power to entertain the application. No other attack is made on the award or the order confirming it.

The point lacks merit. The record before this court indicates that the required papers were all in the file of the action, that the trial judge knew this and had examined the file, and that the basic documents were incorporated by reference into the application. The purpose of the code section is to be sure that the trial judge has access to the arbitration agreement, the names of the arbitrators and the award. Here the trial judge had such access. There is nothing in the record to show that appellants ever objected in the trial court to the failure to attach physically the enumerated documents, nor do they point out

how they were prejudiced by such failure. Under such circumstances, there was substantial compliance with section 1291, and that is all that is required.

The order and judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur,

hour, and changed a wigwag warning signal existing at the crossing at time of accident to a flashing light signal, as original evidence, and not by way of impeachment, for the purpose of establishing railroad's negligence, was prejudicial error.

Judgment affirmed in part and reversed in part.



John S. DAGGETT, Plaintiff and Respondent,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, G. H. Benton, and Irwin M. Pike, Defendants and Appellants.

Olga SMITH and Paul R. Smith, Plaintiffs and Appellants,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, G. H. Benton, and Irwin M. Pike, Defendants, Appellants and Respondents.*

Civ. 5410.

District Court of Appeal, Fourth District, California.

Oct. 8, 1956.

Rehearing Denied Nov. 2, 1956.

Hearing Granted Dec. 5, 1956.

Action by wife's parents for her death, joined with action by husband for death of wife and two children who were killed when an automobile wife was driving and in which children were riding was struck by a train at a crossing. The Superior Court, San Diego County, Dean Sherry, J., entered judgment for defendants as to death of wife, and for husband as to death of children, and parents and defendants appealed. The District Court of Appeal, Barnard, P. J., held that admission of evidence that railroad train changed its speed limit at crossing in question from 90 miles per hour at time of accident to 50 miles per

* Opinion vacated 313 P.2d 557.

1. Negligence ⇨131

Evidence of precautions taken and repairs made after the happening of an accident is not admissible to show a negligent condition at the time of an accident.

2. Negligence ⇨131

Evidence of changes or precautions taken after an accident are admissible in evidence in a negligence action only by way of impeachment of evidence produced by defendant, and not as original evidence on the part of a plaintiff.

2. Appeal and Error ⇨1050(1)

Railroads ⇨347(5)

In action by husband for damages for death of his wife and two children who were killed when an automobile wife was driving and in which children were riding was struck by defendant's train at a crossing, admission of evidence that railroad changed its speed limit at crossing in question from 90 miles per hour at time of accident to 50 miles per hour, and changed a wigwag warning signal existing at the crossing at time of accident to a flashing light signal, as original evidence, and not by way of impeachment, for the purpose of establishing railroad's negligence, was prejudicial error.

Melvin M. Belli, San Francisco, William F. Reed, San Diego, Edwin M. Rosendahl, Los Angeles, for plaintiffs, respondent and appellants.

Robert W. Walker, Richard K. Knowlton, Los Angeles, Luce, Forward, Kunzel & Scripps, San Diego, for defendants, appellants and respondents.

BARNARD, Presiding Justice.

This action arose from a collision between a passenger train and an automobile driven by Paula Smith Daggett, in which she and her two children were instantly killed. One of the children was about one year old and the other about three years old. The action was brought by the surviving husband to recover for the death of his wife and children, and by the parents of Mrs. Daggett, who sought recovery for her death. The engineer and conductor on the train are joined with the railway company as defendants. A jury returned a verdict in favor of the defendants as to the claim arising out of the death of Mrs. Daggett, and in favor of the husband for the deaths of his two children, awarding him \$50,000. A motion for a new trial was denied and a judgment was entered on the verdict. The defendants have appealed from the judgment as entered against them and in favor of the surviving husband. The parents of Mrs. Daggett also appealed from the judgment as against them. It is stated in the brief that the parents have appealed solely as a precautionary measure; that the plaintiffs are satisfied with the present judgment; and that they believe a new trial, in the event one is ordered, should be as to all plaintiffs.

This accident took place where the main line of the Santa Fe crosses Plaza Street in Solano Beach some two miles north of Del Mar, which is a flag stop for south-bound passenger trains. Plaza Street is the main east-west street of Solano Beach. Immediately west of the railroad crossing Plaza Street intersects with Highway 101, which parallels the Santa Fe main line through Solano Beach. At the time in question an automatic wigwag signal was located on the northeast corner of this railroad crossing, and a standard crossarm was situated at the southwest corner. When a south-bound train arrived at a point 3023 feet north of Plaza Street an electric circuit caused this wigwag signal to go into operation, with the wigwag moving back and forth and a bell ringing. At the time of the accident a freight car was

standing on a spur track east of the main line and about 100 feet north of Plaza Street. There was also a lumber company building on the north side of Plaza Street some 75 feet to the east of the railroad track.

This accident occurred at 11:18 a. m. on June 25, 1954. Mrs. Daggett, who was traveling west on Plaza Street in a Chevrolet Convertible, drove directly in front of a south-bound train. This was a regular passenger train, operated with a diesel engine, which was traveling between 85 and 90 miles an hour. Mrs. Daggett's automobile was traveling at from 10 to 15 miles an hour. It appears from the testimony of three outside witnesses, and without conflict, that the automatic wigwag signal was operating and its bell ringing prior to and at the time of the collision. The engineer and fireman testified that the automatic bell on the locomotive was ringing and that the train air horn was blown from a point at least 1,000 feet north of the crossing. The sounding of this horn prior to the accident was also testified to by three outside witnesses. The train was traveling on the company's private right of way and the speed limit for the fourth district of the Los Angeles division of the railway company, which included this crossing, was 90 miles per hour. The engineer testified that he approached this crossing at a speed of between 85 and 90 miles per hour, and the speed tape sealed in the locomotive showed the speed between 85 and 86 miles per hour at the time the emergency brake was applied. The engineer testified that he applied the emergency brake some 100 feet prior to the impact in response to the fireman's warning of the approaching automobile. Over the objection of the appellants the jury was allowed to view the scene of the accident, at that time, 15 months after the accident, the automatic wigwag at the northeast corner of the crossing and the crossarm at the southwest corner of the crossing had been replaced with flashing light signals.

The main contention on this appeal is that it was prejudicial error to allow coun-

sel for the plaintiffs, over the objections of the defendants, to introduce evidence that at some time subsequent to the accident the maximum allowable speed at this crossing had been reduced from 90 miles an hour to 50 miles an hour, and evidence that at some time after the accident the type of warning signals installed at this crossing had been changed. The court overruled objections and admitted evidence of these changes, but we are not informed as to when the changes were made, whether shortly after the accident or a year or more later. The defendants argue that this evidence was brought out by the plaintiffs for the purpose of showing a consciousness or implied admission on the part of the defendants of their previous negligence which caused the injury; and that the error was emphasized in repeatedly referring to these matters throughout the taking of testimony, and in arguing to the jury.

[1] It has long been held in this state, as in most states, that such evidence is not ordinarily admissible. In the early case of *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 P. 590, 593, the court said:

"It would be unjust to hold that, because the employer seeks, by all the aid he gets from the light of experience to make the implement free from danger, he is therefore to be charged with negligence in the use of all prior appliances, even though they were adopted with the best light then under his control. * * * He may have exercised all the care which the law requires, and yet in the light of a new experience, after an unexpected accident has occurred, he may adopt additional safeguards. To hold that the adoption of such new appliances, which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that he was negligent prior thereto, would prevent the very conduct in employers which they should be urged to follow."

In *Helling v. Schindler*, 145 Cal. 303, 78 P. 710, 713, it is said: "[I]t is now well settled in this state, in accord with the rule prevailing generally elsewhere, that evidence of precautions taken and repairs made after the happening of the accident is not admissible to show a *negligent* condition at the time of the accident." These views have been approved in many cases and are based on the sound theory that the fact that a party observes an injury resulting from an accident, and then acts with a view of preventing the possibility of a similar accident again occurring, should operate to commend rather than to condemn the one so acting.

The respondent husband does not question this general rule but argues, under the authority of other cases, that evidence of changes or precautions taken after an accident are admissible for the purpose of impeachment. It is argued that the motorman on this train testified not only that 90 miles per hour was a safe speed through this intersection, but also testified that the speed limit at this intersection, both at the time of the accident and at the time of the trial, was 90 miles per hour, and that it was proper to impeach his testimony by showing that the speed limit at this crossing at the time of the trial was 50 miles per hour. It is also argued that the signal engineer for the defendant company testified that the wigwag signal at this crossing at the time of the accident was the safest type of signal being used on the Sante Fe system at that time, and that it was proper to impeach him on cross-examination by showing that this wigwag signal had been replaced by flashing light signals, and that wigwag signals were being replaced by flashing light signals throughout the entire Sante Fe system.

[2] The exception to the general rule relied on by the respondent, in allowing the admission of evidence of such changes after the accident by way of impeachment of evidence theretofore introduced by the defendant, has been upheld in such cases as

Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377; Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, and Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841. In all such cases, however, such evidence has been allowed only by way of impeachment of evidence produced by the other party and not as original evidence on the part of the plaintiff.

In the instant case, the first witness called by the plaintiffs was the engineer or motorman on this train, who was called and examined under Section 2055 of the Code of Civil Procedure. After bringing out that the speed of this train was from 85 to 90 miles an hour immediately prior to the accident and that the railway company had a 90-mile restriction in the fourth district, which extended from Fullerton to San Diego and included Solano Beach, plaintiffs' counsel inquired as to the speed in the area between Fullerton and Los Angeles. An objection was overruled, and the witness said that the speed restriction on all districts in the Los Angeles division of the Santa Fe is 90 miles an hour except in the third district, from Fullerton to Los Angeles. Counsel for plaintiffs then asked "Well, Mr. Benton the restriction now is 50 miles an hour, isn't it?" An objection was made and the court said he did not know what district was referred to. Counsel for plaintiff said the restriction in the fourth district was referred to, that the witness had said the restriction in the fourth district now is 90 miles an hour, and that they were prepared to show "that the restriction in this district at this crossing now, rather than being 90 miles an hour, is 50 miles an hour". After some argument between court and counsel, counsel for plaintiffs asked the witness whether he had said that "the speeds in these areas then and now are 90 miles an hour." The question was not answered and in a discussion between court and counsel the court said the question was vague and indefinite, and that he did not know whether counsel

meant the speed at the intersection here in question or whether he meant the speed in the entire area between Los Angeles and San Diego. Counsel for plaintiffs then asked the witness "Is it your testimony that the speed area at this Plaza Street now is 90 miles an hour?" An objection was overruled and the witness replied that the speed now at the Plaza Street crossing is 50 miles an hour. Not only was this evidence received by way of cross-examination before any evidence was put on by the defendants, but the record clearly shows that the witness had been discussing the general speed limit in the areas between Los Angeles and San Diego, that the first time he was asked concerning the speed limit at the crossing here in question, as distinguished from the speed in the fourth district as a whole, was at the close of the testimony above referred to, and that he had not theretofore given any testimony which was fairly subject to being impeached in the respect here in question.

The second witness called by the plaintiffs was William Price, the signal engineer for the railway company, who was also called under Section 2055. He was asked his opinion as to whether the automatic wigwag in place at the crossing at the time of the accident was the safest possible signal. He replied that in his opinion it was. Counsel for the plaintiffs then asked "Well, Mr. Price, you did change that signal after the accident, didn't you?" An objection was overruled and the witness replied that they were requested to change it by the Public Utilities Commission. Counsel for plaintiffs then asked "What type of signal is there there now?", and the witness replied: "Flashing light signals." The witness was then asked whether, in his opinion, the new signal was a more safe type of signal than the one in use at the time of the accident. He replied, "I do not think so". He was then asked why he did not think so, and gave his reasons. After then asking the witness many questions in an effort to show that the new signal was a better one, this testimony taking up 10

pages of the transcript, counsel asked: "By the way, aren't you changing this type along the system." The witness replied, "Well, I would say we are gradually going to the flashing light signal." In response to further questions the witness again expressed the opinion that "the wig-wag is just as safe or safer than the flashing light signal," but admitted that "it would be safer with one on each side than with just one over here."

[3] The record rather clearly discloses that this evidence as to the change in speed limit and change of signals was brought out by the plaintiffs before any evidence had been brought out by the defendants, and that the evidence in this connection, admitted over the objection of the defendants, was in no proper sense received by way of impeachment of previous testimony produced by the defendants. In our opinion, it was not admissible under the recognized exceptions to the general rule. That this evidence was prejudicial cannot well be doubted in view of the record as a whole. These changes after the accident were repeatedly referred to throughout the trial and were referred to at great length in the argument of plaintiffs' counsel to the jury. Counsel for the plaintiffs, in his argument, told the jury to remember the man that testified "that he was going 90 miles an hour then and was going 90 miles an hour now, and I had to make him" admit "on impeachment" that they were now going 50 miles an hour. In his closing argument he argued that "the highway signal and the railroad signal" were so close together as to be confusing, and after referring to the changes made he asked the jury why they reduced the speed and why they made the change of the signal if it would not have made any difference; told the jury that the family would still have been alive "if that signal had been a proper signal, not a confusing signal, and the train at that time ran as the train does today, at 50 miles an hour instead of the 90 miles an hour"; and then said: "Do

you think, ladies and gentlemen, that that was a futile act? Not in anywise connected with the safety of that crossing or with this case, that they changed the signal that confused them, and that they changed the speed and cut it in two, from 90 miles an hour to 50 miles an hour? How much more do you need in a lawsuit like this to prove a case to a preponderance, beyond a reasonable doubt, and to a moral certainty?"

The reliance and emphasis thus placed on the changes subsequently made were further emphasized by one instruction given by the court, which reads:

"It is for the jury to determine from all the facts and circumstances and conditions existing at the railroad crossing involved whether such railroad company was negligent in failing to provide additional crossing protection, such as a human gateman, red flashing lights or gates at such crossing."

In this connection the respondent husband further contends that the defendants waived the right to object to the admission of the evidence as to changes subsequent to the accident because they did not request the trial court to instruct the jury that such evidence was admissible solely for the purposes of impeachment. Not only were these errors of such a nature that their effect could not reasonably be expected to have been removed by such an instruction, but there was no impeachment in a proper sense upon which such an instruction could have been based. Such an instruction would have been meaningless to the jury under the circumstances here appearing, especially in view of the way the evidence was brought in and used by the plaintiffs. In his closing argument plaintiffs' counsel told the jury in speaking of these changes, "* * * if it had been the way it is now, certainly there would have been no accident at all, because certainly they wouldn't have made those changes academically or idly, to put in these other signals or to reduce that speed there,

and the track, as it was said, that a train can't dodge. Certainly that train then going through a town like that should give more warning, shouldn't it, at least go slower, at least they thought it should go slower in their wisdom when they reduced the speed to 50 miles an hour."

We find nothing in the fact that the jury was allowed over objection to view the scene of the accident and watch a train go by under the changed conditions, or in the photographs of the intersection taken after the new signals were installed, some of which were admitted without objection, which would excuse or justify the other extended admission and use of evidence of such changed conditions under the circumstances shown.

As to the appeal by the parents of Mrs. Daggett no error is pointed out with respect to the jury's finding that no recovery should be had because of Mrs. Daggett's death, and we find none. Contributory negligence on her part very clearly appears and we see no good reason for retrying that issue. With respect to the other issues, relating to the death of the two children the evidence erroneously admitted could only have had a prejudicial effect upon the issues as to negligence on the part of the defendant, and as to whether any such possible negligence was a proximate cause of the accident. In view of the undisputed evidence that Mrs. Daggett drove onto this crossing, with which she was familiar, in front of an approaching train, with the engine bell and whistle sounding, and with a wigwag signal operating and its bell ringing, these were very important issues on which the defendants were entitled to a fair trial, under evidence limited to the conditions existing at the time.

The judgment insofar as it denied relief on account of the death of Mrs. Daggett is affirmed. Insofar as it awarded the plaintiff husband damages for the death of the two children that judgment is reversed.

GRIFFIN, J., concurs.

145 Cal.App.2d 36

Clark HENDERSON, Plaintiff and Respondent,

v.

George Harry BALCOM, Paul Mathews, et al., Defendants,

George Harry Balcom, Defendant and Appellant.
No. 16850.

District Court of Appeal, First District,
Division 1, California.

Oct. 10, 1956.

Action for injuries arising out of an automobile collision on a wet highway at night. The Superior Court, Santa Clara County, Leonard R. Avilla, J., granted plaintiff a new trial after a jury verdict in favor of all defendants, and one defendant appealed. The District Court of Appeal, Bray, J., held that there was substantial evidence to support verdict in favor of plaintiff against the defendant who appealed.

Order affirmed.

1. Appeal and Error ☞977(3)

New Trial ☞6

The granting of a new trial is largely within the discretion of the trial judge, and will be reversed only if an abuse of discretion clearly appears, and the test is whether there was no substantial evidence which would support a contrary verdict.

2. New Trial ☞72

In considering a motion for new trial, trial court is not bound by rule of conflicting evidence, and may draw inferences opposed to those accepted by jury, and does not abuse its discretion by granting a new trial if there is any substantial evidence or reasonable inferences therefrom, which would support a verdict in favor of party granted the new trial.

3. New Trial ☞70

In action for injuries arising out of an automobile collision on a wet highway at night, where jury returned verdict in favor

of defendants, evidence that the action of one defendant in crossing highway and turning into lane occupied by an overtaking motorist so closely in front of overtaking vehicle as to constitute a menace, was the proximate cause of the accident, warranted the granting of a new trial in favor of plaintiff.

4. Automobiles ⇨245(50)

In action for injuries arising out of an automobile collision on a wet highway at night, evidence of highway patrol officer that he had examined the brakes of defendant's automobile and found that the brake pedal did not meet the main resistance until approximately one inch from the floor, and that then resistance was slight, was not sufficient to require holding as a matter of law that the skidding which caused collision was due to a mechanical failure, rather than to the sudden application of brakes on a wet surface.

5. Automobiles ⇨245(60)

In action for injuries arising out of an automobile collision on a wet highway at night, where overtaking motorist was forced to swerve into outer lane, to avoid defendant who made a left turn in front of him, before being forced to quickly apply the brakes thereby causing overtaking motorist to skid and collide with oncoming automobile, that overtaking motorist had passed defendant's automobile by 160 feet before skidding into oncoming motorist would not as a matter of law withdraw defendant's negligence in turning so close in front of overtaking motorist as a proximate cause of the accident.

6. Automobiles ⇨201(9)

Faulty brakes would not necessarily constitute an independent intervening cause which would completely eliminate defendant's negligence in turning in front of overtaking motorist as a proximate cause.

1. It is well settled that the granting of a new trial is largely within the discretion of the trial judge, will be reversed only if an abuse of discretion clearly appears, and the test is whether there was no substantial evidence which would sup-

7. Automobiles ⇨244(1)

In action to recover for injuries arising out of an automobile collision on a wet highway at night, where trial court granted plaintiff a new trial after the jury returned a verdict in favor of all defendants, there was substantial evidence to support a verdict in favor of plaintiff against defendant who appealed.

Crist, Peters & Donegan, Arthur L. Damon, Jr., Palo Alto, for appellant.

Morton L. Silvers, Philander B. Beadle, San Francisco, for respondent.

BRAY, Justice.

[1] The sole question presented upon this appeal by defendant Balcom alone, from an order granting new trial as to all defendants after a jury verdict in favor of all defendants, is whether there was any substantial evidence that would have supported a verdict in favor of plaintiff against defendant Balcom.¹

Evidence.

The accident, for injuries incurred in which plaintiff brought this action, occurred February 1, 1952, at about 8 p. m. on El Camino highway. The street was wet, but at the time of the accident it was either raining very lightly or not at all. The general area was fairly well lighted by neon lights from stores along the street. All cars had their headlights on. Defendant Balcom was driving southerly on the highway, according to his testimony. Desiring to look at a display in a boat shop, he drove westerly off the highway and parked in front of the shop. Shortly thereafter he drove south on the parking area approximately 200 feet, turned his car east towards the highway, and stopped. He intended to enter upon the highway and travel back in a northerly direction. At

port a contrary verdict. *Deshotel v. Atchison, T. & S. F. Ry. Co.*, 126 Cal. App.2d 303, 305, 272 P.2d 71; *Moss v. Stubbs*, 111 Cal.App. 359, 362, 295 P. 572, 296 P. 86.

this point directly opposite him, Curtner Street entered the east side of El Camino but did not cross. There were no traffic lights. Balcom observed that the nearest approaching traffic on the highway was about 1,000 feet. He was unable to form an opinion as to the speed of any of the cars. He crossed the two southbound lanes and proceeded north in the lane closest to the center line. As he entered the highway he was probably talking to the passenger on his right. His speed was 15-25 miles per hour. As he made the left turn he observed the traffic again and the nearest approaching cars were 600-900 feet away.

Plaintiff's testimony was that, driving southerly on the inside lane of the highway at about 25 miles per hour, he noticed two cars, both of which were approaching him on the northerly inside lane. Balcom's car was about 300 feet from him and about three car lengths ahead of the car driven by defendant Mathews.

Mathews testified that driving northerly 30-35 miles per hour he saw Balcom's car starting to cross the southbound lanes. He was then about 150 feet south of Balcom. Mathews honked his horn thinking Balcom would stop as Mathews was so close to him; but Balcom continued across. When Balcom entered the inside lane going north he was 30-50 feet in front of Mathews. Mathews did not slow down but swerved to the outside northerly lane to avoid hitting Balcom. In this lane there was a car just ahead of him. To avoid hitting it Mathews applied his brakes. He was then either abreast or a little ahead of Balcom's car. The application of his brakes, which apparently caused one of them to "grab," caused Mathews' car to skid in a northerly direction across the highway, into the inside southbound lane where it collided with plaintiff's car. Plaintiff sued both Balcom and Mathews and a Mrs. Taylor (who signed Mathews' application for a driver's license).

Balcom as a Proximate Cause of the Accident.

[2, 3] Having in mind that the trial court in considering a motion for new trial is not bound by the rule of conflicting evidence, may draw inferences opposed to those accepted by the jury, and does not abuse its discretion by granting a new trial if there is any substantial evidence or reasonable inferences therefrom which would support a verdict in favor of the party granted the new trial (see *Ballard v. Pacific Greyhound Lines*, 1946, 28 Cal.2d 357, 358-359, 170 P.2d 465), we fail to find any abuse of discretion here. According to the testimony of plaintiff and of Mathews, Balcom crossed the main highway and turned into the lane then occupied by the Mathews car and another so closely in front of those cars as to constitute a menace to the Mathews car at least.

[4] Balcom contends that this negligence was responsible for no more than causing Mathews to turn into the outside northerly lane, and that Balcom's negligence was not a proximate cause of what happened thereafter. Balcom contends that Mathews' later acts and the "grabbing" of his brakes were unforeseeable intervening acts which eliminated Balcom's actions as a proximate cause of the accident. It requires no argument to state that it is reasonably foreseeable that if it becomes necessary to suddenly apply brakes on a wet highway while turning, skidding may result, and that therefore, as here, when the operator of a car turns in front of a car approaching on a highway at such a close distance as to require the latter to attempt to get out of his way and turn into an adjoining lane in which there is a car, that a proximate result of the first operator's action would be any skidding which might result from the second operator applying brakes on the wet highway. But, says Balcom, the skidding here was not due to the wet surface, but to mechanical failure. This contention is based upon two bits of evidence: (1) Mathews' answer to the following question: "Q. Did you have any feeling of your brakes—of brakes grabbing when you applied them?" A.

Evidently one of them had grabbed because it caused me to skid." (2) California Highway Patrol Officer Bruwer testified that he examined the brakes of Mathews' car and found "Brake pedal did not meet the main resistance until approximately one inch from the floor, then resistance slight." This evidence is not sufficient to require a holding as a matter of law that the skidding was due to a mechanical failure and not due to the sudden application of brakes on a wet surface.

[5] Based upon measurements from locations placed by Mathews on a map, Balcom contends that Mathews traveled approximately 160 feet in the outside lane after passing his car, and that such fact demonstrates as a matter of law that the chain of events started by Balcom was broken. In spite of these measurements, Mathews testified that the total distance he traveled in the outside lane, including a 20-30 foot skid, was approximately 75 feet. It was for the trial judge to determine the distance traveled by Mathews before applying his brakes and whether such distance broke the chain of events set in motion by Balcom. We cannot say as a matter of law that, under all the circumstances here, even 160 feet was such a distance as to withdraw Balcom's negligence as a proximate cause of the accident.

[6] Moreover, assuming Mathews' brakes to have been faulty, such fact would not necessarily constitute an independent intervening cause which would completely eliminate Balcom's negligence as a proximate cause.

Throughout the country there are various views applied as to the liability of one who sets in motion a chain of events leading to the injury of another. California appears to follow the view that where the defendant's negligent conduct is the stimulus for some other act which causes the injury, there is no break in the chain of events which would prevent his liability. In *Champagne v. A. Hamburger & Sons*, 1915, 169 Cal. 683, 689, 147 P. 954, 956, the court said: "The proximate cause,

as defined generally, is the cause which led to what might naturally and probably be expected to produce the result. Here, of course, the contention of appellant is that the injuries of the plaintiff were not caused by the fall of the elevator but by the intervening act of the crowd in rushing over her. But the intervening act of the crowd would not break the causal connection between the negligent act of operating the elevator in a crowded condition and the injuries sustained by plaintiff, if such intervening act was one which might have been foreseen as likely or probable to occur as the result of the original negligence." The court in *Titlow v. Florence Trading Co.*, 1917, 35 Cal.App. 457, 460, 170 P. 172, 173, said: "* * * whatever the jury assumed as an immediate cause for the precipitation of the lamp to the floor, it was justified in taking the position, the negligence of the defendant having been shown, that such immediate cause was the natural and to be expected consequence of that negligence, and that, therefore, the negligence was the proximate cause of the damage, the cause which set all other causes in motion." It was said in *Haverstick v. Southern Pac. Co.*, 1934, 1 Cal.App.2d 605, 614, 37 P.2d 146, 151: "* * * In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. [Citation.] If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence."

The cases cited in appellant's opening and closing briefs in regard to this issue are not of value because all of them deal with *independent* intervening acts—not intervening acts stimulated by defendant's negligence, as here.

[7] In view of the law on this matter, and the evidence that Balcom turned onto

El Camino in a position which caused Mathews to turn to an outside lane where, because of belief that he would overtake a car that was there, he applied his brakes and thus skidded into Henderson, it cannot be said as a matter of law that the trial judge was incorrect in his determination that Balcom's negligence was a proximate cause of the injury.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



144 Cal.App.2d 808

A. S. NAHAS, Donald R. Nuss, Theo H. Erb, Ernest L. Emenegger, and W. C. Warden, Individually and as co-partners doing business under the fictitious firm name and style of Nahas Department Store No. 4, Plaintiffs and Respondents,

v.

LOCAL 905, RETAIL CLERKS INTERNATIONAL ASSOCIATION, an unincorporated association and Local labor union, etc. and Ben N. Scott, Defendants and Appellants.

Civ. 21729.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1956.

Rehearing Denied Oct. 31, 1956.

See 302 P.2d 829.

Hearing Denied Nov. 28, 1956.

Action to enjoin labor union from picketing within area of store owners' premises claimed to be private property of owner. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment enjoining union and union appealed. The District Court of Appeal, Ashburn, J., held that where lease to store in shopping center provided that lessee had right to use parking lot in common with other tenants of landlord as well as such tenants' patrons and customers, lease gave tenant exclusive use of building only and he had no such

right to exclusive occupancy of streets, sidewalks or parking area within center as would enable him to exclude picketing therefrom on ground of trespass, notwithstanding landlord's subsequent supplemental document giving tenant exclusive use of such streets, sidewalks, etc. subject only to use by other tenants, their patrons and customers.

Reversed.

1. Labor Relations ⇨41

Statutory declarations of policy found in National Labor Relations Act are substantially the same as in the California Labor Code. National Labor Relations Act, §§ 7, 8(a) (1) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 157, 158(a) (1); West's Ann. Labor Code, § 923.

2. Courts ⇨97(5)

Decisions of United States Supreme Court respecting when rights of the employer as owner of his plant must yield to demands of union organizers to organize employees, based on federal statutory declarations similar to declarations in California statutes, are binding precedent on California courts so far as they go, whether viewed from a constitutional or statutory standpoint. National Labor Relations Act, §§ 7, 8(a) (1) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 157, 158(a) (1); West's Ann. Labor Code, § 923.

3. Labor Relations ⇨298

Picketing is something more than free speech even when conducted peacefully.

4. Labor Relations ⇨286

The right to use the employer's premises for purposes of disseminating information concerning organization of employees depends on the inability to reach the employees by other means for proselyting purposes.

5. Labor Relations ⇨300

A labor union's claimed inability to reach actual or prospective customers is immaterial as to its claim of right to use

employer's property for purposes of picketing.

6. Labor Relations ⇐290

Where employees had gone on strike, their status as strikers would terminate any right they otherwise might have had to occupy employer's premises for union or organizational purposes.

7. Labor Relations ⇐300

Union organizers and strikers were not entitled to occupy employer's private property for purpose of picketing employer's store.

8. Labor Relations ⇐300

Where lease to store in shopping center provided that tenant had a right to use parking lot in common with other tenants of landlord in center as well as such other tenants' patrons and customers, lease gave tenant exclusive use of building only and he had no such right to exclusive occupancy of streets, sidewalks or parking areas within center that would enable him to exclude pickets therefrom on the ground of trespass, notwithstanding supplemental document from landlord giving tenant exclusive use of such streets, sidewalks, parking areas, subject only to use by other tenants and their patrons and customers.

9. Labor Relations ⇐326

Peaceful picketing when pursued for purpose of organizing a nonunion plant is a legitimate means to a lawful objective.

10. Labor Relations ⇐993

Where employer sought to enjoin union from picketing his store on ground that pickets were using his private property and therefore trespassing, and employer's lease showed that he had no exclusive right to occupy premises being used by pickets and therefore there was no trespass, fact that there were abuses by some of the pickets in allegedly intimidating customers and blocking doorway to employer's store, might justify regulation of manner and extent of picketing but not an injunction prohibiting it entirely.

Gilbert, Nissen & Irvin, Los Angeles, for appellants.

Sheppard, Mullin, Richter, Balthis & Hampton, George R. Richter, Jr., and Edwin H. Franzen, Los Angeles, for respondents.

ASHBURN, Justice.

Here presented is another facet of the recurrent problem of adjusting the right of free speech, in the form of picketing, with an owner's exclusive right to use his private property. Defendant Union and its secretary-treasurer appeal from a judgment enjoining them from conducting any picketing upon or within a certain area held to be the private property of plaintiffs.

On November 29, 1954, plaintiffs, engaged in business as partners under the name Nahas Department Store No. 4, opened a variety type department store at 1250 West Redondo Beach Boulevard in the city of Gardena. It is located upon a ten-acre tract of land, a "shopping center," owned by Victor C. Hornung and wife, who leased to plaintiffs on July 1, 1954, a building 82 x 150 feet in size, together with the right to use the surrounding parking lot (and apparently the private streets, sidewalks, alleyways and courts) in common with Hornung's other tenants and their patrons and customers. The store faces Redondo Beach Boulevard to the north and is surrounded by parking areas. In front is one about 66 feet deep and to the rear a much larger one. Immediately in front and in the rear of each building is a sidewalk, the one in front being 11 feet wide and in the rear 6 feet. A public sidewalk also runs along the front of the premises on the southerly side of Redondo Beach Boulevard. West of the Nahas store is Von's super-market, the two being separated by a private road 38 feet wide. There were no other tenants or buildings on the property at the times of the occurrences now under examination.

Local 905, Retail Clerks International Association, is a local union chartered by the American Federation of Labor to rep-

resent sales clerks and other related employees in the retail variety and department store field. Efforts to obtain a collective bargaining agreement from Nahas, which had been started before the store was opened, proved unsuccessful, and the local began a drive to organize the employees. To that end a picket line was established upon each of said sidewalks adjoining the store in the front and the back. The pickets carried signs reading: "Please Do Not Patronize—This Store Refuses to Sign a Union Contract" or "Please Do Not Patronize Nahas Department Store—A. F. of L. Picket Line." In the parking areas the union caused automobiles to be placed at strategic points displaying similarly worded banners. This began on December 10, 1954. Demand was made that the pickets withdraw from plaintiffs' private property. This was refused and the picketing continued until a temporary restraining order was issued on December 17th. It was followed by a preliminary injunction and the permanent injunction from which this appeal is taken. After December 17th the union pickets paraded on the public sidewalk on the south side of Redondo Beach Boulevard.

The judgment enjoins the defendants and each of them, "their officers, employees, agents, members, representatives, organizers, and attorneys" from "[s]tationing, placing, or maintaining any picket or pickets or other person or persons either in vehicles or on foot anywhere in the areas surrounding plaintiffs' store building which is private property occupied by and subject to the control of the plaintiffs, that is to say anywhere within the territory bounded on the North by Redondo Beach Boulevard and on the East of the property line parallel with Budlong Avenue and on the South by 155th Street and on the West by Normandie Avenue * * *." Also, "from placing or maintaining on any car parked in any of the parking areas located anywhere on the premises described hereinabove any signs or printing of any nature whatsoever containing the words 'Please Do Not Patronize—This Store Re-

fuses to Sign a Union Contract' or 'A. F. of L. Picket Line' or any other signs or printing specifically referring to the existence of a picket line or labor dispute involving the plaintiffs' store." The theory of the ruling is expressed in these conclusions: "That the property upon which the defendants, their agents, employees, and representatives were picketing was private property. * * * That the defendants, their agents, employees, and representatives had no lawful right to picket upon said private property. * * * That the activities of the defendants, their agents, employees, and representatives, in picketing on said private property amounted to a continuing trespass working irreparable injury to the plaintiffs. * * * That the activities of the defendants, their agents, employees, and representatives, in picketing on the private property leased to the plaintiffs interfered with the right of the plaintiffs in the quiet and peaceful enjoyment and use by them of their said property so leased to them and caused said plaintiffs irreparable injury."

Defendants-appellants argue that this is a denial of their right of free speech expressed through the pickets and the car banners. Plaintiffs say that the injunction is limited to an area which is their private property, that the pickets are not employees, and that the right to exclusive use of one's own property precludes trespass thereon by non-employee pickets.

The extent to which the rights of the employer as owner of his plant must yield to the demands of union organizers is largely defined in *National Labor Rel. Bd. v. Babcock & Wilcox*, 351 U.S. 105, 76 S. Ct. 679, 100 L.Ed. 975, decided April 30, 1956. It deals with three cases of employers who prohibited distribution, within their privately owned parking lots, of union literature by representatives engaged in organizational efforts, not employees of the company. The National Labor Relations Board had found this to be an unfair labor practice by the company, relying on *National Labor Relations Board v. LeTourneau Company of Georgia*, one of several

cases reported sub nom. Republic Aviation Corp. v. N. L. R. B., 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372. The Babcock & Wilcox opinion holds " * * * that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." 351 U.S. 105, 76 S.Ct. 679, 684, 100 L.Ed. 975. The court differentiated the LeTourneau case upon the ground that it dealt only with activities of employees upon the master's premises, and further said, 351 U.S. 105, 76 S.Ct. 679, 684:

"This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. * * * Here the Board failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees.

"The distinction is one of substance. No restriction may be placed on the

employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. * * * But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records. * * * The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available." See, also, N. L. R. B. v. Monsanto Chemical Co., 9 Cir., 225 F.2d 16, 20-21; certiorari denied, 351 U.S. 923, 76 S.Ct. 777. 100 L.Ed. 1454.

[1,2] While the Babcock & Wilcox case and the Monsanto Chemical Co. controversy arose upon findings by the National Labor Relations Board of the existence of an unfair labor practice under § 8(a) (1) of the Taft-Hartley Act, 29 U.S.C.A. § 158(a) (1), and superficially do not rest upon a constitutional basis, the discussion actually goes to that depth and deals with the fundamental adjustment of rights of speech and rights of private property. Hence, the statutory origin of controversy in those cases does not detract from their authority when applied to a dispute arising in intrastate commerce, as at bar. Moreover, the statutory declarations of policy found in the Federal Act, 29

U.S.C.A. § 157,¹ and in our Labor Code, § 923,² are substantially the same. "The principle espoused by section 923 is essentially the same as that fostered by the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., namely, the right of workmen to enjoy free collective bargaining over terms and conditions of employment." *Nutter v. City of Santa Monica*, 74 Cal. App.2d 292, 298, 168 P.2d 741, 745. The cited authorities are binding precedents so far as they go, whether viewed from a constitutional or statutory standpoint.

[3] However, those cases deal with the dissemination of literature and personal solicitation rather than picketing, which is something more than free speech even when conducted peacefully. *Building Service Employers International Union v. Gazzam*, 1950, 339 U.S. 532, 536, 537, 70 S.Ct. 784, 94 L.Ed. 1045. "Here, as in *Hughes v. Superior Court*, 339 U.S. 460 [ante, 985], 70 S.Ct. 718 [94 L.Ed. 985], we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.'" *International Brotherhood of Teamsters, Chauffeurs, etc., v. Hanke*, 339 U.S. 470, 474, 70 S.Ct. 773, 775, 94 L.Ed. 995, 1001.

1. 29 U.S.C.A. § 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

2. Labor Code, § 923: "In the interpretation and application of this chapter, the public policy of this State is declared as follows: Negotiation of terms and conditions of labor should result from voluntary agreement between employer and

Ordinarily, picketing is addressed to the public, not the employees, as witness the signs used by appellants' representatives in this case. " * * * [P]eaceful picketing consists of bringing the facts to the attention of the general public by means of one or more persons stationed about the place of employment which is being picketed. So conducted, peaceful picketing is an attempt to bring to bear upon the picketed employer the pressure of the opinion of such portion of the public as may be sympathetic to the objects of the picketing organization, by inducing that portion of the public to cease dealing with the picketed business." * * * " *People v. Spear*, 32 Cal.App.2d 165, 168, 89 P.2d 445, 446. Of course it is not necessarily limited to the public as its objective. In *re Bell*, 19 Cal.2d 488, 497, 122 P.2d 22. No case of which we are aware has gone so far as to hold that the employers' property may be invaded and occupied by non-employees for the purpose of picketing. The "broader perspective", applied in *Northwestern Pac. R. Co. v. Lumber & Saw Mill Workers Union*, 31 Cal.2d 441, 446-447, 189 P.2d 277, 281, may dictate that "the public welfare tip the scales in favor of preventive relief" in such a situation. But, as will appear from the later discussion of trespass, there is no necessity of here deciding whether any such

employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

extension of the Babcock & Wilcox doctrine is appropriate.

No question of discriminatory use of the employers' property arises at bar and the evidence does not afford basis for any finding that the employees of Nahas were "isolated from normal contacts" of union representatives, as in the case of men spending their entire time in the employer's mining camp or aboard his ship. No showing of inability to contact employees through normal channels was made or attempted at the trial of the instant case. The burden of establishing such over-riding necessity of occupying the employers' premises obviously rests upon the union. All that appears is that when Mr. Morriss, business representative of the local, wanted to organize the Nahas employees he arranged on November 19th a lunch-time meeting at a drive-in stand on Redondo Beach Boulevard; that nine employees were present and six membership applications were then obtained; on or before December 11 seven more such applications were procured. Concerning the matter of what constitutes inability to contact employees through normal channels see 76 S.Ct. footnote 1 on page 681 of the Babcock & Wilcox decision, and the last paragraph of the test column 1, page 685.

[4, 5] Appellants argue that it was error to refuse to find upon their plea "That there was no other place or way for plaintiffs' employees who are members of the defendant Local 905 to publicize their dispute through peaceful picketing of the customer entrances of plaintiffs' store except by using the sidewalks in front of and behind plaintiffs' store for that purpose." The thesis is that the customers of plaintiffs and the general public could not be reached effectively except through picketing upon the ten-acre parcel and the sidewalks thereon. This is beside the point. In ability to reach the employees for proselyting purposes is the criterion of a right to use the employers' premises for that purpose; inability to reach actual or

prospective customers adds nothing to the union's claim of right to use the employers' property. A finding on this subject, if made, would be immaterial and the trial judge so held.

[6] Appellants also say that the court erroneously ignored the rights of plaintiffs' own employees to use the master's premises for organization purposes because it appears that at least five of the pickets were employees as well as union members and the injunction runs against the union and all its members. The record discloses, however, that these persons not only had gone on strike, thus suspending their status of employees, *Mark Hopkins, Inc. v. California Emp. Comm.*, 24 Cal.2d 744, 749, 151 P.2d 229, 154 A.L.R. 1081, but had also given up their jobs. There is no specific finding on this matter of voluntarily terminating their employment, but if it were held that this did not occur and that their employment was merely suspended, nevertheless their status of strikers would terminate any right they otherwise might have to occupy the employers' premises for organizational purposes. During the period through which they were rejecting the obligations of employment they could not be heard to claim any of the rights or benefits thereof.

[7] For the foregoing reasons we conclude that, in this case, union organizers and strikers were not entitled to occupy the employers' private property for their picketing activities. The assumption that they were doing so requires a closer look at the lease and supplement thereto.

If the parking area, sidewalks, etc., were not the private property of plaintiffs, the second major question which counsel discuss does not arise. Both sides argue the effect of *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, and *Tucker v. State of Texas*, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274. Appellants claim that the sidewalks and parking lot in question had been thrown open to public use in such manner and to such extent as to place them on a parity with public streets

under the cited cases, and that the question of technical trespass fades away. Respondents say that this argument rests upon a faulty factual premise, namely, that they had opened the use of the property to persons other than actual and prospective customers; that there was in this instance a continuing trespass upon their private property which was properly enjoined by the lower court.

In *Marsh v. State of Alabama*, supra, the court dealt with a company-owned town wherein all property, including streets, sidewalks, alleys, etc., were owned by the private company. Distribution of religious literature upon those streets by a member of Jehovah's Witnesses gave rise to the litigation; the witness was charged with violation of a statute forbidding the entry or remaining on premises of another after being warned not to do so. The Supreme Court held that in the necessary balancing of the rights of free speech and control of private property the mere state of title to the street which was open to the use of all could not control the issue. Speaking through Mr. Justice Black, the court said, 326 U.S. at pages 505-506, 66 S.Ct. at page 278, 90 L.Ed. 265: "We do not agree that the corporation's property interests settle the question. * * * Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Mr. Justice Frankfurter, concurring, said: "[T]he technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution." 326 U.S. at page 511, 66 S.Ct. at page 281. The statute was held invalid as applied to the activities of the Jehovah's Witness. The same holding was made in *Tucker v. State of Texas*, supra, which involved a town entirely owned by the United States government.

In *Marshall Field & Co. v. National Labor Relations Board*, 7 Cir., 200 F.2d

375, the rights of non-employee union organizers to carry on their activities in various parts of the Marshall Field store were involved. One of the areas was a company-owned street which extended through the store from one public street to another. It was used to a limited extent by company employees and the public to enter the building. The labor board held that a company rule which prohibited organizational activities in said private street was pro tanto invalid. The court upheld this ruling upon the authority of *Marsh v. State of Alabama*, supra, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.

[8] Counsel for both sides argue the question of whether the sidewalks and parking area involved herein are and have been open to the public to such an extent as to place them on a parity with public streets for picketing purposes. As above indicated we do not reach that problem because the factual basis for the discussion is not supplied by the evidence. Those areas were not and are not owned by plaintiffs-respondents, nor do they hold the same under an exclusive lease.

The original lease of July 1, 1954, was made by Victor C. Hornung and wife as lessors to Nahas as lessee. It describes the leased property as follows: "A location in the development at the southeast corner of Normandie Avenue and Redondo Beach Boulevard in said City of Gardena, to be a building 82'0" x 150'0" in size and design as mutually agreed upon between Lessor and Lessee, *exclusive of parking which is hereinafter provided for*. Said demised premises shall consist of said real property, the building and improvements to be erected thereon as hereafter provided on a plot of ground with its boundary located 38'0" east of present Von's Market building, *and Lessee's rights to use the parking lot in common with other tenants of Lessor as hereinafter provided*." (Emphasis added.) Paragraph (1) says that the premises to be occupied by the lessee "are to be a part of a planned development in which development Lessor will include

approximately seven hundred (700) feet in developed and improved frontage on Redondo Beach Boulevard, and on the south side thereof, extending in an easterly direction from the east line of Normandie Avenue." A map is attached and incorporated by reference. Paragraph (15) contains this: "Lessor agrees to install and pave the parking lot as indicated on Exhibit 'A' attached hereto, and to make, at its own expense, all necessary improvements so as to provide *suitable and adequate parking for the entire development. Said parking lot shall be used by all of the tenants of Lessor in said planned development, as well as patrons and customers of said tenants.*" (Emphasis added.) Plainly, the document leaves plaintiffs possessed of an exclusive right to the building itself but limited to a common use of the parking facilities with all other tenants and their patrons and customers. The lease makes no specific mention of streets, sidewalks, etc., but, as the supplement of December 14, 1954, recites that the lease covers the building and "in common with other tenants of Lessor, the parking area, private streets, sidewalks, alleyways and courts," it may be conceded for present purposes that that is a correct interpretation of the original document.

The picketing started on December 10, 1954. At that time plaintiffs had no exclusive right whatever in or to the locus of the picketing. Only the right to use it in common with others. No right to exclude anyone. The supplement of December 14th was made at the request of Mr. Nahas who told Mr. Hornung, according to the testimony of the latter, that "the purpose was to protect my private property. * * * Against the pickets."

This document, after reciting Nahas' existing right to common use, specifies that same "shall be subject only to the rights of all other tenants of Lessor on said real property and their suppliers, and the employees and agents of such tenants and their suppliers, and patrons and customers of said tenants, to use said private streets, sidewalks, alleyways and courts for ingress

and egress in connection with the regular business of such tenants, and to use said parking area for parking of vehicles in connection with the regular business of said tenants, and Lessee shall have the right to remove any other persons from said parking area and said private streets, sidewalks, alleyways and courts on said real property.

[9] "2. Lessee shall have the exclusive right to control the use of the sidewalks extending along the front * * * and the rear of the building * * * except that Lessee shall keep said sidewalks free and clear of any obstructions and shall permit the use of said sidewalks by other tenants of Lessor on said real property, and patrons and customers of such tenants, for normal ingress and egress to and from the buildings occupied by said tenants, and Lessee shall have the right to remove all other persons therefrom." Manifestly it would be impossible to differentiate between customers of Nahas and Von, or to distinguish actual customers from prospective buyers, or potential patrons from mere lookers, or mere lookers from out and out trespassers. The quoted language of the supplement adds nothing to the lessee's right except an asserted power to remove "any other persons," and that language, read in the light of the existing situation, meant only the strikers. The professed "right to control" falls in the same category. This document was nothing but an attempt on Hornung's part to transfer to Nahas a right to remove the pickets upon the theory that they were trespassers. Trespass against whom? Not Nahas, for he had no greater right in these walks than does one who fronts on a public sidewalk,—the right to enjoin picketing which is violent or threatening or abusive or en masse, or the like, but not orderly and peaceful picketing. Hornung is not a party to this action. The pickets were not interfering with him or his enjoyment of the premises. He had no right to cause their removal which he could transfer in gross. The problem presented by the attempted application of the Marsh and Marshall Field cases, supra,

does not arise here because plaintiffs had no title to the walks or parking lot. They had only the same rights which one has whose store fronts on a public sidewalk or parking lot. "The defendants have a right to use the public sidewalk in front of plaintiff's market for the purpose of spreading their propaganda. Plaintiff has a right to have his customers use the sidewalk for the purpose of entering and leaving his market. Neither right is exclusive; each may, fortunately, be exercised without a denial of the other, although each may interfere with the other. Defendants' use of the sidewalk may not be prohibited, but there may be a limitation placed upon the number using it and the manner of use, so that there is neither intimidation nor undue interference with its use by plaintiff's customers." *Pezold v. Amalgamated Meat Cutters and Butcher Workmen*, 54 Cal.App. 2d 120, 126, 128 P.2d 611, 615. Peaceful picketing, when pursued for the purpose of organizing a nonunion plant, is held in this state to be a legitimate means to a lawful objective. *C. S. Smith Metropolitan Market Co. v. Lyons*, 16 Cal.2d 389, 401, 106 P.2d 414; *Park & T. I. Corp. v. International Brotherhood of Teamsters, etc.*, 27 Cal.2d 599, 604, 165 P.2d 891, 162 A. L.R. 1426; *Pezold v. Amalgamated etc. Workmen*, supra, 54 Cal.App.2d 120, 122, 128 P.2d 611.

[10] The trial court found that there were certain abuses by some of the pickets, that they took pictures of customers and employees, made remarks to customers, such as "get that lady's license number," pushed Von's shopping carts in front of plaintiffs' doorway in such manner as to block it, and used a sound truck. Such findings may justify a regulation of the manner and extent of picketing, but not an injunction prohibiting picketing entirely. *Chrisman v. Culinary Workers' Local*, 46 Cal.App.2d 129, 133, 115 P.2d 553; *Pezold v. Amalgamated etc. Workmen*, supra, 54 Cal.App.2d 120, 126, 128 P.2d 611; *Steiner v. Long Beach Local No. 128*, 19 Cal.2d 676, 684, 123 P.2d 20.

The pickets were not trespassing upon plaintiffs' rights and the injunction against any picketing upon the Hornung property was too broad.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SCHAUER, J., dissenting.



BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, a national banking association, et al., Plaintiff, Cross-Defendants and Respondents,

v.

LAMB FINANCE COMPANY, Inc., a corporation, and **Leah Lamb Poyet**, also known as **L. L. Poyet**, **Leah D. Lamb** and **Leah Lamb**, Defendants, Cross-Complainants and Appellants.*

Civ. 21775.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1956.

Rehearing Granted Oct. 29, 1956.

For Opinion on Rehearing see
303 P.2d 86.

Action to enforce the payment of a promissory note wherein a cross-action was filed seeking damages based on alleged fraudulent activities of cross-defendants in connection with transactions affecting the cross-complaints. From a money judgment rendered on a directed verdict of the jury in favor of plaintiffs in the Superior Court of Los Angeles, Arthur Crum, J., the defendants appealed. The District Court of Appeal, Fox, J., held that the trial court erred in not permitting certain defenses based on alleged fraud to be tried by the jury, improperly denied the defendants the right to amend cross-complaints and properly excluded parol evidence to show an agreement between the payee of a note and the guarantor thereof by which the former promised not to enforce the latter's liability thereon.

* Opinion vacated 303 P.2d 86.

Judgment reversed as to the plaintiff bank; appeal dismissed as to cross-defendants.

1. Jury ⇨10

The right to a trial by jury guaranteed by the Constitution is the right to a trial by jury in actions at law of issues which were triable at the common law in 1850. West's Ann.Const. art. 1, § 7.

2. Jury ⇨13(14)

Where an action presents issues of both a legal and equitable nature, a party is entitled to a trial by jury of any legal issue remaining after the equitable aspects of the case have been determined by the court. West's Ann.Const. art. 1, § 7.

3. Jury ⇨13(14, 18)

Equity jurisdiction is not automatically conferred by a mere charge of fraud made affirmatively or defensively so as to authorize the trial court to remove the issues of fraud from the jury. West's Ann.Const. art. 1, § 7.

4. Contracts ⇨94(1)

Deeds ⇨70(1)

Fraud will invalidate in a court of law as well as in a court of equity and annul every contract and every conveyance affected with it.

5. Jury ⇨13(18)

In action on a promissory note defendants having pleaded fraud defensively to avoid their apparent obligations were entitled to a trial by jury of the issue so raised. West's Ann.Const. art. 1, § 7.

6. Jury ⇨13(18)

Where fraud in the inducement is relied upon as a defense to a legal demand based upon a simple contractual obligation, the issue thus raised is properly triable to the jury. West's Ann.Const. art. 1, § 7.

7. Bills and Notes ⇨103(1)

Fraud in the inducement is available as defense against the holder not in due course of a negotiable instrument.

8. Jury ⇨13(18)

In action on note, cross-complaint seeking damages of \$500,000 based on alleged fraudulent activities of cross-defendants did not transmute the litigation into an equitable proceeding precluding a jury trial on the issues of fraud raised. West's Ann.Const. art. 1, § 7.

9. Jury ⇨13(18)

In action on a note, prayer in cross-complaint that plaintiff take nothing by its action and that defendants be released of all liability did not indicate the equitable character of the action so as to preclude a jury trial on the issues of alleged fraud raised in the cross-complaint. West's Ann. Const. art. 1, § 7.

10. Jury ⇨13(18)

In action on a note, where cross-complaints sought damages for alleged fraudulent activities of the cross-defendants, denial of a jury trial was not justified on the ground that even if the issue of fraud had been tried by the jury the court would have been justified in directing a verdict for the plaintiff. West's Ann. Const. art. 1, § 7.

11. Evidence ⇨423(7)

Parol evidence to the effect that guaranty was a matter of form and no personal liability would attach to the guarantor as a result of the transaction was properly rejected under the parol evidence rule.

12. Evidence ⇨441(12)

The guarantor of a promissory note which is unambiguous as to his liability is precluded from showing an oral agreement accompanying the signing of the instrument that he would never actually be called upon to pay it.

13. Appeal and Error ⇨78(3)

Where parties to cross-complaint are not identical with parties to the original action, order dismissing cross-complaint amounts to a final adjudication between cross-complainants and new parties joined by the cross-complaint and is appealable judgment. West's Ann.Rules on Appeal, rule 2(b) (2).

14. Appeal and Error ⇨356

Where defendants never appealed from an order dismissing their cross-complaints in which new parties were joined so that as to such cross-defendants the judgment had become final, purported appeal as to such parties must be dismissed.

15. Appeal and Error ⇨1180(1)

Where ruling dismissing cross-complaints as to plaintiff bank striking affirmative defense and denying defendants' motion to amend were interlocutory in character and judgment in favor of the bank must be reversed, interlocutory rulings were set aside and the parties restored to the position in which they found themselves at the out-set of the proceedings.

16. Appeal and Error ⇨1201(3)

After an unqualified reversal, the trial court may in its discretion permit such amendment of the pleadings as may be proper.

17. Bills and Notes ⇨477**Estoppel** ⇨114

In action on a note, pleadings of cross-complaint negatived the charge that the cross-plaintiff was in full possession of the facts constituting the alleged fraud at the time the renewal note was executed and she was not estopped from denying the obligation on the ground of alleged fraud.

18. Pleading ⇨360(9)

Allegations of cross-complaint were required to be accepted as true on motion for dismissal.

19. Principal and Surety ⇨41, 42

Any concealment of material facts or any express or implied misrepresentation thereof or any undue advantage taken of the surety by the creditor furnishes a sufficient ground to invalidate the contract.

20. Guaranty ⇨20

In action on a note, wherein a recovery was sought against codefendant who had guaranteed to pay the indebtedness evidenced by the note, guaranty was invalidated where it appeared that alleged fraud infected the renewal of the guaranty.

21. Guaranty ⇨20

That one guarantying indebtedness on a note discovered some elements of the claimed fraud prior to the execution of the renewal note did not put her upon inquiry and charge her with all knowledge which a diligent investigation would have discovered.

22. Contracts ⇨100

Whether there is an implied waiver of the defense of fraud is not ordinarily decided as a matter of law but is essentially a question of intention and an issue of fact which can be resolved only when the trier has before it the evidence bearing on the issue.

23. Guaranty ⇨26

In action on a note, whether guarantor of note had full knowledge of facts and clearly intended to waive the alleged antecedent fraud at the time she renewed the note was an issue of fact for the jury.

24. Pleading ⇨205(1)

In action on a note, cross-complaint seeking damages based on alleged fraudulent activities of cross-defendants was not vulnerable to a general demurrer.

25. Pleading ⇨267

Defendants should be given an opportunity to clarify ambiguities, amend insufficiencies to eliminate surplusage or explain mistaken statements if any in the cross-complaints particularly with respect to the explanation of any purported admissions shown to be the result of excusable inadvertence or unfortunate choice of phraseology.

J. W. Ehrlich, San Francisco, N. E. Youngblood, Beverly Hills, and Robert M. Maslow, Hollywood, for appellants.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Robert H. Fabian, and Richard G. Rypinski, Los Angeles, for respondents.

FOX, Justice.

In an action to enforce payment of a promissory note, defendants appeal from

a money judgment rendered upon a directed verdict of the jury in favor of plaintiff.

The fundamental issue presented is whether the court erred in not permitting certain defenses based on fraud to be tried by the jury. Other questions raised are (1) the propriety of the dismissal of defendants' cross-complaints at the time of trial without affording leave to amend, and (2) whether parol evidence is admissible to show an agreement between the payee of the note and a guarantor thereof, by which the former promised not to enforce the latter's liability thereon.

Plaintiff bank instituted the within action for the unpaid balance on a promissory note excuted by defendant Lamb Finance Company. In its second count, the bank sought recovery against co-defendant Leah Lamb Poyet, who had guaranteed, by a writing on the reverse side of the note, to pay the indebtedness evidenced by said note. Defendants answered with general denials and eleven affirmative defenses. Mrs. Poyet and the Lamb Finance Company filed cross-complaints against plaintiff, W. N. Newton, assistant manager of plaintiff's Hollywood Main Office, W. A. Angione, former president and director of the Lamb Finance Company, and F. J. McFarland, former accountant of the Lamb Company. The cross-complaints primarily sought damages of \$500,000 based on the alleged fraudulent activities of the cross-defendants in connection with certain transactions affecting the cross-complainants.

At the outset of the trial, while the parties were in the chambers of the court, the cross-defendants moved for dismissal of the cross-complaints on the ground that no cause of action was stated. Mrs. Poyet and the company moved for leave to amend. This latter motion was denied, the cross-defendants' motion was granted, and the cross-complaints dismissed. A motion to strike defendants' eleventh affirmative defense was likewise granted.

Prior to the impanelment of the jury, plaintiff bank moved for segregation of

what termed the legal and equitable issues. It requested that the court try without a jury the first, sixth, seventh and ninth affirmative defenses on the theory that these constituted equitable defenses on which defendants were not entitled to trial by jury. This motion was granted, the court directing that these defenses were to be tried by the court subsequent to the trial of the legal issues by the jury. After four days of trial, the jury was excused. Trial was then resumed before the court only on the four remaining defenses, two of which were grounded on fraud in the inducement or procurement of the note. At the conclusion of this phase of the trial, plaintiff moved for a directed verdict. The court granted said motion, recalled the jury and directed the return of a verdict for plaintiff. The court then signed and filed its findings and rendered judgment for plaintiff. This appeal followed.

[1] The main controversy involved in this appeal hinges on defendants' assertion that they were wrongfully deprived of their right to a jury trial on the issues raised in their first, sixth, seventh and ninth affirmative defenses. The right to a trial by jury is provided by Article I, section 7, of the Constitution of California. This section has been judicially construed as guaranteeing the right to a trial by jury in actions at law of issues which were triable by jury at common law in 1850. *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 286-287, 231 P.2d 832.

[2] In *Ripling v. Superior Court*, 112 Cal.App.2d 399, 247 P.2d 117, the court gives cogent expression to the principles determinative of a litigant's right to a trial by jury. These principles, as far as they are here germane, may be epitomized as follows: (1) If the gist of the action as framed by the pleadings is such that the issues raised were cognizable at law in 1850, a trial by jury is a matter of right; (2) even though the case involves equitable principles, if it is one where the common law courts could and would grant

relief, trial by jury is preserved; (3) where law and equity possess concurrent jurisdiction to provide relief, the mere existence of a remedy in equity cannot operate to defeat a party's right to elect to proceed at law; (4) it is only where the issues to be tried are exclusively cognizable in equity that a suitor is deprived of the right to a jury trial; (5) those issues that are legal in nature are triable to a jury. 112 Cal.App.2d at pages 401-402, 407, 247 P.2d at pages 118-119, 121. Where an action presents issues of both a legal and equitable nature, a party is entitled to trial by jury of any legal issue remaining after the equitable aspects of the case have been determined by the court. *Connell v. Bowes*, 19 Cal.2d 870, 123 P.2d 456.

Adverting now to the essential allegations of the affirmative defenses which the court removed from the jury's consideration, it plainly appears therefrom that defendants rely on plaintiff's fraud in the inducement of the execution of the note to defeat their liability thereon.¹ Out of the prolix and indiscriminate welter of allegations which have been incorporated into the answers with noticeable disregard for the niceties of pleading or the precepts of grammar, these significant facts may be culled: That defendant Leah Lamb Poyet was one of the incorporators and later sole stockholder in defendant Lamb Finance Company (sometimes referred to as the company) in January, 1952. W. A. Angione became president and a director of the company in March, 1952, and became acquainted with Mrs. Poyet's financial worth. Angione advised her to transfer certain personal bank accounts and the company's bank account to the Hollywood main office of plaintiff bank upon representations that he had known W. N. Newton, the assistant manager thereof, for many years and that Newton would deal fairly and honestly with her. Unknown to Mrs. Poyet at the time, Angione had informed Newton that he was advising Mrs. Poyet to transfer her deposits to his bank and it was arranged that Newton

would ingratiate himself with Mrs. Poyet and Angione would induce her to establish her account in Newton's branch and under his control. On March 3, 1952, Angione introduced her to Newton at plaintiff's Hollywood branch office. Newton told her he would personally arrange to make her deposits in her account and would extend various courtesies to her. Mrs. Poyet thereafter opened her personal account at the Hollywood branch and also transferred \$50,000 in cash in an account opened for defendant company, which Mrs. Poyet told Newton was not to be used until a permit was issued by the Corporation Commissioner. Newton assured Mrs. Poyet that he would see to it that she and the company would at all times be protected. He also advised her that Angione was extremely reliable and a man of integrity. Relying on such representations, she left the company's matters entirely in Angione's hands. Thereafter, pursuant to a conspiracy between them and unknown to Mrs. Poyet, Newton permitted Angione to overdraw the company's account in approximately \$20,000. Thereafter, on Newton's representation that the company's business was good, that Angione was managing the business well and that the bank would approve a line of credit to the company in the amount of \$200,000, a promissory note was executed by Mrs. Poyet on behalf of the company in favor of the bank in the sum of \$50,000, Newton stating he would credit this sum to the company's account. Newton also procured her to sign the note as guarantor, stating the bank would never hold her personally liable but would liquidate the note out of the line of credit to be advanced. Newton failed to disclose that Angione had overdrawn the account at the time the note to the bank was executed. Thereafter, the note was periodically renewed upon maturity, Newton failing to advise her that Angione had again overdrawn the company account, and assuring her that the bank would extend the credit applied for although the ap-

1. Duress and coercion are included in the defenses removed from the jury.

plication had in fact been denied. It is alleged that had defendants known the true state of affairs which Newton misrepresented and concealed, the various notes would not have been executed or renewed.

In support of the trial court's removal of the issues referred to from the jury, plaintiff contends that the defendants' "constitutional right to a jury trial did not extend to the equitable issues of fraud raised in the answers." It argues "that the defense of fraud in the inducement asserted to defeat an obligation on a contract raises issues solely equitable in nature." This position is manifestly untenable.

[3,4] The underlying fallacy permeating plaintiff's argument is its contention that where fraud in the inducement of an instrument, as distinguished from fraud in its execution, is interposed by way of defense to the enforceability of the instrument, the issues thereby presented are exclusively cognizable in equity. This is without historical foundation. Equity jurisdiction is not automatically conferred by a mere charge of fraud made affirmatively or defensively. *Casaretto v. DeLucchi*, 76 Cal. App.2d 800, 808, 174 P.2d 328. From earliest times, law and equity have exercised concurrent jurisdiction in divers types of controversies to suppress and relieve against fraud. "Again, it hath been said that fraud, accident and trust are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to in a court of law * * *." *Cooley's Blackstone*, 4th Ed., Vol. II, Book III, p. 1178. Lord Mansfield, in the case of *Bright v. Eynon* (1 Burrow, 391, 395), remarks "fraud or covin may, in judgment of law, avoid every kind of act." That case was a suit upon a note, to which defendant interposed a written discharge. Lord Mansfield granted a new trial so that the jury might consider whether the discharge was obtained from the payee by fraud and imposition. Chief Justice Kent, in delivering the opinion of

the court (in 1813) in the case of *Jackson ex dem. Gilbert v. Burgott*, 10 Johns. N.Y., 457, says "courts of law have concurrent jurisdiction in all cases of fraud. Fraud will invalidate in a court of law as well as in a court of equity and annul every contract and every conveyance infected with it." at page 462. In 1838, speaking for the Supreme Court of the United States in the case of *Swayze v. Burke*, 12 Pet. 11, 9 L.Ed. 980, Mr. Justice McLean states: "That fraud is cognizable in a court of law as well as in a court of equity is a well established principle. It has been often so ruled in this court." In *Crane v. Bunnell & Boutwell*, 10 Paige, N.Y., 333, an action at law had been brought on a note, to which the defense was asserted that it had been procured by fraudulent misrepresentations regarding a land transaction. Defendant then filed a bill in chancery alleging the same fraudulent misrepresentations as a basis for cancelling the note and enjoining the action at law. The chancellor, conceding he possessed concurrent jurisdiction in cases of fraud, refused to allow the cause to be removed from the court of law which had first taken cognizance. He pointed out that fraud in the inducement in making the note was equally available as a defense in the suit at law, where the parties could have the benefit of a jury trial. At page 340. In *Dutil v. Pacheco*, 1863, 21 Cal. 438, our Supreme Court dismissed a bill in equity to set aside a judgment in an action growing out of a fraud inducing the sale of property. The court observed that such fraud was a defense which could have been raised in the action at law in which the judgment was rendered.

[5] It is clear that having pleaded fraud defensively to avoid their apparent obligation on the note, defendants were entitled to trial by jury of the issue so raised. The general rule is stated in 50 C.J.S., *Juries*, § 46, page 758, as follows: "As respects the right to a jury trial, courts of law and courts of equity both have jurisdiction of the issue of fraud in

proper cases, and, where the facts constituting the fraud and the relief sought are cognizable in a court of law, the parties are entitled to a jury trial; but, where the case made by the pleadings involves the application of the doctrines of equity and the granting of relief which can be obtained only in a court of equity, the parties are not entitled to a jury trial. So, where fraud is pleaded as a defense in an action at law, the issue is triable by the jury, and in a suit in equity, by the court." Professor Pomeroy, in Vol. III of his treatise on Equity Jurisprudence (5th Ed.), remarks (sec. 872, p. 419): "Fraud in some of its phases, has long been an occasion for the exercise of jurisdiction both in law and in equity. The various reliefs on the ground of fraud which are possible from the nature of the legal and equitable modes of procedure and remedies are the following:

"At law * * * 2. The affirmative relief whereby the defrauded party suffers the transaction to stand and by action recovers pecuniary damages as compensation for the injury maintained by him from the deceit; 3. Defensive relief, whereby the party sets up the fraud as a defense, and thereby defeats any action brought to enforce the apparent fraudulent obligation."

The defense of fraud in the inducement to defeat an apparent contractual obligation or to avoid the effect of various types of written instruments is well recognized in California as raising a legal issue triable before a jury. In *Kearney v. Bell*, 160 Cal. 661, 117 P. 925, plaintiff sued on an account stated. Defendant's answer contained a defense that she had been induced to execute the account stated by virtue of plaintiff's false representations. At the outset of the trial by jury, plaintiff's motion that the court alone try what he termed the equitable defense of fraud was denied. This ruling was urged as error upon the appeal. In repelling plaintiff's argument, the court observed, 160 Cal. at page 663, 117 P. at page 926: "'An account stated is a contract, and like any other contract

may be avoided by showing that the assent of one party thereto was procured by the fraud of the one seeking to enforce the contract. Such a defense is a legal and complete defense' * * * The action upon an account stated is an action at law, and we know of no reason why the defense that the defendant's assent to the account stated was procured by fraud may not be passed upon by the jury, under the instructions of the court. This is what was done in this case, and there was no error in so doing.'"

In *Ito v. Watanabe*, 213 Cal. 487, 488, 2 P.2d 799, 800, plaintiff sued for the balance of the purchase price under a contract for the sale of a business. Defendant's answer alleged fraudulent misrepresentation inducing the making of the contract, partial failure of consideration, and a prior notice of rescission. Eleven special interrogatories were submitted to the jury, four of which related to the alleged fraudulent misrepresentations, upon which the jury found in defendant's favor. Plaintiff moved the court to disregard this verdict and enter judgment in his favor, which it did. In support of the court's disregard of the jury's verdict, plaintiff maintained that the answer raised only equitable issues, a jury trial was unnecessary, and its verdict only advisory. The court stated: "The present action is brought by the seller for the balance of the purchase price, and the buyer is defending on the ground of fraud, and alleging a prior rescission * * *. Fraud is the issue, and, as raised in this case, it is a legal issue. No equitable doctrine is involved and no equitable remedy is sought [citation]."

Landreth v. Ducommun, 8 Cal.2d 694, 68 P.2d 231, offers an interesting parallel to the matter before us. There, plaintiff sued upon a promissory note. Defendant's answer relied principally upon fraud in the inducement as a bar to his liability upon the note. Upon plaintiff's motion the court directed the jury to render a verdict in her favor. Upon appeal defendant claimed that there was sufficient evidence of fraud

to require submission of the case to the jury. The Supreme Court held it to be reversible error to direct a verdict for plaintiff where the state of the record warranted the jury's determination on the issue of fraud in the inducement.

In *Wilson v. San Francisco-Oakland Terminal Railway*, 48 Cal.App. 343, 191 P. 975, plaintiff brought an action to recover for personal injuries. Defendant pleaded a release executed by plaintiff as a defense to the action. Plaintiff offered to prove the release was obtained from him by various fraudulent misrepresentations of defendant's agents. The court refused to entertain such evidence and directed the jury to enter a verdict for defendant. Upon appeal the case was reversed, the court holding that the question of whether the release was obtained through the fraud alleged is a question for the jury.

[6, 7] The authorities and texts referred to unmistakably establish that where fraud in the inducement is relied upon as a defense to a legal demand based upon a simple contractual obligation, the issue thus raised is properly triable to a jury.² For the proposition that only equity can vitiate a contract where fraud occurred in its inducement, plaintiff relies upon *Hartshorn v. Day*, 19 How. 211, 15 L.Ed. 605, and *George v. Tate*, 102 U.S. 564, 26 L.Ed. 232. The *Hartshorn* case related to a sealed assignment of a patent; the *George* case to a bond. These instruments were specialties at the common law. In each case it was held that fraud relating to the consideration for the sealed instrument could not be shown in an action at law. In the *George* case, which cites the earlier decision, the court said: "It is well settled that the only fraud permissible to be proved at law in *these cases* is fraud touching the execution of the instrument * * *." (Italics

added.) It is clear from the italicized language that the rule announced applies to contracts falling within the class of sealed instruments or specialties, which enjoyed a peculiar sanctity at common law. This limited interpretation of the language in the *George* and *Hartshorn* cases is, after close analysis, set out in *American Sign Co. v. Electro-Lens Sign Co.*, D.C., 211 F. 196, where the court notes that all of the cases cited involved contracts under seal. As pointed out by Professor Ames in 9 Harv.L.R. 49, a seal was a sacred thing at common law. It showed that the document to which it was attached was executed with studied formality and could not be lightly abrogated. The seal was accorded such reverence, that neither fraud in the inducement, illegality, payment of the obligation, nor failure of consideration would be heard as a defense in an action at law upon sealed contracts. 9 Harv.L.R. 49, 51-54. Such considerations do not prevail in this contemporary age in an action on a promissory note. Fraud in the inducement is available as a defense against the holder, not in due course, of a negotiable instrument. *Landreth v. Ducommun*, 8 Cal.2d 694, 699, 68 P.2d 231. In the *American Sign Company* case, *supra*, the court held that fraud in the inducement interposed by way of defense to an action on a promissory note raises issues cognizable at law. This case is cited as authority for the same proposition in *Ito v. Watanabe*, 213 Cal. 487, 489, 2 P.2d 799.

[8, 9] Plaintiff asserts that by reason of the prayer, the litigation was transmuted into an equitable proceeding, citing *First National Bank of San Pedro v. Superior Court*, 71 Cal.App. 64, 234 P. 420. The case cited was one in which a proceeding originally commenced as an action at law was transformed by subsequent pleadings into

2. Plaintiff has cited no California authority to the contrary. On the other hand, the reports are replete with cases in which jury trials are granted in causes where fraud in the inducement has been raised as a defense to a simple contract. In addition to *Landreth v. Ducommun*,

supra, reference may be made to cases where such defense was tried to a jury in actions to enforce a promissory note. *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 P. 761; *Conner v. Butler*, 113 Cal.App. 502, 298 P. 546; *J. B. Colt v. Freitas*, 76 Cal.App. 278, 244 P. 916.

a suit in equity for a partnership accounting and for the termination of the partnership relationship. The prayer in the instant action does not require the invocation of equitable relief or remedies. The prayer "for the sum of \$500,000.00 as damages" is a request for a money judgment based on allegations sounding in tort and which, if established, would constitute a counterclaim predicated on deceit. Both the remedy pursued and the relief asked are legal in nature. It is also prayed that "plaintiff take nothing by its action" and that defendants "be released of any and all liability by reason of the notes, endorsements and guaranties." It is suggested that the latter is a prayer for affirmative relief and indicates the equitable character of the action. A similar contention was repelled in *Locke v. Moulton*, 108 Cal. 49, 52-53, 41 P. 28, where the court points out that the essential relief sought by defendant is that plaintiff take nothing by the action. A judgment that plaintiff take nothing would effectively release defendants of liability by reason of the notes and guaranty.

[10] It is also urged that even if the issue of fraud had been tried to the jury, the court would have been justified in directing a verdict for plaintiff because "there was no competent evidence of fraud introduced sufficient to justify sending the case to the jury." Having read the voluminous evidence and having examined the numerous exhibits introduced, we are convinced that there was substantial evidence upon which the jury might have found that Mrs. Poyet was a victim of fraud in executing the notes in question. There was evidence that Newton told Mrs. Poyet that the money deposited in the company's account would not be used until a stock permit had been issued, that Newton would keep her informed of any irregularities in the company's accounts, that prior to the execution of the first note Newton failed to inform her that Angione had overdrawn the company's account, that Newton instead told her the company was in good condition, and that Newton assured Mrs.

Poyet that the bank intended to extend a line of credit to the company at a time when he knew credit had been denied. Mrs. Poyet testified that not until February, 1954, did she learn that the company's account was overdrawn over \$20,000 as of August 6, 1952. The jury might have believed, in the light of such evidence, that but for Newton's misstatements and concealments on these subjects peculiarly within his knowledge, which cast the financial position of the company in a more favorable light than was warranted by the facts known to Newton, Mrs. Poyet would not have executed the notes. *Landreth v. Ducommun*, supra, 8 Cal.2d at page 699, 68 P. 2d at page 233.

Since defendants were deprived of a jury trial to which they were entitled, the cause must be reversed to grant them their day in court.

[11, 12] It might be useful, in the event of a new trial, to consider defendants' assignment of error based on the court's exclusion of evidence offered by Mrs. Poyet for the purpose of proving an alleged oral agreement, made on the part of Newton at the time of the execution of the note, to the effect that her guaranty was a matter of form and no personal liability would attach to her as a result of the transaction. The court properly sustained plaintiff's objection to the reception of such testimony, which contradicted the plain language of the guaranty signed by Mrs. Poyet, as incompetent under the parol evidence rule. In *Newmark v. H. and H. Products Mfg. Co.*, 128 Cal.App.2d 35, 37, 274 P.2d 702, 703, this court stated: "Parol evidence of fraud to establish the invalidity of a written instrument induced by a promise made without any intention of performing it is only permissible in the case of a promise to do some additional act which was not covered by the terms of the contract and such evidence is not admissible in the case of a promise directly at variance with the terms of the written instrument. [Citations.]" It is well settled that the maker or guarantor of a promissory note which is

unambiguous as to his liability thereon is precluded from showing an oral agreement accompanying the signing of the instrument that he would never actually be called upon to pay it. *Shyvers v. Mitchell*, 133 Cal. App.2d 569, 572-574, 284 P.2d 826; *Shaw v. McCaslin*, 50 Cal.App.2d 467, 471, 123 P.2d 102; see *Bank of America Nat. Trust & Savings Ass'n v. Pendergrass*, 4 Cal.2d 258, 263, 48 P.2d 659. The case of *Shyvers v. Mitchell*, supra, is squarely in point. The court below admitted oral evidence that at the time respondent signed a promissory note as guarantor, one Partridge, president of the payee bank, represented that respondent would never be held liable thereunder. One of appellant's contentions on appeal was that the court erred in admitting Partridge's statements that respondent would not be required to pay the note he guaranteed. This contention was sustained, the court stating, 133 Cal.App.2d at pages 573-574, 284 P.2d at page 830: "We think it is clear that evidence of the promises of Partridge hereinbefore set forth could not properly be received or considered as constituting a defense to the action, for to do so would in our opinion, violate the parol evidence rule. While it may be true that 'where the execution of a contract has been induced by a promise made without any intention of performing it, this constitutes such fraud in obtaining the contract that it may be declared null and void' [citation], yet when that promise which, because it is squarely against the terms of the writing, does by its very nature, if counted on, supersede that writing, then, even though it be made with intent on the part of the promisor that the promise will not be kept, evidence of it can neither be received nor counted upon to support a finding of fraud. [Citation.] If the judgment in the instant case depended upon the admission of the promises of Partridge we would be required to hold that it was reversible error to admit them and that the judgment was without evidentiary support." That states the rule here applicable.

[13, 14] Defendants also contend that it was error for the trial court to dismiss their cross-complaints on the ground that they failed to state a cause of action, without affording them an opportunity to amend their pleadings. As has been stated, defendants filed cross-complaints against the bank and joined as new parties therein cross-defendants Angione, Newton and McFarland. On September 28, 1955, the motions of each of the cross-defendants to dismiss the cross-complaints were granted with an award of costs except as to plaintiff. The order embodying this ruling was entered in the permanent minutes on September 30, 1955, there being no direction that a written order be filed, Rules on Appeal 2(b) (2). Where the parties to the cross-complaint are not identical with the parties to the original action, the order dismissing the cross-complaint amounts to a final adjudication between the cross-complainants and the new parties joined by the cross-complaint and is an appealable judgment. *Keenan v. Dean*, 134 Cal.App.2d 189, 191, 285 P.2d 300; *Herrscher v. Herrscher*, 41 Cal.2d 300, 303, 259 P.2d 901; *Kennedy v. Owen*, 85 Cal.App.2d 517, 520, 193 P.2d 141. Defendants have never appealed from this order. Therefore, as to cross-defendants Angione, Newton and McFarland such judgment has become final, the time for appeal therefrom having elapsed. As to these parties the purported appeal must be dismissed.³

[15, 16] As to the plaintiff bank, the rulings dismissing the cross-complaints, striking the eleventh affirmative defense and denying defendants' motions to amend their cross-complaints were interlocutory in character. Since the judgment in favor of plaintiff bank must be reversed and the cause remanded for a new trial, these interlocutory rulings are, of course, set aside and the parties restored to the position in which they found themselves at the outset of the proceedings. *Hall v. Superior Court*, 45 Cal.2d 377, 381, 289 P.2d 431. After an unqualified reversal, the trial court may, in

3. The only appeal taken is from the judgment in favor of the bank.

its discretion, permit such amendment of the pleadings as may be proper and appropriate... *Holt v. Morgan*, 128 Cal.App.2d 113, 118, 274 P.2d 915; *Mitchel v. Brown*, 78 Cal.App.2d 58, 62, 176 P.2d 957; *Heidt v. Minor*, 113 Cal. 385, 388, 45 P. 700.

[17-20] Apart from certain criticisms directed to the insufficiency of the cross-complaints to state the requisite elements of actionable fraud, which could ordinarily be supplied by amendment, plaintiff asserts that the pleadings are, in effect, incurably defective because of certain admissions and allegations destructive of defendants' cause of action predicated on fraud. It contends that the pleadings affirmatively show that Mrs. Poyet discovered the alleged fraud prior to the execution of the renewal note in October, 1953. It urges that by renewing the notes with knowledge of the antecedent fraud, she ratified the prior transactions and waived the fraud. It is true that there are numerous cases holding that the renewal of a note with full knowledge of the exercise of fraud in procuring the original may estop the maker from denying the obligation on that ground. However, the allegations of the lengthy pleadings, which need not be discussed in detail, negative the argument that Mrs. Poyet was in full possession of the facts constituting the frauds charged at the time the renewal was executed. There are allegations that Mrs. Poyet did not discover the full extent of Newton's alleged duplicity, misrepresentations and fraudulent concealment of the truth until after the note was last renewed. One example is Newton's statement to her that the bank was granting the company a line of credit far in excess of the amount of the note and that capital would thus be available to pay off the face of the note. Newton reiterated this statement when the note was renewed in October, 1953, and also concealed the fact that the bank had previously rejected the application, a fact that Mrs. Poyet did not discover until November or December, 1953. Furthermore, accepting, as we must, the veracity of this allegation, it would thus appear that fraud infected the renewal of

the guaranty. The principle governing guaranty contracts is thus stated in *American Nat. Bank of San Francisco v. Donnellan*, 170 Cal. 9, 22-23, 148 P. 188, 193: "The contract of surety imparts entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract." *Story, Eq.Jur.* § 324. 'If the creditor conceal any fact unknown to the proposed surety which, had he known it, would have deterred him from becoming surety * * * it is a fraud upon him, and relieves him from obligation. Especially is this so where the obligation is entered into at the request of the person to whom the security is given.' [Citation.]"

[21] It is asserted, however, that the pleadings show that Mrs. Poyet discovered some elements of the claimed fraud prior to the execution of the renewal note here sued upon, and that "these earlier discoveries would put Mrs. Poyet upon inquiry and would charge her with all knowledge which a diligent investigation would have discovered." This claim is without merit as a statement of a proposition of immutable law. As stated in *French v. Freeman*, 191 Cal. 579, 589, 217 P. 515, 519: "We cannot say as a matter of law that when plaintiff discovered the shortage of chickens he was put on constructive notice as to the other frauds. The rule that a person who has discovered that he has been cheated in one particular is put on inquiry as to other possible frauds must be applied with reference to all the circumstances of the case, and is, of course, a question for the trial court to determine."

[22-24] A more significant infirmity in plaintiff's attack on the sufficiency of the cross-complaints, however, stems from its suggestion that the allegations respecting discovery of the fraud and subsequent renewal of the notes compel the conclusion

that defendants' waived fraud as a defense. However, whether there was an implied waiver of the defense of fraud is not ordinarily decided as a matter of law but is essentially a question of intention—an issue of fact which can be resolved only when the trier has before it the evidence bearing on that issue. In *French v. Freeman*, supra, 191 Cal. at page 590, 217 P. at page 519, the rule is thus stated: "The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be considered in determining the ultimate fact of waiver or nonwaiver * * * Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, and this is shown by his declarations, his acts, or his conduct, which are matters of fact. The question is therefore a question of fact for the determination of the jury." In *Conner v. Butler*, 113 Cal.App. 502, 514, 298 P. 546, 551, it is said: "The defense to the note on the ground of fraud was not waived by the mere renewal of the note. There is a conflict of evidence regarding the defendant's knowledge of alleged fraud at the time he renewed the note. * * * 'Ratification of a fraudulent transaction can only be made where there is a full knowledge of the facts constituting the fraud [citation] and depends primarily on the intention of the party as shown by his declarations, acts, and conduct [citation].'" In *Chung v. Johnston*, 128 Cal. App.2d 157, 164, 274 P.2d 922, 926, the court states: "In the case of fraud the courts are reluctant to spell out a ratification unless the evidence thereof is clear. * * * Waiver of fraud is a question for the determination of the trier of fact. [Citation.] No general rule fits all cases. The question whether acts of the defrauded party do or do not constitute a waiver must be determined in connection with the circumstances of each case [citation]." It has been said that a claimed waiver of fraud by the subsequent acts of the party imposed on "ought to be watched with the

utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place.'" *Green v. Duvergey*, 146 Cal. 379, 391, 80 P. 234, 239. It cannot be said as a matter of law from the pleadings that Mrs. Poyet had full knowledge of the facts and clearly intended to waive the alleged antecedent fraud at the time she renewed the notes. See *Brakhage v. McCaslin*, 52 Cal.App.2d 382, 386, 126 P.2d 378. On the contrary, the matter of waiver was an issue of fact to be decided by the jury after a consideration of all the circumstances of the particular case. *Hefferan v. Freebairn*, 34 Cal.2d 715, 722, 214 P.2d 386; *Friedberg v. Weissbuch*, 135 Cal.App.2d 750, 756, 287 P.2d 785; *Lobdell v. Miller*, 114 Cal.App.2d 328, 338, 250 P.2d 357. For the foregoing reasons the cross-complaints were not vulnerable to a general demurrer.

[25] It is not amiss at this point to comment on the draftsmanship reflected by defendants' pleadings, which were not authored by present counsel. The cross-complaints are most egregious examples of maladroitness pleading, being over-freighted with surplusage, and in places obscure, ambiguous, equivocal and confusing. Some of the language which plaintiff relies upon and narrowly construes as purported admissions that Mrs. Poyet discovered certain matters relating to the frauds charged at a time earlier than that to which she testified under oath, may as readily be the product either of tangled syntax or inadvertent mistake or general ineptness in stating facts. In dismissing the cross-complaints without allowing an opportunity to amend, the judge stated: "The reason for the court's ruling is simply this: This is a trial department, and this case has come in here and it is claimed to be at issue by all of the parties. It has come here for trial. This is a trial department. That is the reason." Defendants' pleadings were never amended and present counsel was never given an opportunity to clarify ambiguities,

amend insufficiencies, eliminate surplusage or explain mistaken statements, if any. Such an opportunity should be afforded, particularly with respect to explanation of any purported admissions shown to be the result of excusable inadvertence or unfortunate choice of phraseology. See *Meyer v. State Board of Equalization*, 42 Cal.2d 376, 386, 267 P.2d 257; *Jorgensen v. Dahlstrom*, 53 Cal.App.2d 322, 330-331, 127 P.2d 551; *Jackson v. Pacific Gas & Electric Co.*, 95 Cal.App.2d 204, 211, 212 P.2d 591, 595. The controlling philosophy underlying this latter consideration is well expressed in the *Jackson* case, last cited, as follows: "We think the correct rule with respect to reference to former pleadings which have been substituted by amended pleadings filed by leave of court is that the abandoned and substituted pleadings may be considered only for certain limited purposes, but not to bind the pleader to an untrue and erroneous admission against interest which was inadvertently contained therein, but which has been subsequently disavowed and corrected in an amended pleading filed by leave of court, in which or accompanying which, satisfactory explanation is made of the reason which caused the original erroneous statement. Otherwise, it would be useless and futile to correct an innocent mistake of fact by stating the truth with respect thereto and explaining the cause of the erroneous statement. The primary function of our courts of justice is to ascertain the truth and real facts of a case and to administer justice accordingly. If courts were to bind litigants to inadvertent untrue statements of facts and forbid them the inherent right to correct the false by substituting the true facts, they would become partisans to miscarriages of justice. Our courts not only permit, but strive to elicit, the true facts of all cases, and to render justice by applying the law to such facts."

The judgment in favor of plaintiff bank is reversed, and the cause remanded for a new trial, with directions to consider such applications as may be made for an amendment of the pleadings. As to cross-defend-

ants W. N. Newton, W. A. Angione and F. J. McFarland, the purported appeal is dismissed.

MOORE, P. J., and ASHBURN, J., concur.



144 Cal.App.2d 755

CRAG LUMBER COMPANY, Inc., a corporation, Plaintiff and Respondent,

v.

H. C. CROFOOT and H. C. Crofoot, Jr., individually and doing business as The Crofoot Lumber Company, a co-partnership, Defendants and Appellants.

Civ. 8768.

District Court of Appeal, Third District,
California.

Oct. 1, 1956.

As Modified on Denial of Rehearing

Oct. 26, 1956.

Hearing Denied Nov. 28, 1956.

Purchaser's action for breach of contract. The Superior Court, Mendocino County, Hale McCowen, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that vendor had rendered performance impossible by failing to make payments under another contract by which it procured land sold, and that purchaser had not been guilty of any breaches of its contract.

Modified and affirmed.

1. Election of Remedies \S 7(1)

Where affidavit for attachment stated that it was based upon written contract, procuring of writ could not be held to constitute an election by purchaser to pursue remedy of restitution, treating contract as rescinded, rather than remedy of damages for breach of contract.

2. Vendor and Purchaser \S 350

In purchaser's action for breach of contract, evidence would not sustain ven-

dor's contention that purchaser had assumed vendor's obligation to third party from whom vendor procured land in question.

3. Vendor and Purchaser ⇨350

In purchaser's action for breach of contract, evidence sustained finding that vendor had rendered its performance impossible by failing to make payments under another contract by which it procured land sold and that purchaser had not been guilty of any breaches of its contract.

4. Logs and Logging ⇨2

Where, under terms of contract, purchaser was to receive title to real property, as well as to timber, contract was one for sale and conveyance of real property, notwithstanding fact that main purpose for purchase of realty was to obtain timber standing thereon, and Civil Code section relating to detriment caused by breach of agreement to convey an estate in real property, rather than general statute on damages, was applicable to action for vendor's breach of agreement. West's Ann.Civ. Code, §§ 3300, 3306.

5. Vendor and Purchaser ⇨351(1)

Code section relating to detriment caused by breach of agreement to convey an estate in real property prevails over the general statute on damages; but recovery in case governed by special section is limited to those items of damages mentioned therein. West's Ann.Civ.Code, §§ 3300, 3306.

6. Logs and Logging ⇨2

Quoted phrase, in code section authorizing, in case of bad faith breach of agreement to convey, recovery of, *inter alia*, expenses properly incurred in preparing to "enter upon the land", has reference to taking of possession rather than to things done to put land to general use; and purchaser of timber lands could not recover, upon vendor's breach, for expenditures made for access roads and for depreciation in value of mill constructed by pur-

chaser to process timber cut from land. West's Ann.Civ.Code, § 3306.

See publication Words and Phrases, for other judicial constructions and definitions of "Enter upon the Land".

7. Vendor and Purchaser ⇨352

Whether or not purchaser had failed in any duty to minimize damages was a question for trial court to determine upon conflicting evidence in action for breach of contract to convey realty.

8. Damages ⇨62(1)

Duty to minimize damages does not require an injured person to do what is unreasonable or impracticable.

Spurr & Brunner, Ukiah, Sullivan, Roche, Johnson & Farraher, San Francisco, for appellants.

Morris M. Grupp, San Francisco, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendants, the complaint setting forth two causes of action. The first cause of action alleged in part:

"That within four years last past, in the County of Mendocino, State of California, defendants above named and each of them became indebted to plaintiff on an open book account as and for moneys had and received by the defendants, moneys expended by the plaintiff on behalf of said defendants and moneys paid to said defendants, all at the specific instance and request of said defendants, and each of them, in the sum of Thirty-Eight Thousand, Two Hundred Thirty-Seven and 50/100 Dollars (\$38,237.50), plus interest at legal rate thereon from the 30th day of April, 1948, to date, all of which was pursuant to a written contract between the parties."

The second cause of action alleged that defendants entered into a written contract with plaintiff, and alleged further:

That by virtue of said contract, plaintiff paid to defendants \$31,250 in reliance upon the representations of defendants that said defendants were the then owners of said lands; that but for said representations, plaintiff would not have paid the said sum;

That in further reliance upon the representations, plaintiff proceeded to and did construct a mill at a cost to plaintiff of the sum of \$174,000; that defendants knew that plaintiff intended to construct a mill; that but for the representations of defendants, plaintiff would not have built said mill; that defendants knew that if their representations were false and fraudulent said mill would not be worth the sum to be expended;

That in reliance upon the representations of defendants plaintiff cut timber from a portion of said land;

That thereafter plaintiff confirmed the fact to be that defendants did not own the lands and that said defendants knew that they did not own the said timber lands and that said defendants knew their representations with reference to ownership were false and untrue and that said defendants' warranty of title was false, fraudulent, and was knowingly made by them as a fraudulent and false warranty;

That by reason of defendants' false and fraudulent representations, plaintiff was obliged to pay \$4,950;

That defendants were placed in a position, by reason of their own wrongful and fraudulent representations, which made performance of the contract (with plaintiff) on their part impossible of performance; that plaintiff was damaged by reason thereof in various items of damages totaling \$114,275;

That in doing the things alleged, and in knowingly, falsely and fraudulently representing to plaintiff that they, the defendants, were the owners of the said lands, and in knowingly, fraudulently and falsely warranting title, defendants acted mali-

ciously, illegally, and were guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof plaintiff demanded exemplary and punitive damages against the said defendants.

On the same day that the complaint was filed a writ of attachment was issued, the affidavit therefor alleging: "that the Defendants in the said action are indebted to plaintiff in the sum of Thirty-Eight Thousand, Two Hundred Thirty-Seven & 50/100 Dollars (\$38,237.50), of the United States, over and above all legal set-offs and counter-claims upon an written contract, for the direct payment of money, to-wit: ——— and that such contract was made and is payable in this State, * * *."

After filing the original complaint plaintiff filed an amendment whereby it substituted the Exhibit "B" to the original complaint for a different exhibit. A demurrer to the original complaint as thus amended having been sustained, the plaintiff filed the second amended complaint herein upon which the issues were joined at the trial.

The second amended complaint also contained two causes of action, the first alleging that:

"* * * defendants above named became indebted to plaintiff upon an open book account for moneys paid over to and loaned to said defendants and moneys paid on behalf of said defendants, all at the specific instance and request of said defendants, and each of them, in the sum of Thirty-Eight Thousand, Two Hundred Thirty-Seven and 50/100 Dollars (\$38,237.50), plus interest at legal rate thereon from the 30th day of April, 1948, all of which said money was had or received by the defendants for the use and benefit of the plaintiff."

The second cause of action set forth the contract between defendants and plaintiff and alleged various items of damages resulting to plaintiff because of defendants' "breach of said contract in bad faith."

The defendants' answer, after a general denial of the two counts contained in plaintiff's second amended complaint, set up two affirmative defenses to the first cause of action and three affirmative defenses to the second cause of action.

The affirmative defenses to the first cause of action are (1) that no book account existed between the parties, and (2) that since no book account existed and this is an action on an implied contract, the action is barred by the provisions of section 339, subdivision 1, of the Code of Civil Procedure, the complaint having been filed more than two years after the cause of action arose.

The affirmative defenses to the second cause of action are (1) that plaintiff has irrevocably elected to rescind the contract and is estopped to sue for damages for breach thereof, (2) that the action is barred by the provisions of section 338, subdivision 4, of the Code of Civil Procedure, and (3) that plaintiff, after October 1, 1948, with full knowledge of the facts, assumed the obligations of defendants under the North Coast contract and is estopped to claim damages herein.

The action was tried by the court sitting without a jury. At the conclusion of plaintiff's evidence defendants made a motion for a nonsuit and the court granted the motion as to count one upon the ground that plaintiff had not proved a book account, but denied the motion as to count two. After the trial had been concluded the court found generally in accordance with the allegations of count two and against the affirmative defenses of defendants, and found that plaintiff was entitled to recover the following items of damages from defendant:

A. \$31,250 paid on account of purchase price as provided in contract, Exhibit A to plaintiff's second amended complaint, together with interest at legal rate from April 30, 1948, to the date of judgment.

B. For the sums of \$781.25 interest and \$313.60 taxes paid by plaintiff to

defendants by paying said sums, at the specific instance and request of defendants to the North Coast Development Company on behalf of said defendants.

C. For the sum of \$1,512.95, for the cost of constructing the roads on the lands in question, so expended in preparation to properly enter upon the land, and which sum the court found to be the reasonable expenditure for that purpose.

D. For the sum of \$318 spent for surveying the land in preparation to properly enter upon the land, which sum the court found to be the reasonable sum expended for that purpose.

E. For the sum of \$44,400, being the appreciated value of the timber on the lands in question and the sum which said timber appreciated from its value on April 29, 1948, to the date of the breach of the contract.

F. For the sum of \$40,000, being the depreciation in the value of the mill from its reasonable value prior to the breach as compared with its value after the breach of the contract in question.

Judgment was accordingly entered in favor of plaintiff in the sum of \$118,575.80, with interest on \$31,250 from April 30, 1948, and defendants have appealed from said judgment and in arguing for a reversal of the judgment make the following major contentions: I. Respondent rescinded the contract, electing to pursue its remedy for restitution, in assumpsit, by levying an attachment, and was forever thereafter debarred from pursuing the remedy for damages for breach of contract; II. Respondent is estopped to maintain this action by virtue of its breach of the assumption agreement; III. Respondent could not maintain this action because it was first in breach; and IV. The damages awarded are excessive.

Before discussing these contentions we shall give a brief summary of the factual situation, as shown by the record and as

found by the trial court, bearing in mind the familiar rule that where there is a conflict in the evidence such conflict must be resolved in favor of respondent.

On April 8, 1948, North Coast Development Company (hereinafter referred to as North Coast), through S. Orie Johnson, sales agent for North Coast, in consideration of \$10,000, gave H. C. Crofoot an option to buy certain timber lands, in which were included the lands in controversy here. Crofoot gave North Coast his check for \$10,000, payment of which was refused upon presentation to the bank. Under date of April 15, 1948, Johnson notified Crofoot to return the option, and this was done by Crofoot on April 20, 1948.

On April 21, 1948, Mr. Lessard, as president of plaintiff, Crag Lumber Company, paid Crofoot \$10,000 as a deposit on the purchase price of the land in question, for which Crofoot Lumber Company (hereinafter referred to as Crofoot) gave a receipt which read in part as follows:

"The Crofoot Lbr. Co. guarantees 25 Million feet of Redwood and Fir timber. Approx. 80% Redwood, 20% Fir and all right of way to said timber guaranteed.

"The stumpage price for said timber to be at the rate of \$3.75 per thousand."

During the negotiations Crofoot was told that the land and timber were being purchased for operating purposes, and that Crag planned on building a mill, to saw lumber for sale.

Under date of April 29, 1948, Crofoot (first party) as seller, and Crag Lumber Company (hereinafter referred to as Crag) as buyer, executed a contract (the one in litigation, and hereinafter referred to as Contract 1) for the sale and purchase of certain lands situated in the "Dago Creek Area," in Mendocino County, for \$93,750, or \$3.75 per thousand feet, Spaulding Scale, for the redwood and fir timber on the land, whichever of the two amounts is the greater, but in any event not less than

\$93,750, as a guaranteed minimum payment.

Said contract represents that "first party [Crofoot] owns certain lands described in Exhibit 'A', attached hereto * * *" and "first party hereby warrants his said title to said lands and timber situated thereon. * * *"

Payment of the purchase price was to be made as follows: \$31,250 upon the execution of the contract, receipt of which was admitted. "This amount shall be applied as the last payment due under the terms of this paragraph, and *shall be held* [emphasis added] by the first party as a guarantee for the faithful performance of this contract by second party." The balance was to be paid in three installments of \$20,833.34 each, on the 29th day of April of 1949, 1950, and 1951, together with interest at the rate of two and one-half per cent (2½%) per annum on the deferred payments.

Crag, inferentially, was given the right to enter upon the land and cut, but "before beginning the *removal* (emphasis added) of timber from any forty (40) acre tract, described in Exhibit A, to make complete payment in advance therefor to first party on the basis of the Donohoe estimate set forth in Exhibit A." Upon payment of \$93,750 Crofoot was "to convey to second party, by a good and sufficient deed, all the real property described in Exhibit A," with certain reservations of hardwood, and certain other timber.

At the date of this contract Crofoot had no interest in the land or timber which he had agreed to sell to Crag. He had been negotiating with North Coast, and an oral agreement for the purchase of the land and timber in question had been reached, but no contract had been executed.

Thereafter, a contract dated April 28, 1948, was executed on May 10th, following. In this contract (hereinafter referred to as Contract 2) Crofoot, the purchaser, agreed to pay North Coast, the seller, \$80,000, in three installments of \$10,000 each, on or before October 1, 1948, January 1, and

March 1, 1949, respectively, and four payments of \$12,500 each, payable on or before June 1, September 1, and December 1, 1949, and April 1, 1950, respectively.

With respect to cutting and removing timber this contract provided:

"It is distinctly understood that while the Parties of the First Part may enter upon said property under this Agreement, that the said Parties of the First Part shall not remove any timber from any of the property covered by this Agreement, except as hereinafter specified. Should Parties of the First Part desire to remove the timber from any group or subdivision as mentioned in 'Exhibit A', said Parties of the First Part shall first notify in writing, deposited in the United States mails by postage prepaid addressed to North Coast Development Company, 2400 Warring Street, Berkeley 4, California, the group or subdivision which said Parties of the First Part desires to cut. Before any *cutting is done* [emphasis added.] Parties of the First Part shall make payment for each group or subdivision named in the written notice in the amount specified in 'Exhibit A' for the particular group or groups mentioned; such payment or payments shall apply against the sums agreed to be paid as specified in Paragraph 2 hereof."

With respect to the sale of any of said lands, the contract provided:

"Said Parties of the First Part shall have the right to sell any of the property mentioned in 'Exhibit A' subject to the other terms of this Agreement provided first that the amount is paid to the Party of the Second Part for the group desired to be sold as specified and in the amount specified in 'Exhibit A'."

The provisions of the contract concerning default in payments are as follows:

"In case of default of any indebtedness, either of principal, interest, or

otherwise, due hereunder, the maturities of the entire balance of all amounts payable hereunder shall be accelerated and such balance shall become due within thirty days following date of mailing postage prepaid of written notice from Party of the Second Part addressed to Parties of the First Part at Redwood Valley, California."

A third contract, dated April 28, 1948, was executed on May 8, 1948, wherein North Coast agreed to sell, and Crofoot to buy, 742 acres of land and timber, outside of the Dago Creek area, at a price of \$49,250, of which \$25,000 was paid upon the execution of the contract, and the balance payable in three installments, two of \$9,000 each, due on the first days of June and July, and the third of \$6,250, due on August 1, 1948. It is to be noted that the initial payment of \$25,000 was made from the Crag payment of \$31,250 on Contract 1. The full price was paid by September 8, 1948, and the land deeded to Crofoot.

Following the execution of Contract 1, Crag secured a mill site, built a mill at a cost of approximately \$130,000; had the land surveyed at a cost of \$318.00; constructed logging roads on the property at a cost of \$1,512.95; brought in loggers, logging equipment, and began falling timber preparatory to milling it.

By October 1, 1948, Crag had felled about 950,000 feet of timber, and Lessard, President of Crag, received word from Johnson, the sales agent for North Coast, to call and see him. At the conference between these two gentlemen Lessard learned for the first time that Crofoot did not own the property and had therein only the rights given by Contract 2, by which he was required to pay in advance before any timber was felled, and permitted to sell only land for which he had paid in full. At that time Lessard was notified by Johnson to stop cutting timber until some settlement was made, and thereafter Crag withdrew from the land and did no more cutting.

The payment of \$10,000, due October 1, 1948, on Contract 2 was not made by Crofoot, and pursuant to the acceleration clause in that contract North Coast wrote Crofoot on October 4, 1948, as follows:

"Under your timber purchase agreement No. 2 with us dated April 28, 1948, payment of \$10,000.00 was due October 1, 1948.

"Inasmuch as the October 1 payment has not been received, your contract is now in default, and all unpaid balances are now due and payable, as provided in Section 8 of said purchase agreement, as follows:

\$10,000.	due October 1
70,000.	balance of contract
1,600.	interest to November 1
<u>81,600</u>	total due"

Under date of October 18, 1948, Mr. Johnson wrote Crofoot as follows:

"On October 5 you came to this office asking for an extension of time on your Purchase Agreement No. 2 dated April 28, 1948 with the North Coast Development Company, on which nothing has been paid, and concerning which that company sent you under date of October 4, 1948 official notice that the contract was in default.

"At that time you assured us that you could pay \$10,000 against this contract not later than the following Monday, October 11, and that you would like to have the January 1 and March 1 payments of \$10,000. postponed until April 1, 1949, at which time you would pay \$20,000, and meet the other payments as specified in the contract. The way we left the matter was that you should send in the \$10,000 as soon as possible, and we would take the matter up with the officers of the North Coast Development Company, and see what arrangements could be worked out. To date we have heard nothing further from you.

"When you were in our office you assured us that the property under contract had not been jeopardized in any manner. I told you it was my understanding that Mr. Lessard had paid you a substantial deposit against this property. You admitted he had paid you \$25,000 against a contract to furnish him 25 million feet of stumpage, and although you expected to fulfill your obligation to Mr. Lessard by furnishing him the timber on this North Coast contract, that you were not obligated to deliver him this specific property.

"Mr. H. C. Crofoot 2: 10-18-48

"Recently Mr. Lessard came to see us, and stated he had paid you \$31,000., and had an agreement with you to purchase the North Coast property on Dago Creek, which is the property covered by your Agreement No. 2 with the North Coast Development Company, and that another payment of \$20,000 would be due you January 10, 1949. Mr. Lessard also admitted he had cut 300,000 to 400,000 feet of timber on the 40 near Hendy Grove, presumably the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 23, Township 14 N, Range 15 W, although he did not give us the legal description of the 40 on which he had cut. If this is the case, you are in additional default of \$4,950.00—under the terms of your contract with North Coast, Group 8 of Exhibit A."

It appears from the testimony of Miss Schellenger, Secretary of North Coast, who was present at the conference of October 5, 1948, between Johnson and Crofoot, that Crofoot told Johnson he had not agreed to sell Crag the timber in Dago Creek area but only to furnish it 25,000,000 feet. This, in spite of Contract 1.

Pursuant to the suggestion of Johnson in his letter of October 18, 1948, a meeting of Crofoot, Lessard and a North Coast representative was held at the office of Mannon and Brazier in Ukiah, California, on October 30, 1948. At that conference

Crofoot agreed to deliver to Mannon and Brazier, on or before November 4, 1948, a cashier's or certified check, payable to North Coast, for \$11,913.60, in payment of the following items: \$1,600 interest to October 28, 1948, on \$80,000 (the purchase price specified in Contract No. 2), \$10,000, installment of principal which accrued October 1, and \$313.60, the first installment of taxes. Crag agreed to pay within fifteen days \$4,950 for the timber cut on the land, to be applied as a credit on the January 1st installment of \$10,000, to accrue on Contract No. 2.

None of these payments were made within the times specified, but about December 1, 1948, North Coast was paid \$11,913.60 by Crofoot, of which \$1,094.85 was advanced by Crag. This advance covered \$313.60 for taxes, and \$781.25 interest for six months at two and one-half per cent (2½%) on the balance of the Crag-Crofoot contract. On December 20th Crag paid North Coast \$4,950 for the timber trespass, which was credited on the installment of \$10,000 to accrue January 1, 1949, on the North Coast-Crofoot contract, leaving a balance of \$5,050 to be paid by Crofoot on the date last mentioned.

Sometime during November, 1948, the exact date of which is not fixed by the evidence, H. C. Crofoot, Sr., and Mr. Lessard had a meeting in Ukiah, at which one of the topics discussed was the course which the payments from Crag to Crofoot were to take. Lessard told Crofoot that in the future he would like to make those payments direct to North Coast, undoubtedly for the purpose of channeling them to the owner so that they could not be diverted by Crofoot for some other purpose. According to Crofoot, it was agreeable to him, and from that time on he paid no attention to the payments accruing on that contract as he considered that Crag had assumed his obligations thereunder.

Under the terms of the North Coast-Crofoot Contract 2, \$10,000 was to be paid on January 1, 1949. On December 21, 1948, Crag had paid \$4,950, which was

credited against this installment, leaving a balance of \$5,050. By January 5th Crofoot had not paid that balance, and a reminder was sent to Crofoot. Under date of January 8, 1949, Earl Sherman, for Crofoot, wrote that "Mr. Crofoot is feeling much better now and is able to be up and around and has asked me to inform you that he will be able to come down to see you January 14th."

Payment of the above mentioned balance not having been made by January 17th, a registered letter was sent by North Coast to Crofoot, reminding him of the failure to pay and advising that principal of \$65,000 and interest in the amount of \$433.66 were immediately due.

Under date of February 28, 1949, B. M. Schellenger, Secretary of North Coast Development Company, wrote Crofoot as follows:

"Inasmuch as we have not received the check, which you assured us would be in our hands not later than Wednesday of last week, we have no recourse but to place your defaulted contract in the hands of Mannon and Brazier, Ukiah, California. The file is going forward to them today. We ask that you communicate with Mr. Brazier, instead of this office, in connection with all matters relating to this contract."

To this letter under date of March 10 1949, Crofoot replied as follows:

"I have been meaning to get in touch with you, but I haven't been feeling too well again, and unable to do anything. The lumber business has been bad as I guess you know.

"I had a chance to sell the Mill and Timber in the Orr Springs, area. I am going to close up the deal on the 18th as you can see by the attached notice. The timber I have to let go on a cutting basis which will work out in a term of years.

"Mr. Lessard came down and I guess he is having some delays on his loan but felt sure it would be through

by the 1st. He said he would be able to take care of his payment at that time. I will take care of the balance of the payment on closing this mill deal."

No further payments were made, and in an attempt to save the situation Crag made an offer to Crofoot to assume and pay the balance of Contract 2 in full, if Crofoot would pay \$16,664.60, the amount of the delinquent interest and principal. As a memorandum of the proposed agreement, Lessard prepared, executed for Crag, and left with Crofoot, the following:

"April 27th, 1949

"1. Crofoot agrees to assign North Coast Dev. Co. contract #2 (Dago Creek) to Crag.

"2. Crofoot agrees to furnish prior to May 15, 1949 the sum of \$16,664.60 to be paid to North Coast Dev. Co. in order to bring said contract up to date.

"3. Crag agrees to assume and pay balance of said contract in full.

"4. Balance due under Crofoot-Crag contract to be paid quarterly commencing July 1, 1949 (12500 each), other terms to remain in effect.

"5. Crag to receive credit on Crofoot-Crag contract for all sums paid or to be paid on North Coast-Crofoot contract (Dago Creek) by Crag.

"Crag Lumber Co Inc
"By Ed Lessard Pres."

This agreement was never executed by Crofoot and Crag did not pay the installment of \$20,833.44 due on contract No. "1" on April 29, 1949, and the Crofoots did not make the payment to North Coast which was necessary to relieve them from default under their contract with North Coast, and sometime later, the exact date of which is not shown by the evidence, the "Dago Creek lands" were sold by North Coast to a third party.

The record shows that on November 21, 1950, a letter was written to North Coast by

R. K. Shore, a certified public accountant, stating that H. C. Crofoot had retained him to audit his affairs for the past three years and stating that Crofoot's records contained certain data that he (Shore) wished to verify. A part of the letter stated: "Contract #2, being in default, was revoked and the entire \$14,950 paid by Mr. Crofoot forfeited in March 1949." At the end of the letter was the statement: "You are hereby authorized to comply with the above request," signed by H. C. Crofoot.

Appellant H. C. Crofoot testified that defendants had between \$60,000 and \$70,000 in two banks, and at any time could have paid any outstanding obligations. For failing to pay North Coast, he offered the excuses that he did not know that the North Coast contract was in default, and that Crag had agreed to make the payments on that contract, that he paid no further attention to it, and assumed that the payments had been made.

[1] Appellants' first major contention is that respondent rescinded the contract between appellants and respondent by electing to pursue its remedy for restitution upon an implied contract by levying an attachment, and was thereafter debarred from pursuing the remedy for damages for breach of contract. In support of this contention appellants assert: (a) The pursuit of the remedy for restitution, by count one of the original complaint, constituted a rescission of the express contract between the parties; (b) the attachment obtained by respondent was based on count one of the original complaint; (c) by obtaining the levy of an attachment, respondent elected to pursue its remedy for restitution upon implied contract.

Appellants argue that in an action based upon a breach of contract, the injured party has the election to pursue either the remedy of restitution treating the contract as rescinded and suing to recover what he has paid, or sue for damages, but that he cannot do both. They cite *Boshes v. Miller*, 119 Cal.App.2d 332, at page 337, 259 P.2d 447,

449, a case involving a breach of contract, where the court said:

"* * * He could have treated the contract as rescinded because of defendants' breach, and sued for the amount by which defendants had been unjustly enriched, or he could have stood on the contract and sued for damages resulting from the breach. He could not do both, and if he recovered on one theory he could not recover on the other. He could not take out his money, which was the consideration for the contract, and at the same time enforce the contract. As long as the contract had not been modified, superseded or rescinded his action was on the contract."

Appellants also state that it is the settled law in California that when a plaintiff, in pursuit of one of several inconsistent remedies, obtains an attachment, he gains an advantage over his adversary and that act constitutes an irrevocable election to pursue that remedy. They quote the following from *Steiner v. Rowley*, 35 Cal.2d 713, at page 720, 221 P.2d 9, at page 13:

"Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedies is based upon the principle of estoppel. 'Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained an advantage over the other party, * * * he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right.' *De Laval Pac. Co. v. United Cleaners & Dyers Co.*, 65 Cal.App. 584, 586, 224 P. 766, 767 * * *

"An action for tort in which exemplary damages are sought is inconsistent with one for money had and received. Civ.Code, sec. 3294. The Steiners were therefore required to make a timely election of remedies.

Pleading the two causes of action in the alternative did not constitute an election because inconsistent counts are permissible [citing cases] and an election cannot be forced by demurrer [citing case]. But the Steiners also obtained an attachment. This was a positive act of a plaintiff 'in pursuit of * * * [the contractual remedy] * * * whereby he has gained * * * advantage over the other party. * * *' *De Laval Pac. Co. v. United Cleaners & Dyers Co.*, 65 Cal. App. 584, 586, 224 P. 766, 767."

Respondent in reply argues that the attachment was not issued upon an implied contract; that there was no action on implied contract filed, and respondent points out that the affidavit for attachment states specifically that the attachment was based "upon a written contract for the direct payment of money."

The record shows that after the filing of the Second Amended Complaint and before trial, appellants moved the trial court for an order declaring that respondent, by obtaining an attachment, had elected to pursue its remedy upon an implied contract for restitution, and to dismiss Count Two upon the grounds that respondent, having elected to pursue its remedy for restitution, was debarred from seeking damages for breach of contract. Respondent filed an affidavit in opposition to said motion, alleging, among other things, that the attachment was not based upon Count One of the original complaint but was based on various items of damage suffered by respondent because of appellants' breach of the written contract incorporated as Exhibit "A" in the second cause of action.

It is to be noted that the affidavit for attachment does not refer specifically to either cause of action but does state that it was based upon a written contract. It is apparent also that respondent was seeking to recover damages suffered by it because of appellants' alleged breach of contract. It is true that the amount set forth in the affidavit for attachment and in the writ of

attachment was \$38,237.50, the same as the amount set forth in the first cause of action, but it is also true that this sum of \$38,237.50 includes more than the sum of \$31,500 which respondent had paid to appellants under the contract, and includes the sums of \$4,950 paid by respondent to North Coast Development Company on behalf of appellants; \$1,300 spent to construct necessary roads on the land; \$512.50 for rights of way which under the contract were to be provided by appellants; and \$225. In this state of the record we do not believe that the trial court erred in denying appellants' motion to dismiss Count Two upon the ground that respondent was debarred from seeking damages for breach of contract. As stated in *Steiner v. Rowley*, supra, and quoted by appellants: "Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedies is based upon the principle of estoppel."

The record shows further that after the conclusion of the trial in which a non-suit had been granted as to Count One, but before the case was decided by the trial court, appellants made a motion to dissolve the attachment upon the ground that it was based upon Count One as to which the non-suit had been granted. After a full hearing at which all of the exhibits which were before the court at the trial were introduced in evidence, the court denied said motion.

The court also, in its findings as to the affirmative defense of appellants to the second cause alleging that respondent had irrevocably elected to rescind the contract and was estopped to sue for the breach thereof, found substantially as follows:

That it is not true that by the first cause of action of the original complaint plaintiff sued upon implied contract; that plaintiff sued on an open book account alleging that the sum sued for was "pursuant to a written contract" but did not refer to any specific contract; that Exhibit "A" was for the first time referred to and incorporated into the complaint by the second cause of action, which seeks to recover

damages for the breach of Exhibit "A" to the second amended complaint; that upon the filing of the original complaint, plaintiff obtained the issuance of a writ of attachment and the defendants' bank account has ever since been held under levy; that the issuance of the attachment was not based upon the first cause of action of the original complaint, but was based on the sum alleged due under a written contract as set forth in the "Affidavit for Attachment Against Resident"; that thereafter plaintiff filed a second amended complaint prior to any motion to dismiss the attachment and thereafter upon defendants' demand a bill of particulars was filed by plaintiff, setting forth the items allegedly constituting the items of the book account, the basis of the first cause of action; that no combination of said items constitutes or equals the amount for which the attachment was issued; that the second cause of action based upon the written contract, Exhibit "A", contained, among others, six items of damages which totalled the exact amount of the attachment and the exact amount referred to in the "Affidavit for Attachment Against Resident" and under said second amended complaint, the only count which contained a written contract as set forth in the said affidavit was the second count; that the attachment being so issued on the basis of the affidavit setting forth therein that the same was based upon an indebtedness arising out of a written contract was based upon the second cause of action and not upon the first cause of action.

While it must be stated that the record shows a somewhat unusual and confusing situation so far as the pleadings are concerned, we do not believe that either reason or authority would justify us in holding that the issuance of the attachment in the instant case constituted an irrevocable election to rescind the contract or to estop or debar respondent from proceeding with the second cause of action for breach of contract. It is evident that what respondent was seeking to do was to recover alleged damages for breach of the contract and it would be an extremely technical and

unrealistic construction of the authorities to hold otherwise.

[2] Appellants' second major contention is that respondent is estopped from maintaining this action by virtue of its breach of the assumption agreement. Appellants contend that when respondent, in October of 1948, advised appellants that it would assume the payment obligations of the North Coast contract, with full credit for what had already been paid and with adjustment upon the final cut, which is supported by all of the subsequent conduct of the parties, and thereafter failed to make such payments, respondent became estopped from asserting the failure to make such payments by appellants as the cause for alleged damages. With reference to the fact that the so-called assumption agreement was not in writing, appellants argue that it would be a fraud upon them to allow respondent to assert the statute of frauds with reference to it. It appears from the record that nearly seventeen months after filing their answer to respondent's second amended complaint, appellants filed an amended answer in which they for the first time set up the defense that respondent, with full knowledge of appellants' contract with North Coast, "promised and agreed with defendants to assume and pay the future payments under said contract and defendants promised and agreed to credit such payments as they were made upon the contract between plaintiff and defendants referred to as Exhibit A in plaintiff's Second Amended Complaint," and that "Thereafter, and relying upon said promise and agreement aforesaid, said defendants, and each of them, made no further payments to said North Coast Development Company but depended and relied upon said plaintiff to make said payments as they became due for its own protection and to take credit therefor upon its said contract with defendants."

Respondent points out that the trial court found that these allegations were not true, and asserts correctly that this issue is a factual one and that the trial court's find-

ings upon it are supported by the record. We have read the record and the exhibits carefully and the evidence upon this issue is highly conflicting. It resolved itself very largely into a question of whether the court believed the testimony of appellant Crofoot or Mr. Lessard, President of Crag Lumber Company, and the court evidently chose to disbelieve the testimony of Crofoot. We are satisfied that there is support in the record for the court's finding upon this issue. There appeared to be a willingness upon respondent's part to assume the payments under Crofoot's contract with North Coast if Crofoot complied with certain conditions and made certain payments. This is indicated by the following excerpt from Lessard's testimony quoted by appellants in the supplement to their opening brief:

"I told him that if this thing were brought up to date and everything was cleaned up, that we could make future payments, if he would turn the contract over to us, but with full credit for the moneys already paid, and that the \$80,000.00 contract [North Coast-Crofoot contract] was to be thrown aside."

But there is testimony to support a finding that appellants did not make such payments or perform said conditions.

[3] Appellants' third major contention is that respondent could not maintain this action because respondent was first in breach of its contract with appellants. Appellants contend that respondent has been guilty of three breaches of its contract, which are: (1) failure to make its payment under the terms of the contract when it became due on April 29, 1949; (2) failure to pay for the stumpage on the 40 acre section from which it removed timber "before beginning the removal"; and (3) its failure to account to appellants for the exact stumpage removed from said 40 acres and pay the difference between the advance payment called for under its contract and the amount due based on the actual removal. The default with regard

to the second point only was cured. Appellants argue that \$16,978.19 was due from Crag to Crofoot on April 29, 1949, which was more than was due from Crofoot to North Coast, but for the acceleration of payments, and that North Coast was willing to waive the acceleration had the \$16,978.19 been paid.

Appellants contend further that there was no anticipatory breach on April 29, 1949, which would excuse Crag's duty to perform its obligation under the contract and make the payment due. They argue that even though they may have been in default, it was not *impossible* for them to perform their contract with respondent, as they *might* have reinstated their contract with North Coast.

Respondent in reply argues that appellants' contention that respondent was first to breach the contract cannot be sustained. They state that respondent could not reasonably be required to make a payment to appellants on April 29, 1949, which was two months after appellants' contract with North Coast was forfeited and terminated, and the Crofoots had been in breach of the Crag-Crofoot contract in failing to protect Crag's rights to cut and remove timber, its rights to possession and its ultimate right to get title. They state further that these present rights were the most important part of the contract and from the very outset Crofoot was in breach because respondent was given a right to cut trees without paying for them "until before 'removal'"; that appellants gave away something they did not have, unless they first met a condition precedent, to-wit: pay North Coast *before* respondent cut. They point to the testimony that when North Coast learned of respondent's entry, it instructed respondent not to cut any more timber on their property; that Crofoot did more than "indicate" that "he will not perform," and he did more than render "substantial performance apparently impossible," either one of which is all that is needed for anticipatory breach; he rendered substantial performance impossible.

It is apparent from the record that there is a sharp conflict in the evidence upon this issue but we are convinced that the record supports the finding and conclusion of the trial court that respondent was not guilty of any breaches of its contract with appellants but that appellants by failing to make the payments under their contract with North Coast were responsible for the forfeiting of their contract with North Coast, thus rendering it impossible for them to perform under their contract with respondent. Appellants have pointed to testimony which would have sustained a finding in their favor, but the trial court was not bound to find in accordance with this testimony in view of the testimony in conflict with it.

Appellants' next contention is that if respondent is entitled to any damages at all (and appellants have contended most earnestly that they are not), the amount of damages awarded is excessive.

In their opening brief appellants contend that the amount of damages to which respondent is entitled (if at all) is limited by section 3306 of the Civil Code which reads:

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

Respondent in its brief states:

"But, conceding for a moment that it was not a proper item under Section 3306 of the Civil Code, respondent cannot accept appellants' interpretation, that no other damage is recoverable in this action other than those allowed under Section 3306 of the Civil Code.

"As we have heretofore pointed out, the Crag-Crofoot contract is *more than a contract to convey land*. The land values were of little significance to the parties themselves."

Appellants in their closing brief state

"This cause was pleaded and tried and the judgment of the trial Court rendered upon the theory that the contract involved was one for the conveyance of real property and the measure of damages provided in Section 3306 of the Civil Code was applied. It was and is the contention of appellant that the contract was not one for the sale and conveyance of real property and the measure of damages for a breach is that provided in Section 3300 of the Civil Code. The Court committed reversible error in adopting the measure of damages expressed in Section 3306 rather than Section 3300 of the Civil Code for which reason the judgment should be reversed and a new trial had so that the proper measure of damages, if any, will be applied."

Section 3300 of the Civil Code reads:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Appellants' principal attack upon the damages awarded by the court is upon the item of \$40,000 for depreciation in the value of the mill. In their opening brief appellants argue that such damages are not provided for by section 3306 of the Civil Code, and in their closing brief appellants argue that the court committed reversible error in adopting the measure of damages expressed in section 3306 rather than in section 3300 of the Civil Code.

It is apparent that there was doubt in the minds of counsel and the court as to which

section or sections entitled respondent to recover damages, but it is also clear from the record that what was at issue in the instant case was whether or not appellants had breached their contract with respondent and, if so, what damage had resulted to respondent by reason of such breach. As we have hereinbefore pointed out, the record supports the findings of the trial court that the appellants, by failing to make the payments under their contract with North Coast, were responsible for the forfeiting of their contract, thus rendering it impossible for them to perform under their contract with respondent. The following statements of the trial court in its order for findings are supported by the record:

"[Appellant] H. C. Crofoot, testified that defendants had between \$60,000.00 and \$70,000.00 in two banks, and at any time, could have paid any outstanding obligations. For failing to pay North Coast, he offered the excuses that he did not know that the North Coast contract was in default, and that Crag had agreed to make the payments on that contract, that he paid no further attention to it, and assumed that the payments had been made. Neither of these excuses carry any weight, when considered in the light of the other evidence in the case.

"From the very outset, Crofoot was in breach of Crag contract, by selling timber to be paid for on *removal*; when their right, and this acquired after the execution of Contract No. '1', was to cut the timber only after notice in writing had been given to North Coast, and payment in advance made for the timber to be cut. Of the deposit made by Crag, to *'be held * * * as a guarantee for the faithful performance'*, of the contract, \$25,000.00, was used by Crofoot, not as a payment on the contract in question, but applied on the purchase of other lands, for which payment in full was made, by September of 1948, and those lands conveyed to Crofoot.

"Under the facts of this case, no conclusion, other than [that] the breach was wilful and the product of bad faith, can be reached."

After finding as to the various items of damage hereinbefore set forth, the court concluded:

"That the acts and omissions of the defendants as found by this Court in the findings of fact constitute a breach, in bad faith, as of February 28, 1949, of the contract, Exhibit A to plaintiff's second amended complaint; and by said acts and omissions defendants wilfully placed themselves in a position under which they could not then or ever carry out the terms and conditions of said contract, Exhibit A to plaintiff's second amended complaint, on their, defendants', part to be kept and performed.

"That by reason of the defendants' breach of the said contract wilfully and in bad faith, the plaintiff suffered damages and is entitled to judgment against the defendants and each of them, therefore, as follows:"

[4] Even if we adopted the contention of appellants made in their closing brief, with which respondent agrees, that the proper measure of damages is that provided in section 3300 of the Civil Code, which is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby", see *Kline v. Guaranty Oil Company*, 167 Cal. 476, 140 P. 1, respondent could not recover both the appreciation in the value of the timber and the depreciation in the value of the mill. To permit recovery of both would exceed the statutory limit. Civ.Code, sec. 3300. The depreciation in the value of the mill was not a loss suffered by respondent by reason of the breach. Not only such decrease in value, but the total depreciation of the mill, would have been borne by respondent if the contract had been fully performed. A proportionate part thereof would have been chargeable as a necessary expense against the anticipated profits

to be realized from the contemplated use of the timber. To permit recovery of the depreciation of the value of the mill, as well as the increase in the value of the timber, would unjustly enrich respondent. Monetarily, it would be in a better position than if the contract had been fully performed. It would receive an amount in excess of that which would compensate it for the loss proximately caused by the breach. Thus, even under section 3300, respondent could not be awarded damages for both the increase in the value of the timber and the amount of the depreciation of the mill. Moreover, we do not believe that in this case the proper measure of damages is that provided for in section 3300. The trial court's finding that the appellants wilfully and in bad faith breached the contract supports an award for those items of damages specified in Section 3306 of the Civil Code. Although, as the parties contend, the timber was the important thing for which they were contracting, nevertheless appellants agreed to convey title to the real property after the completion of the installment payments provided for in the contract. Therefore, the rule announced by this court in *Palmer v. Wahler*, 133 Cal. App.2d 705, 711, 285 P.2d 8, 12, is inapplicable. We therein declared that "standing timber *purchased separately from the land* under a contract for severance, thereby becomes personalty for all purposes depending upon the contract of purchase." (Emphasis added.) In the instant case, under the terms of the contract, the respondent was to receive title to the real property, as well as to the timber. The contract did not cease to be one to convey title to real property by reason of the fact that the main purpose for the purchase of the realty was to obtain the timber standing thereon. The trial court found that the appellants, in bad faith, breached the contract. Section 3306 provides:

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and pre-

paring the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

Thus, under said section respondent was entitled to recover the amount paid upon the purchase price "and the expenses properly incurred in examining the title and preparing the necessary papers, *with interest thereon.*" (Emphasis added.) In addition, due to appellants' bad faith, the award properly included the amount of the increase in value of the timber, Civil Code, sec. 3306; *Nelson v. Fernando Nelson & Sons*, 5 Cal.2d 511, 517-518, 55 P.2d 859, and "the expenses properly incurred in preparing to enter upon the land." Civil Code, sec. 3306. However, interest is not allowable upon such items of special damages. *Boshes v. Miller*, supra, 119 Cal.App. 2d at pages 336 and 337, 259 P.2d 447. The statute, sec. 3306, does not so provide. Neither does it authorize an award for damages for the depreciation in the value of the mill.

[5,6] We have said that even under section 3300 the depreciation of the value of the mill could not be allowed since it would constitute double recovery, but we think that section does not govern and that the damages herein must be measured by section 3306 of the Civil Code. That section is a special section relating to detriment caused by breach of agreement to convey an estate in real property and, being special, its provisions prevail over the general statute on damages and recovery in a case governed by that section is limited to those items of damages mentioned therein. The section purports to state what damages are recoverable in such case and damages not therein mentioned are thereby excluded and cannot be recovered. The only provision of that section which it is claimed covers the item under discussion is that the item constitutes a

cost to respondent to enter upon the land. The trial court found that this item was a cost for entry upon the land and also that the building of access roads to and into the land for the purpose of taking out timber from the land to the mill were costs expended in preparation for such entry. But these costs were not expenditures incurred in preparing to enter upon the land. They were expenditures made in accomplishing the general purposes for which the property was bought, that is, expended in the use of the land. The phrase "to enter upon the land" refers to the taking of possession rather than to things done to put the land to general use. This land was timber land. Its highest and best use was for the marketing or manufacturing into lumber of the timber growing thereon. Nothing was expended in preparing to enter upon the land. The expenditures were made for the use of the land and that use continued for some time until, by reason of appellants' breach of the contract, possession was lost. In view of the foregoing we are convinced that, except for the depreciation in value of the mill and of the moneys expended in the building of access roads, the record supports the judgment, but that the judgment should be modified by striking out the award of damages for such depreciation of the mill and for the cost of such access roads.

Appellants argue also that the allowance of the difference in the value of the timber between the date of the contract and the date of its breach was not proper because, appellants contend, there is no evidence in the record as to what the actual damages of respondent were. However, the following statement in the memorandum opinion of the trial court appears to be supported by the record:

"There is little, or no conflict, in the evidence, on the amount of damages suffered by plaintiff. The only item, on which any evidence was offered by defendant, related to the increase in the value of timber, and that is practically in accord with the evidence offered by the plaintiff."

The court found that appellants by their acts and omissions "wilfully placed themselves in a position under which they could not then or ever carry out the terms and conditions of said contract." While there is considerable conflict in the testimony, we are satisfied that the evidence supports the findings both as to the breach and as to the damages, with the exception of the items allowing damages for the amount of the depreciation in the value of the mill and the cost of the access roads.

Appellants' final contention is that respondent failed to comply with its duty to mitigate damages. Appellants argue that if respondent "had made its payment on April 29, 1949 as called for by the contract no damage would have occurred at all because as Crag thereafter removed timber to provide its mill with the necessary logs as it had contemplated, sufficient moneys would have become due to keep the payments to North Coast current."

Respondent in reply states that appellants overlook the fact that Crofoot's contract with North Coast was terminated two months before April 29, 1949.

[7,8] Whether or not respondent failed in any duty to minimize damages was a question for the trial court to determine upon the conflicting evidence hereinbefore referred to. As stated in *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, at page 846, 147 P.2d 558, at page 561: "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable."

No other points raised require discussion.

In view of the foregoing we are convinced that, with the exception of the depreciation of the mill and the cost of the roads hereinbefore mentioned, the record supports the judgment, but that the judgment should be modified by striking out the award of damages for said depreciation of the mill and the cost of the roads.

The judgment is modified by subtracting from the total sum thereof, to-wit, \$118,-575.80, together with interest at the legal

rate on the sum of \$31,250.00 of the above amount from April 30, 1948, to the date of judgment, the sum of the amount allowed for depreciation in the value of the mill and the amount allowed for construction of roads, these two sums totaling \$41,512.95, and as so modified the judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



144 Cal.App.2d 822

Leo CHAPPELLE, Jr., a minor, by Mary Chappelle, his guardian ad litem,
Plaintiff and Appellant,

v.

CITY OF CONCORD, a municipal corporation, and Tony Freitas, and First, Second, Third Does, and XYZ Company, Defendants and Respondents.

Civ. 17000.

District Court of Appeal, First District,
Division 2, California.

Oct. 4, 1956.

Action for false arrest, false imprisonment and assault and battery by minor through guardian ad litem against police officer and municipality. From a judgment of the Superior Court, County of Contra Costa, Hugh H. Donovan, J., dismissing second complaint on ground that issues had been adjudicated in prior action, minor appealed. The District Court of Appeal held that where minor permitted judgment sustaining demurrer to complaint on same cause of action to become final, and second complaint was identical to first except in respect to allegation of estoppel which was determined not to be applicable, first judgment was *res judicata*, even though erroneous.

Affirmed.

1. Judgment \Leftrightarrow 572(2)

A judgment on a general demurrer will have the effect of a bar in a new ac-

tion in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the grounds on which the demurrer in the former action was sustained is equally applicable to the second one.

2. Municipal Corporations ⇨724, 747(3)

The operation of a police department by a municipality is a governmental function, and in the absence of a special statute rendering it liable, the municipality is not liable for the torts of its officers in the performance of governmental functions and the same rule applies to damages caused by negligence of municipality itself in exercise of governmental function.

3. Judgment ⇨572(2)

In action for false arrest, false imprisonment, assault and battery by minor through his guardian ad litem against municipality, where previous complaint was dismissed on general demurrer of municipality setting forth governmental immunity from torts of its officers, and second complaint set forth no new allegations against the city except with respect to estoppel which was determined by the court to be irrelevant, the doctrine of res judicata with respect to the municipality was applicable.

4. Municipal Corporations ⇨741(1)

Statute requiring presentation of verified claims for damages to clerk of municipality and officer for personal injuries as a result of negligence or carelessness of officer within 90 days does not apply to causes of action based on intentional torts. West's Ann.Gov.Code, § 1981.

5. Judgment ⇨660

Where no appeal has been taken, an erroneous judgment is as conclusive as a correct one.

6. Judgment ⇨576(1)

Where upon demurrer to complaint against police officer for false arrest, false imprisonment and assault and battery both parties had misapprehended the law as to

the applicability of claims statute against public officers, and had induced the court to do the same, judgment had been permitted to become final and second complaint was identical with first, the doctrine of res judicata was applied even though first judgment was erroneous. West's Ann.Gov.Code, § 1981.

7. Judgment ⇨576(1)

Exception to res judicata doctrine in case where rigid adherence would defeat the ends of justice, contrary to important considerations of policy, would not be applied simply because first judgment sustaining demurrer to complaint was erroneous.

Benjamin F. Marlowe, Oakland, for appellant.

Thomas F. McBride, City Attorney, Martinez, for respondent City of Concord.

Thomas John Coll, Concord, for respondent Tony Freitas.

PER CURIAM.

Plaintiff appeals from a judgment entered on the sustaining of demurrers to his complaint and dismissal of said complaint on the ground that the issues raised in it had been adjudicated in a prior judgment.

Plaintiff, a minor through his guardian ad litem, had brought an action against the City of Concord (hereinafter called the city) and Tony Freitas, a police officer of the city, for false arrest, false imprisonment, assault and battery allegedly occurred on June 10, 1954. The action against the city was also based on negligence in retaining defendant Freitas in its service as a police officer notwithstanding his reputation for violence. It was further alleged in the first amended complaint in said action that plaintiff served a claim on the City Clerk of the city on February 24, 1955, at which time he had first heard of his legal rights against the city from his guardian ad litem. Demurrers of both the city and Freitas were sustained without leave to

amend and judgment for defendants was entered accordingly on May 18, 1955. Plaintiff did not appeal from said judgment but on the same date filed a new complaint, which introduced the present action. Its allegations were literally the same as those of the first amended complaint in the prior action, except that an allegation was added to the effect that immediately after the assault plaintiff's guardian ad litem was informed by the city through its city manager that it was not necessary for her to file a claim on behalf of plaintiff and that the city would take care of everything, that in reliance on said representation, plaintiff failed timely to file a verified claim and that the city therefore is estopped to rely on said failure. The demurrers sustained to said complaint are mentioned in the judgment but their character does not appear from the transcript. However, the judgment for defendants must at any rate be upheld on the basis of *res judicata*.

[1] Whether and in how far a judgment entered on the sustaining of a demurrer is *res judicata* depends on the character of the demurrer sustained. To plaintiff's first amended complaint, the defendants demurred both generally (no cause of action stated) and specially for ambiguity, uncertainty and unintelligibility, the special demurrers relating to different minor details. The fact that the demurrers to the first amended complaint were sustained without leave to amend shows that it was the general demurrers that were sustained. That such was also the understanding of plaintiff is shown by the fact that in his new complaint he did not try to cure the alleged defects against which the special demurrers were directed. A judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained, is equally applicable to the second one. *Goddard v. Security Title Ins. & Guar. Co.*, 14 Cal.2d

47, 52, 92 P.2d 804; *Keidatz v. Albany*, 39 Cal.2d 826, 828, 249 P.2d 264. Under this rule the former judgment is a bar to the present action.

[2, 3] No cause of action against the city is stated in either complaint because in the governmental function here involved it is protected against tort liability by the sovereign immunity. The operation of a police department by a municipality is a governmental function, and in the absence of a special statute rendering it liable, the municipality is not liable for the torts of its officers in the performance of said function. *Henry v. City of Los Angeles*, 114 Cal.App.2d 603, 250 P.2d 643 and cases there cited. The same rule applies to damages caused by the negligence of the municipality itself in the exercise of a governmental function. *Miller v. City of Palo Alto*, 208 Cal. 74, 75, 280 P. 108. *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12, on which appellant relies, was an action against individual superior officers of the tortfeasor, to which individuals the sovereign immunity does not extend. The governmental character of the function was one of the grounds adduced by the city for its general demurrer and we must presume that the demurrer was sustained in whole or in part on that ground. The new allegation with respect to the estoppel of the city is wholly irrelevant to this point. The application of the doctrine of *res judicata* with respect to the action against the city was correct.

[4-6] The general demurrer of defendant Freitas was based solely on the requirement of section 1981 of the Government Code that for certain personal injury and property damage actions against a public officer a verified claim must within 90 days be presented to the officer claimed to have caused the damage, which presentation was not alleged. The contention was unsound. Section 1981, *supra*, according to its language refers to *negligence or carelessness* of a public officer only. It does not apply to intentional torts like the ones here alleged. *Sarafini v. City & County of*

San Francisco, 143 Cal.App.2d 570, 300 P.2d 44; cf. Ward v. Jones, 39 Cal.2d 756, 760, 249 P.2d 246. No other ground why no action would lie against the tortfeasor himself appears. However, the general demurrer was sustained and plaintiff did not appeal so that the judgment became final. "An erroneous judgment is as conclusive as a correct one." Panos v. Great Western Packing Co., 21 Cal.2d 636, 640, 134 P.2d 242, 244; Weil v. Barthel, 45 Cal.2d 835, 839, 291 P.2d 30. With respect to the action against defendant Freitas, the complaint in the action before us and the one in the prior action are identical. The only additional allegation, the one concerning the estoppel, relates to defendant city only. The adjudication in the prior action was then conclusive in this respect.

[7] We are aware of the fact that in rare cases exceptions to the application of the res judicata doctrine have been made when rigid adherence would defeat the ends of justice, contrary to important considerations of policy. See Greenfield v. Mather, 32 Cal.2d 23, 35, 194 P.2d 1; 50 C.J.S., Judgments, § 592, p. 13; 30 Am. Jur. 909. However, such exception is not applied simply because the decision is erroneous. Even in Greenfield v. Mather, supra, which goes further in this direction than any other case known to us, many circumstances were stated showing the exceptional character of the case, in which many appeals to the Supreme Court had been taken and in which conflicting decisions had been given on points not clearly in issue, and even in that case three Justices dissented. Here, both parties misapprehended the law and induced the court to do the same and plaintiff permitted the decision to become final although appeal was available. There is no reason to permit him to relitigate the point, contrary to the purpose of the res judicata doctrine that there be an end to litigation when once a final decision as to a point has been obtained by the parties.

Judgment affirmed.

Clara L. BECKLEY, Administratrix of the Estate of Frank M. Beckley, Deceased,
Plaintiff and Appellant,

v.

The RECLAMATION BOARD of the State of California, A. R. Gallaway, Jr., George H. Holmes, W. P. Harkey, Henry Ohm, Grover Shannon, George R. Wilson and George E. Lodi, as members of the State Reclamation Board. The Sacramento San Joaquin Drainage District, State of California, and A. M. Barton, Defendants and Respondents.

C. F. SEAVER and Emma F. Seaver, Plaintiffs and Appellants,

v.

The RECLAMATION BOARD of the State of California, et al., Defendants and Respondents.

D. W. GEORGE and Helen May Forry, Plaintiffs and Appellants,

v.

The RECLAMATION BOARD of the State of California, et al., Defendants and Respondents.

Katherine Frances ERISEY, Plaintiff and Appellant,

v.

The RECLAMATION BOARD of the State of California, et al., Defendants and Respondents.*

Civ. 8687.

District Court of Appeal, Third District, California.

Oct. 4, 1956.

Rehearing Denied Oct. 29, 1956.

Hearing Granted Nov. 28, 1956.

Civil action. From order denying the plaintiffs' motions to vacate judgments of dismissal entered pursuant to the orders sustaining the defendants' demurrers without leave to amend in the Superior Court, Colusa County, Hugh H. Donovan, J., the plaintiffs appeal. The District Court of Appeal, Peek, J., held that where it appeared to the trial court that the attorney for plaintiff was in attendance at a regular session of the Legislature, the court was without power other than to continue the case in accordance with the statute and by failing to do so and rendering judgment the

* Opinion vacated 312 P.2d 1098.

court exceeded its power and such act was in excess of its jurisdiction and void.

Orders reversed.

1. Courts ☞40

Where a statute requires a court to exercise its jurisdiction in particular manner, follow a particular procedure or subject to certain limitations, an act beyond those limitations is in excess of its jurisdiction.

2. Judgment ☞163

Hearsay statements contained in affidavit were required to be disregarded in determining right to set aside a default judgment because the attorneys for plaintiff were in attendance at a regular session of the Legislature. West's Ann.Code Civ. Proc., §§ 595, 1054.1.

3. Judgment ☞162(4)

As respects right to set aside a default judgment because the attorneys for plaintiff were in attendance at the state Legislature evidence established that a telegram requesting a continuance because of such attendance was received by the trial court. West's Ann.Code Civ.Proc., §§ 595, 1054.1.

4. Judgment ☞99

Where it appeared to the trial court that the attorney for plaintiff was in attendance at a regular session of the Legislature the court was without power other than to continue the case in accordance with the statute and by failing to do so and rendering judgment the court exceeded its power and such act was in excess of its jurisdiction and void. West's Ann.Code Civ.Proc. §§ 595, 1054, 1054.1.

5. Judgment ☞381

Court has inherent power to set aside a void judgment even on its own motion and it is immaterial how such invalidity is brought to the attention of the court

Edmund G. Brown, Atty. Gen., by Walter S. Rountree and Willard A. Shank, Deputy Attys. Gen., for respondents.

PEEK, Justice.

These are consolidated appeals from orders denying plaintiffs' motions to vacate judgments of dismissal, which judgments were entered pursuant to orders of the court sustaining defendants' demurrers without leave to amend.

For convenience, counsel for all of the parties stipulated that the record in the case of Beckley v. Reclamation Board, case number 9453 in the trial court, could serve as the clerk's transcript on all four appeals. The record in that case shows that plaintiff's notice of motion to vacate the judgment was made upon the grounds that it was entered through the mistake, inadvertence, surprise or excusable neglect of counsel; and upon the grounds that the judgment as entered was contrary to the provisions of sections 595, 1054 and 1054.1 of the Code of Civil Procedure, and therefore void.

In support of said motion, affidavits were filed by plaintiff's attorneys, Earl D. Desmond and E. Vayne Miller, and by F. G. Hammett, manager of the Sacramento office of the Western Union Telegraph Company. Attorney Desmond, by his affidavit, averred that he and Mr. Miller were the sole attorneys of record for the plaintiff; that he was a member of the Senate of the California Legislature; that he was in attendance at the second portion of the regular 1953 session of the Legislature from February 24, 1953, until its adjournment on June 10, 1953; that after said demurrer to the first amended complaint had been submitted to the trial court, affiant and Mr. Miller were served notice on or about May 11, 1953, that said demurrer had been sustained without leave to amend; that in the belief that said complaint could be amended to state a cause of action, affiant sent the following telegram on May 20, 1953, to the trial court: "Request entry judgment George Beckley Erissey and Seaver against state be not executed by

Earl D. Desmond and E. Vayne Miller, Sacramento, for appellants.

Court until June 10th. Legislative duties necessitate continuance so I can study proceedings." Affiant further averred that on June 5 and again on June 19, 1953, he sent telegrams requesting that judgments not be entered until June 19 and June 26, respectively; that affiant believed the trial court would grant an extension of time and not enter a judgment prior to June 26, or that the trial court would inform counsel of the denial of his request; that affiant believed the trial court would not enter judgment prior to the time extended by the Code of Civil Procedure which would have been 30 days after the adjournment of the Legislature; and that affiant believed that the statutory provisions were mandatory upon the court after the receipt of said telegrams.

Mr. Hammett stated in his affidavit that each of the telegrams sent by Senator Desmond was, according to the company's records, received by the trial court.

Mr. Miller stated in substance the same facts as set forth by Senator Desmond, and in addition averred that by reason of the trial court's failure to grant the statutory or a reasonable continuance to Senator Desmond, and that because on June 24 and July 13, 1953, the judgment did not appear in the "document file" of the action, although it had been entered in the "Judgment Book", that it was not until August 4 that affiant learned from a deputy county clerk that the judgment had been rendered and entered on June 4.

Except for the hearsay statements contained in a counter-affidavit filed by Mr. Shank, a deputy attorney general, the statements contained in the affidavits of plaintiff's counsel and Mr. Hammett concerning the telegrams are uncontradicted. In his affidavit Mr. Shank stated that he personally conferred with the trial judge on September 23, 1953, and that the judge stated to him that he had received two telegrams, one dated June 6, 1953, and the other dated June 19, 1953, but that "he had not received a telegram dated May 24, 1953, and had no knowledge of such a tel-

egram." (This is presumably the telegram of May 20.) Contrary to defendants' claim, the trial court's memorandum of decision does not indicate whether or not he received that telegram prior to the entry of the judgment.

On December 3, 1953, counsel for plaintiff filed a proposed amendment to the first amended complaint. Thereafter on December 15, 1953, the motion to vacate the judgment was denied, as was plaintiff's motion to set aside the order on the motion to vacate and permit consideration of plaintiff's proposed amendment to the first amended complaint. Plaintiff's appeal is from both orders.

The pertinent portions of section 595 of the Code of Civil Procedure are as follows:

"The trial of any civil action, or proceeding in a court, * * * shall be postponed when it appears to the court, * * * that * * * any attorney of record * * * is a member of the Legislature of this State and that the Legislature is in session * * *. When the Legislature is in session * * * such action or proceeding shall not, without the consent of the attorney of record therein, be brought on for trial or hearing before the expiration of thirty (30) days next following final adjournment * * *."

Section 1054.1 of the Code of Civil Procedure provides in part that,

"When an act to be done, * * * relates to the pleadings in the action, * * * the time allowed therefor, * * * shall be extended * * * when it appears to the judge * * * that an attorney of record for the party applying for such extension is a Member of the Legislature of this State, and that the Legislature is in session * * *. When the Legislature is in session or in recess, extension shall be to a date not less than thirty (30) days next following the final adjournment of the Legislature * * *."

[1] In the case of *Burnett v. King*, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333, a somewhat similar question was presented relative to the interpretation of certain mandatory requirements of the statute there in question. It was there stated, 33 Cal.2d at page 807, 205 P.2d at page 658:

"It has been held repeatedly, and recently, that where a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction."

[2,3] Applying the enunciated rule to the facts herein, if the hearsay statement contained in the affidavit of Mr. Shank be disregarded, as it must, *Franklin v. Nat. C. Goldstone Agency*, 33 Cal.2d 628, 631, 204 P.2d 37; *Gay v. Torrance*, 145 Cal. 144, 151-152, 78 P. 540, then not only was there the presumption that the telegram of May 20 was received by the trial court, *Eppinger v. Scott*, 112 Cal. 369, 42 P. 301, 44 P. 723, but there was also the direct statement contained in the *Hammett* affidavit that the telegram was received. Hence on this record we must consider that the telegram was received.

[4] Necessarily, therefore, when it appeared to the trial court that Senator Desmond was in attendance at a regular session of the Legislature, that court was without power other than to continue the case in accordance with the mandatory provisions of the quoted sections. Stated otherwise, by failing to act in the particular manner prescribed by those sections, the trial court exceeded its power, and such act was in excess of its jurisdiction and void. *Bottoms v. Superior Court*, 82 Cal. App. 764, 768, 256 P. 422; see also *Barton-Mansfield Co. v. Higgason*, 192 Ark. 535, 92 S.W.2d 841.

[5] Furthermore, by reason of the inherent power of the court to set aside a void judgment, even on its own motion, it was immaterial how such invalidity was brought to the attention of the court (29

California Jurisprudence, Sec. 120, p. 38); and therefore it becomes unnecessary to discuss the contentions made by defendants in support of the orders.

The orders are reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



145 Cal.App.2d 1

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Lonzo WILSON, Defendant and Appellant.

Cr. 3225.

District Court of Appeal, First District,
Division 1, California.

Oct. 8, 1956.

Rehearing Denied Oct. 23, 1956.

Hearing Denied Oct. 31, 1956.

Prosecution for bookmaking. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Peters, P. J., held that under evidence showing that defendant had been under surveillance for three weeks by police officer who could not testify as to any illegal or suspicious acts committed during that period, defendant's arrest on charge of vagrancy, while he was really suspected of bookmaking, was illegal, as was the subsequent search of defendant's person and automobile, allegedly with defendant's consent, rendering evidence of bookmaking activities obtained thereby, inadmissible.

Reversed.

1. Criminal Law \S 394

Evidence obtained by illegal searches is inadmissible.

2. Arrest \S 63(4)

Where defendant was under surveillance for three weeks by police officer who

could not testify as to any illegal or suspicious act committed by him during that period, defendant's arrest on charge of vagrancy, although officer really suspected him of bookmaking, was illegal. West's Ann.Pen.Code, § 647.

3. Arrest ⚖71

Criminal Law ⚖394

In prosecution for bookmaking, under evidence showing defendant, suspected of bookmaking, had been improperly arrested for vagrancy, subsequent search of defendant's person and automobile was improper although allegedly with defendant's permission, and rendered evidence obtained of bookmaking activities, inadmissible. West's Ann.Pen.Code, §§ 337a, 647 and subd. 1.

4. Searches and Seizures ⚖7(28)

Permission to make search granted after a person has been improperly arrested and searched, while he is still in custody, and without informing him of his legal right to refuse permission, is not a real or proper consent.

Borah R. Hansen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty. of City and County of San Francisco, Philip J. Hanley, Deputy Dist. Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant was charged with three violations of section 337a of the Penal Code, in that (1) he kept or occupied a place for the purpose of recording bets; (2) that he recorded bets; and (3) that he made a bet upon the result of a race. He waived a jury trial. He was convicted on counts 1 and 2, and acquitted on count 3. He appeals from the judgment of conviction.

The principal point involved on this appeal is whether the basic evidence admitted over objection was obtained by means of an illegal search of defendant and of his automobile.

The facts are not substantially in dispute. In June of 1955 a police officer, in civilian clothes, was assigned the duty of keeping a designated pool hall and adjoining restaurant under surveillance. He performed this duty from June 9th to June 30th, 1955. Each working day during this period he observed the defendant, whom he had known before he became a policeman, from about 10 a.m. to 4:30 p.m., "loitering around the pool hall and the restaurant. Occasionally he would come in; might shoot a game of pool, but, as a general rule, he would walk into the pool hall, perhaps talk with some of the men that were there, then return to the restaurant, and sit at the counter." While in the restaurant "Practically each day that I would see him there, he would have the newspaper turned to the racing sheet. Men would come in and out of the restaurant, sit at the counter with him, and converse"; about 10 or 15 men would come into the restaurant each day and talk with defendant; "Other than have a conversation together, there was nothing that I saw," except that normally the men and defendant would look at the racing section of the paper, but he observed no one pointing toward any names in the paper, nor did he overhear any conversation, nor did he observe defendant make any notations, nor did he see any money pass between them, nor did he see defendant make or receive any telephone calls. Defendant did not appear to be working in either the restaurant or the pool hall.

Once during the period of observation the officer asked defendant if he was still working at the shipyard. Defendant said that he was not, "that he didn't have any regular employment; that he did odd jobs, such as painting, to get the money and support himself."

On June 30th the officer entered the restaurant and told defendant that he wanted to talk to him on police business. The defendant accompanied the officer, and outside the restaurant, by pre-arrangement, they met the police sergeant who had received the officer's daily reports. The sergeant asked defendant if he was working; de-

defendant said that he had been out of work for about two months, and that he was supporting himself by "doing odd jobs, painting, and anything that he could get hold of." The sergeant thereupon placed defendant under arrest for vagrancy, and, without the permission of defendant, immediately searched defendant's person. In defendant's watch pocket the sergeant found a piece of tissue paper on which was recorded a bet placed on a horse in the 8th race at Hollywood Park that day. Defendant stated that he had placed that bet for himself with a newspaper vendor. In defendant's rear pocket was a racing form dated June 30th. In defendant's wallet was found \$103 in currency, which defendant told the officers was to pay an overdue bill for the repair of his automobile. The sergeant then asked defendant where his automobile was parked, and defendant mentioned a place nearby. Then the sergeant "told him we would like to look at the car to see what was in it," and the defendant "furnished us the keys, and give us—gave us permission to search his car." The trial judge, significantly enough, when the sergeant so testified, stated "Uncoerced, I'm sure." The officers did not tell the defendant that he did not have to permit the search.

Upon searching the car the officers noted a large pocket on the back of the front seat. In this pocket the officers found several slips of paper and two racing forms dated June 29th and June 30th, respectively. On the slips of paper were recorded bets written in a code usually used by bookies. The defendant told the officers that these articles were not his, that he had not put them in the car and that he did not know how they had got there. No attempt was made to prove that the recorded bets were in the handwriting of the defendant.

The defendant testified that he lived with his wife next door to the restaurant; that he had known the proprietor of the restaurant for about four years; that the proprietor was repairing the establishment and had asked him, as long as he was not working, to assist her with odd jobs about the

place, which he did. The proprietor of the restaurant corroborated defendant. As to the \$103 found on defendant, he testified that his wife had given him \$50 from her paycheck to pay an overdue repair bill on his automobile. This was corroborated by defendant's wife. Forty dollars, defendant testified, he had borrowed from his mother for the same purpose. He had intended paying the repairman \$100 on a past due bill of about \$166. It was stipulated that the repairman, if called, would testify that the day before defendant was arrested defendant had telephoned to him and promised to pay \$100 on the bill on the 30th. This stipulation was based upon the fact that a deputy district attorney had interviewed the repairman who corroborated defendant.

The trial judge was troubled over the admissibility of the evidence found in the automobile, and the validity of the search. He was particularly troubled over the fact that the defendant was arrested for vagrancy when he obviously was suspected of and searched for evidence of bookmaking. The court admitted the evidence subject to a motion to strike, and, thereafter, the matter was argued at some length. The court finally ruled that the evidence was admissible and found the defendant guilty of recording and registering bets, and of keeping a place (his car) for that purpose, but not guilty as to count 3—placing a bet.

[1] The only evidence that defendant recorded bets or kept a "place" for that purpose is the evidence found in the search of the automobile. If that search was illegal, the evidence so secured was inadmissible. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. Since the decision of the Cahan case, in April of 1955, the Supreme Court has decided more than a score of cases in which it has reaffirmed the rule there stated, elaborated on it, explained it, and attempted, with obvious success, to fix its general scope and limits. See *Shepard's California Citations*, August, 1956, p. 224. Although not expressed in these words, after reading all of these cases, it is apparent that the central theme of all of them is

that the Supreme Court is attempting to lay down rules that will be reasonably fair to the defendant and will also be reasonably fair and afford reasonable protection to the public. In the vast number of cases involving the point, the basic question is, would a reasonable officer, in possession of the facts known to him, have made the arrest and engaged in the search of the person or place involved? If so, the arrest and search were held to be proper, but if not, the search, at least, was held to be unreasonable, and the evidence secured in such search held to be inadmissible. The majority of the Supreme Court apparently believed that this was the only practical method to protect the constitutional guarantee of freedom from unreasonable searches and seizures. The court had observed the deliberate disregard of this constitutional guarantee by some law enforcement officers who openly advocated and practiced the policy that the end justifies the means. The new rule is sound, is predicated on the federal rule, and is based on fundamental principles of morality. Certainly, it cannot be the law that it is necessary for proper law enforcement that the law be broken in order to enforce it. For these reasons, we believe that the new rule is not only sound, but should be zealously protected by the courts against any unreasonable attempt to limit or to circumscribe it.

The present case is a good example of over-zealous law enforcement. The arrest for vagrancy was an obvious subterfuge to try and secure evidence of bookmaking, and when that arrest, and the search of the person, failed to produce evidence of that activity, the police officers determined to search defendant's automobile. It is significant, so far as the record is concerned, that the officers did not even know defendant had an automobile until he so informed them during the improper search of his person. It is also significant that there is not one

word of evidence to indicate that defendant had a past record of bookmaking, or of any other offense, that he had been reported to the police for engaging in bookmaking or other offense, had ever annoyed or molested anyone, or even had ever acted in a suspicious manner. All that appears in the record is that the police, for some undisclosed reason, decided to keep a certain restaurant and pool hall under surveillance. Whatever that reason may have been, it certainly was not for the purpose of finding evidence that defendant was a vagrant. During that three-week period of surveillance, defendant was observed daily. During that time he was not observed committing one illegal or even suspicious act. He was observed reading the racing news in a daily newspaper, and occasionally talking with other visitors in the restaurant, apparently about the racing news. No money passed, no violations of law were observed, no pointing at names in the newspaper was observed, no telephone calls were made or received. There is no indication in the record that defendant was unkempt in appearance, annoyed or attempted to annoy anyone, or was without funds. In the one conversation the police had with defendant before his arrest he frankly stated that he was not presently regularly employed, but was doing odd jobs to support himself until he could secure regular employment. If those facts warrant the arrest of a person for vagrancy, then there is hardly a person walking the streets or visiting public places who cannot be lawfully arrested for vagrancy and searched against his will.

It is true that the vagrancy statute, sec. 647 of the Penal Code, and particularly subdivision 1 thereof,¹ defines vagrancy in very broad terms. That subdivision of the section is apparently based on the outdated concept that it is a criminal offense not to work. Under it, every unemployed person, every housewife and every retired person

1. Section 647, subd. 1, of the Penal Code provides: "Every person (except a California Indian) without visible means of living who has the physical ability to

work, and who does not seek employment, nor labor when employment is offered him; * * *

Is a vagrant."

conceivably could be arrested for vagrancy. If it be assumed that the section is constitutional, we certainly do not think it should be interpreted as broadly as respondent contends.

[2] For these reasons we do not think that the arrest for vagrancy was a proper one. *Ipso facto*, the search of the person, predicated on such illegal arrest, was improper. It is equally apparent that the facts known to the officers did not constitute any grounds, far less reasonable grounds, for the officer to believe that defendant had violated any of the offenses prohibited in section 337a of the Penal Code. Nothing that defendant was observed doing was illegal, or even reasonably suspicious. It is certainly not illegal or even reasonably suspicious to read, look at or discuss with others the sport page of a newspaper. If it is not a crime to do this for one day it does not become a crime, or a reasonably suspicious circumstance, standing alone, when it is done for 21 days.

Thus, it is apparent that the arrest and search of the person of defendant were unreasonable and illegal. This makes it unnecessary to discuss the rules that might be applicable were the arrest for vagrancy a valid one.

[3,4] The only incriminating evidence that was introduced against defendant on the two charges upon which he was convicted was secured upon the search of the automobile. Respondent argues that defendant consented to this search. It is true that one of the arresting officers testified that defendant "furnished us the keys, and give us—gave us permission to search his car." This so-called "permission" was granted after defendant was improperly arrested and improperly searched. Without the purported consent, the search of the car would have been improper even if the arrest and search of the person had been proper. *Hernandez v. Superior Court*, 143 Cal.App. 2d 20, 299 P.2d 678. While the question of consent is one of fact, *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469, it is obvious that a "permission" granted after a person has

been improperly arrested and searched, while he is still in custody, and without informing him of his legal right to refuse permission, is not a real or proper consent. The search of the car, under the circumstances, was clearly unreasonable.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



144 Cal.App.2d 798

Loren BESS, Robert W. Cushman, Leo A. Hill and Harry F. Long, Plaintiffs and Respondents,

v.

Edward P. PARK, Labor Commissioner of the State of California, Defendant and Appellant.

Civ. 21288.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1956.

Rehearing Denied Oct. 25, 1956.

Hearing Denied Nov. 28, 1956.

Action by four employment agencies licensed by Labor Commissioner to have declared invalid and void rules and regulations governing procedure for hearing and determining controversies between employment agencies and applicants required to be submitted to Labor Commissioner and to restrain Labor Commissioner from enforcing and administering such rules. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgments adverse to Commissioner and Commissioner appealed. The District Court of Appeal, White, P. J., held that under statute providing that Labor Commissioner shall hear and determine controversies between employment agencies and applicants and containing provision that Labor Commissioner may certify that there is no controversy within meaning of section where agency presents substantial evidence that applicant

acknowledges fee to be due, such provision is void for uncertainty but statute as it was before such provision was added by amendment remains in full force.

Affirmed in part, reversed in part and remanded with directions.

1. Constitutional Law  318

Labor Relations  18

Statute providing that Labor Commissioner shall hear and determine controversies between employment agencies and applicants implies condition precedent that both parties shall be given reasonable notice and opportunity to be heard and does not fall within proscription of due process clause of State and Federal Constitutions. West's Ann.Labor Code,    1550 et seq., 1647; West's Ann.Const. art. 1,   13; U. S.C.A.Const. Amend. 14,   1.

2. Constitutional Law  318

The character of notice required to constitute due process varies with the nature and purpose of the proceeding, and the notice in each case must be such that it is reasonably probable that the person proceeded against will learn of proceeding and be given a reasonable opportunity to appear.

3. Administrative Law and Procedure  391

Administrative rules and regulations are presumed to be reasonable in absence of proof to the contrary, and courts will not substitute their judgment for that of administrative agency unless it is clearly shown that regulation is so unreasonable as to be arbitrary or capricious or in excess of authority vested in agency.

4. Administrative Law and Procedure  760

Labor Relations  18

Under regulations governing procedure for hearing and determining controversies between employment agencies and applicants before Labor Commissioner, lack of specification of time which must elapse between receipt of notice of time and place of hearing and hearing did not justify court in substituting its judgment for that

of Legislature and Labor Commission. West's Ann.Labor Code,   1647.

5. Statutes  47

Under statute providing that Labor Commissioner shall hear and determine controversies between employment agencies and applicants and containing provision that parties involved shall refer the matters in dispute to Labor Commissioner, since both parties and matters are plural, either party may submit controversy, and provision does not make statute void for uncertainty. West's Ann.Labor Code,   1647.

6. Statutes  47, 143

Under statute providing that Labor Commissioner shall hear and determine controversies between employment agencies and applicants and containing provision that Labor Commissioner may certify that there is no controversy within meaning of section, where agency presents substantial evidence that applicant acknowledges the fee to be due, such provision is void for uncertainty, but statute as it was before such provision was added by amendment remains in full force and effect. West's Ann. Labor Code,   1647.

7. Constitutional Law  318

Labor Relations  18

Administrative Code provisions that Labor Commissioner shall notify parties of proposed determination of controversy between employment agencies and applicants and upon receipt of objection shall review record did not set forth procedure denying due process where either party after such determination had right to trial de novo in Superior Court. West's Ann. Labor Code,   1647.

Pauline Nightingale, Leon H. Berger, Los Angeles, Leon E. Gold, San Francisco, for appellant.

Edmond Gattone, Los Angeles, for respondents.

WHITE, Presiding Justice.

This action was commenced by four employment agencies licensed by the Labor

Commissioner of the State of California to have declared invalid and void the rules and regulations governing the procedure for hearing and determining controversies between employment agencies and applicants required to be submitted to the Labor Commissioner under the provisions of Section 1647 of the Labor Code, and to restrain the Labor Commissioner from enforcing and administering these rules.

The Labor Commissioner has appealed from the judgment rendered, permanently enjoining and restraining him and his assistants, deputies, officers, agents, clerks, servants, employees and attorneys, from enforcing and administering against the plaintiffs Section 1647 of the Labor Code and Sections 11976 to 11983, both included, of Title 8 of the California Administrative Code; declaring that each of said sections of the Administrative Code is void and without legal force and effect, inconsistent with the Labor Code, beyond the statutory authority conferred upon the Labor Commissioner; that said sections are "not uniform in their requirements or operation and constitute an abuse of administrative discretion and upon the further ground that said sections are promulgated as rules of procedure in furtherance of Section 1647 of the Labor Code which said section of the Labor Code is unconstitutional and void";

"That it is declared that Section 1647 of the Labor Code is void for uncertainty: (a) in that what may or may not be classed as controversy within the provisions of Division II, Part 6, Chapter 1 of the Labor Code is not stated or defined therein; (b) in that it is uncertain whether that Section of the Labor Code requires that both parties must join together in submitting the controversy or else it cannot be submitted, nor action or hearing thereon had; (c) in that if it was intended that either party might act individually that section of the Labor Code fails to say so; (d) in that if either party may initiate the submission of a controversy there is no provision requiring him or the Labor Commissioner to give notice to the adverse party and there-

fore said section of the Labor Code is in violation of Article I, Section 13, of the Constitution of the State of California and of Amendment 14, Section 1 of the Constitution of the United States and the enforcement of said section of the Labor Code constitutes a denial of due process of law.

"That it is declared that the failure of an applicant for employment to pay the employment agency an undisputed fee does not constitute a controversy to be determined by the Labor Commissioner within the provisions of Division II, Part 6, Chapter 1 of the Labor Code and it is further declared that the employment agency is not required as a condition precedent to the enforcement of collection of said undisputed fee to procure from the Labor Commissioner a certification that no controversy exists."

[1] If, as concluded by the trial court, Section 1647 of the Labor Code "constitutes a denial of due process of law" and is unconstitutional, then the judgment must be affirmed. We will, therefore, first consider that question. Said section 1647 provides:

"In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo. To stay any award for money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars (\$1,000) and approved by the superior court.

"The Labor Commissioner may certify that there is no controversy within the meaning of this section, where the agency presents substantial evidence that the applicant acknowledges the fee to be due."

Appellant Labor Commissioner contends that the Supreme Court has affirmed the constitutionality of Section 1647 of the Labor Code by its decisions in *Collier & Wallis, Ltd. v. Astor*, 9 Cal.2d 202, 205-206, 70 P.2d 171; *Garson v. Division of Labor Law Enforcement*, 33 Cal.2d 861, 864-865, 206 P.2d 368; and *Robinson v. Superior Court*, 35 Cal.2d 379, 388, 218 P.2d 10, and, therefore, the judgment to the contrary in the instant action is erroneous.

In *Collier & Wallis, Ltd. v. Astor*, supra, the judgment in favor of an employment agency was reversed for the reason that the controversy had not been referred to the Labor Commissioner before the action was filed in court. Therein, the provision of said section 1647 for an appeal to Superior Court after the determination by the Labor Commissioner is attacked, and, 9 Cal.2d at pages 205 and 206, 70 P.2d at page 173, the Supreme Court held that said section does not attempt to invest in the Labor Commissioner the right to exercise any judicial function; and, since said section provides for a trial de novo in the Superior Court, it does not "contravene any provision of our State Constitution fixing and defining the appellate jurisdiction of the Superior Courts".

Collier & Wallis, Ltd. v. Astor, supra, is not determinative of any questions as to the constitutionality of said statute, other than the questions therein discussed. *Oakland Paving Co. v. Whittell Realty Co.*, 185 Cal. 113, 119-120, 195 P. 1058; *Worthley v. Worthley*, 44 Cal.2d 465, 471-472, 283 P.2d 19. No constitutional questions were decided in the *Garson* and *Robinson* cases, supra.

In the instant action, the trial court determined that Section 1647 of the Labor Code violates the State and Federal Constitutions because it contains no provision requiring either party to give notice to the adverse party, and said section "constitutes a denial of due process of law". No decision on this point has been cited or found by us.

As said by Justice Schauer, speaking for the court in *In re Porterfield*, 28 Cal.2d 91, 103, 168 P.2d 706, 714, 167 A.L.R. 675:

"We unequivocally recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties. Those freedoms are vastly more consequential than any object to be attained by business or professional regulations and the integrity of the former is not to be compromised to save the latter. It is a general rule, also, that the power of the courts, from its very nature, must be exercised with the utmost caution. Laws are enacted by and for the people. The people have a right of experimentation, of evolution through trial and error. Constitutionality of purpose and application is generally to be presumed. It has often been said that it is only when it clearly appears that an ordinance or statute passes definitely beyond the limits which bound the police power and infringes upon rights secured by the fundamental law, that it should be declared void. [Cases cited.]

"The choice, then, which the courts must make—to say where the individual's freedom ends and the State's power begins—is a delicate one. * * *

Appellant urges that, since Section 1647 provides for hearing by the Labor Commissioner and does not expressly negative the requirement for notice, the requirement for reasonable notice will be implied, as in *Carroll v. California Horse Racing Board*, 16 Cal.2d 164, 105 P.2d 110; *Fascination, Inc., v. Hoover*, 39 Cal.2d 260, 271, 246 P.2d 656; *Keenan v. San Francisco Unified School Dist.*, 34 Cal.2d 708, 714, 214 P.2d 382; *Ratliff v. Lampton*, 32 Cal.2d 226, 233, 195 P.2d 792, 10 A.L.R.2d 826; and *McDonough v. Goodcell*, 13 Cal.2d 741, 751, 91 P.2d 1035, 123 A.L.R. 1205. The respondents contend that the decisions just

cited do not apply in the instant action because here the actual taking of property and not merely the refusal to issue or the revocation of a license or the dismissal from public employment is involved.

In their brief, respondents state that "in the case at bar, the statute itself must expressly provide for notice and hearing and failing to do so it falls within the constitutional proscription of the due process clauses of the State and Federal Constitutions". To support that statement, they cite and rely upon *Modern Loan Co. v. Police Court*, 12 Cal.App. 582, 586, 587, 108 P. 56; *In re Grout*, 105 App.Div. 98, 93 N.Y.S. 711; *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. None of the last cited cases is applicable to the situation now engaging our attention. The *Modern Loan Co.* case, *supra*, held a certain procedure for summary disposition of personal property taken by search warrant was invalid. *In re Grout*, *supra*, involved a statute authorizing imprisonment for contempt because of a refusal to answer questions of the Comptroller of New York. In neither case did the statute provide for a hearing before the taking of the property or liberty. *Roller v. Holly*, *supra*, decided in 1900, holds that a Texas statute requiring only five days' notice to be given to any defendant residing anywhere in the world to appear in Texas and defend an action to foreclose a vendor's lien upon real property was unreasonable and violated the due process clause of the Constitution. See *Whitcomb v. Emerson*, 46 Cal.App.2d 263, 271, 115 P.2d 892; and *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 335, 74 P.2d 761.

In our opinion, the provision of said section 1647 that the Labor Commissioner "shall hear and determine" the controversies between employment agencies and applicants implies the condition precedent that both parties shall be given reasonable notice and the opportunity to be heard. *Carroll v. California Horse Racing Board*, *supra*.

Section 1646 of the Labor Code provides that "The Labor Commissioner may promulgate rules and regulations, not inconsistent with this chapter for the purpose of enforcing and administering this chapter." The Administrative Procedure Act, Gov. Code, Sec. 11370 et seq., provides the methods and procedures for adopting such rules and regulations. It is not claimed that any of the rules and regulations hereafter discussed were not duly and regularly adopted after a fair hearing.

The trial court in the instant action has declared the sections of the Administrative Code, 11976 to 11983, both included, void.

Under the provisions of section 11978, the Labor Commissioner shall give to each of the parties notice of the time and place of the hearing for the determination of a controversy. The notice required to be given to the parties is by "ordinary mail; or the agency may serve personal notice in the manner prescribed by the Code of Civil Procedure for service of summons in a civil action, or may request the Labor Commissioner to make service by registered mail, the agency paying necessary costs. * * * Evidence that the party has received the notice of hearing must be established prior to or at the time of hearing."

[2] The character of the notice required to constitute due process varies with the nature and purpose of the proceeding. *People v. One 1941 Chrysler 6 Touring Sedan*, 81 Cal.App.2d 18, 34, 183 P.2d 368. The notice in each case must be such that it is reasonably probable that the person proceeded against will learn of the proceeding and be given a reasonable opportunity to appear. Most of the hearings concerning fees earned by the agencies are requested by the agencies, in which cases the agencies are aware of the proceedings. In matters referred to the Labor Commissioner by applicants, there is no showing that the agencies have been in any way prejudiced by lack of notice or short notice.

[3] Administrative rules and regulations are presumed to be reasonable in the absence of proof to the contrary and courts will not substitute their judgment for that of the administrative agency unless it is clearly shown that the regulation is so unreasonable as to be arbitrary or capricious, or in excess of the authority vested in the agency. *Nelson v. Dean*, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; *Rible v. Hughes*, 24 Cal.2d 437, 445, 150 P.2d 455, 154 A.L.R. 137; *Fillmore Union High School Dist. v. Cobb*, 5 Cal.2d 26, 33, 53 P.2d 349. There is no showing that the regulations here assailed are either arbitrary or capricious.

[4] Nor does the lack of a specification of the time which must elapse between the receipt of such notice and the hearing justify the court in substituting its judgment for that of the Legislature and the Labor Commission.

The fact that the employment agencies are required to remain at the address which is licensed by the Commissioner, Labor Code, §§ 1581, 1592, 1593 and 1594, and can be reached there by ordinary mail and by telephone, while the applicants involved in such hearings are usually, according to respondents' pleading and testimony, "migratory and financially irresponsible", is reason enough for the Administrative Code's differing requirements for notice to them of hearings pursuant to said section 1647 of the Labor Code.

[5] The trial court decided that section 1647 is void for uncertainty in that it cannot be ascertained therefrom whether both parties are required to join together in submitting the controversy. The section provides that "the parties involved shall refer the matters in dispute". Since both the parties and the matters are plural, either alone may submit any controversy.

[6] The trial court further decided that said section is uncertain as to "what may or may not be classed as a controversy". Mr. Justice Carter, in 1949, speaking for the Supreme Court in *Garson v. Division of Labor Law Enforcement*, 33 Cal.2d 861,

866, 206 P.2d 368, 371, said: "As we have seen, the statute is broad and comprehensive and it is indicated * * * that the Commissioner is empowered to hear and determine *all* such disputes including the existence of the contract, termination, liability thereunder and the like." (Emphasis added.) Section 11975 of the Administrative Code formerly provided that refusal or failure to pay a fee admitted by the applicant to be due the agency is not a controversy to be determined by the Labor Commissioner.

In 1953, the last paragraph of section 1647 was added, reading: "The Labor Commissioner may certify that there is no controversy within the meaning of this section, where the agency presents substantial evidence that the applicant acknowledges the fee to be due." Thereafter, section 11975 was repealed and sections 11982 and 11983 were added to the Administrative Code. The new sections provide that the agency must submit a written request for such certification which shall include "a statement as to the nature of the evidence showing the applicant acknowledges the fee to be due"; and the Commissioner may so certify "upon examination of evidence establishing to his satisfaction that the agency is entitled to the fee claimed, that the applicant has acknowledged the fee to be due, and that conditions have not changed since the time the acknowledgment was made".

The apparent meaning of Labor Code Sections 1550-1663, and of Section 1647 in particular, was determined in *Garson v. Division of Labor Law Enforcement*, supra. The first paragraph of said section 1647 was then the entire section and it remains the same. The paragraph added thereto is ambiguous.

If the Legislature intended by such added paragraph, as believed by respondent and the trial court, to relieve the Labor Commissioner of the duty to hear and determine the liability of the applicant to the agency for fees agreed to be paid, it has not expressed that intention. Whether or

not a controversy is "within the meaning" of the section is a question of law and cannot be finally determined by the Labor Commissioner. Certainly the Labor Commissioner could not certify even that the applicant acknowledges the fee to be due without a hearing at which the applicant is given an opportunity to controvert the evidence.

The purpose of the administrative proceedings here involved is to save time for the agency, the applicant, and the courts by having such controversies determined by a specialist, the Labor Commissioner. Most of the disputes referred to him for determination involve unpaid fees. If, at the hearing requested by the agency, he admitted only evidence that applicant had acknowledged the fee to be due, and certified "no controversy", the agency would then have to proceed by court action. When the matter came up for trial, if the court should find from the evidence produced that there is a controversy, the court would have to dismiss the actions as premature and the agency would have to again refer the matter to the Labor Commissioner. *Collier & Wallis, Ltd. v. Astor*, supra. We do not believe that is what was intended by the Legislature, nor have we been able to determine from the language of the last paragraph of said Section 1647 what was intended. Therefore, we conclude that the last paragraph of said section is void for uncertainty.

Sections 11982 and 11983 which were adopted for the purpose of making said last paragraph effective can, therefore, serve no useful purpose.

However, section 1647, as it was before the amendment of 1953, remains in full force.

[7] Sections 11979, 11980 and 11981 of the Administrative Code provide: that the Labor Commissioner "shall notify each of the parties in writing of his proposed determination"; that within ten days after such notice "either party may file objec-

tions" thereto; that "upon receipt of the objections the Labor Commissioner shall review the record, and may cause an additional investigation to be made or hearing to be held"; and that "after expiration of the ten day period for filing objections, or after considering objections if such have been filed, the Labor Commissioner shall issue his determination".

Said sections 11979, 11980 and 11981 are among those covered by the injunction from which the Labor Commissioner has appealed. Respondents, in their brief, state that, since the initial hearing is presided over by a Deputy Labor Commissioner, whose proposed decision and file—in the event written objections are filed—is reviewed by the Assistant Labor Commissioner and sometimes by the legal staff and the Labor Commissioner, who personally makes the decision, such procedure is unconstitutional and void because "the one who decides must hear". The procedure here under consideration is not a denial of due process for the reason that either party may, after such determination, commence an action in the superior court and is there entitled to a complete trial de novo. As stated in *Hohreiter v. Garrison*, 81 Cal.App.2d 384, 402, 184 P.2d 323, 334: "Due process contemplates that somewhere along the line a fair trial be had—not that there be two or three fair trials".

In so far as the judgment appealed from holds that the last paragraph of Section 1647 of the Labor Code and Sections 11982 and 11983 of the Administrative Code are uncertain and therefore invalid, it is affirmed.

In all other respects, the judgment is reversed and the cause remanded with directions to the court below to amend its Conclusions of Law and render Judgment in accordance with the views herein expressed.

DORAN and FOURT, JJ., concur. ✓

145 Cal.App.2d 50

Cassie BARTLETT, Alfred Bartlett, Patricia Sue Bartlett, a minor, by her guardian ad litem, Alfred Bartlett, and Judy Ann Bartlett, a minor, by her guardian ad litem, Alfred Bartlett, Plaintiffs and Appellants,
v.

STATE of California, Frank Durkee, Director of Public Works, George C. McCoy, Paul Harding, W. L. Fahey, William Sedgwick, L. R. Smith, Ted Martin, Earl Hawkins, Does One, Two, Three and Four, B. R. Caldwell, Commissioner of the Department of the California Highway Patrol, Mark Hebblethwaite, Richard White, County of Los Angeles, Defendants.

B. R. Caldwell, Commissioner of the Department of the California Highway Patrol, and Richard White, Respondents.

Civ. 21542.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1956.

Action against commissioner and captain of state highway patrol by occupants of automobile for their injuries in collision at intersection from which the stop sign was missing. The Superior Court, Los Angeles County, Bayard Rhone, J., sustained demurrer to amended complaint without leave to amend and rendered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that complaint failed to state statutory cause of action in that there was no allegation that commissioner or captain had authority to restore stop sign or that they had the requisite public funds available to them.

Affirmed.

1. Pleading Ⓒ225(1)

If it is patent that no liability on part of defendant exists in favor of plaintiff, demurrer to complaint is properly sustained without leave to amend.

2. Courts Ⓒ90(4)

Decisions construing earlier statute are persuasive in construing later reenactments of statute.

301 P.2d—62½

3. Officers Ⓒ116

The statute relating to liability of officers for damage or injury from defective or dangerous condition of public property was not enacted to create a liability of public officers for negligence in the performance of their duties beyond existing liability. West's Ann.Gov.Code, § 1953.

4. Officers Ⓒ116

Plaintiffs suing public officers for injuries from defective or dangerous condition of public property must plead cause of action within statute imposing restrictions on public officers' liability. West's Ann.Gov.Code, § 1953(a-e).

5. Automobiles Ⓒ301(1)

Amended complaint, filed by occupants of automobile for their injuries in collision at intersection from which the stop sign was missing, failed to state statutory cause of action against commissioner and captain of state highway patrol in that there was no allegation that commissioner or captain had authority to restore stop sign or that they had the requisite public funds available to them. West's Ann.Gov.Code, § 1953(c).

6. Highways Ⓒ190

Under statute, even though police officer knows that absence of stop sign creates dangerous condition at intersection, the danger alone does not make officer liable for injuries resulting from absence of sign unless officer also has authority to repair the condition and has the funds requisite to make such repair. West's Ann.Gov.Code, § 1953(b, c).

7. Highways Ⓒ190

If stop sign is missing from intersection and commissioner and captain of state highway patrol neglect to notify public works' officers of absence of sign and of resultant danger to public, commissioner and captain are subject to discipline by the constituted authority for such neglect, but the entity liable for the presence of such dangerous condition is the sovereign or such political subdivision as has been authorized to repair defective or dangerous conditions. West's Ann.Gov.Code, § 1953.

8. Highways Ⓒ190

Commissioner and captain of state highway patrol have not so assumed responsibility of maintaining stop signs in order and repair as to render themselves liable for continued existence of danger from missing stop sign after having knowledge thereof. West's Ann.Gov.Code, § 1953; West's Ann.Vehicle Code, § 139-37(b).

9. Officers Ⓒ116

Before any common law liability of officer for failure to act may exist, there must have been a duty to act under the circumstances.

10. Automobiles Ⓒ301(3)

Automobile occupants suing commissioner and captain of state highway patrol for injuries sustained in collision at intersection from which the stop sign was missing must allege that commissioner and captain had a duty to act and that such duty was not dependent on their official status, in order to state cause of action on any theory of common law liability for breach of general duty to exercise due care for safety of others.

11. Automobiles Ⓒ301(3)

In action against commissioner and captain of state highway patrol by occupants of automobile for their injuries in collision at intersection from which the stop sign was missing, amended complaint failed to state cause of action on any theory that commissioner and captain undertook to maintain stop signs or to replace signs and were negligent in their attempts.

12. Highways Ⓒ190

Under the statutes, the power and duty to erect and maintain stop signs at intersections of state highways deemed to be dangerous is vested in state department of public works and is vested in local authorities with respect to streets and highways within their jurisdictions, and such power is not vested in the highway patrol. West's Ann.Vehicle Code, §§ 465, 471.

13. Highways Ⓒ190

Under the statutes, commissioner and captain of state highway patrol have no duty to restore absent stop signs at intersection of county road with state highway. West's Ann.Vehicle Code, §§ 465, 471, 473.

14. Automobiles Ⓒ301(3)

Budget disclosed that in fiscal year 1953-1954 the state highway patrol had no funds to use in maintaining stop signs, and hence automobile occupants injured in 1953 collision at intersection from which the stop sign was missing, could not state a cause of action against commissioner and captain of state highway patrol under statute providing that funds must be available to officer to remedy the condition before he can be held liable for injury from dangerous condition of public property, and consequently demurrer to amended complaint was properly sustained without leave to amend. St. 1953, p. 2348; West's Ann.Gov.Code, § 1953 and subd.(c).

Wolford, Johnson & Pike, George Pike, El Monte, for appellants.

Edmund G. Brown, Atty. Gen., Delbert E. Wong, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

Appellants demand a reversal of a judgment of dismissal pursuant to an order sustaining a demurrer to the amended complaint without leave to amend as to respondents Caldwell and White. The pleading attempts to declare causes of action for personal injuries against departments of the State government and against Caldwell and White, respectively Commissioner of the California Highway Patrol and Captain of such Patrol in the Seventh Area. The injuries of appellants resulted from an intersectional collision of two automobiles of one of which they were occupants. Such vehicle was operated by appellant Alfred Bartlett along Fawcett Street, an east-west county road and public

street, and onto Rosemead Boulevard, a north-south state highway. Appellants assert the liability of respondents by virtue of their failure to maintain a stop sign at Rosemead where it is entered by Fawcett; that by reason of the absence of such stop sign, the driver of the Bartlett car failed to discern the nature of the state highway; that on the day of the accident, December 22, 1953, and since about 1936, a stop sign had been provided for such intersection according to law and had been erected by or on behalf of Los Angeles County; that after it was placed, it was "maintained and cared for and controlled by each and all of said persons and governmental bodies named defendants herein, at the westbound (as well as the eastbound) approaches of Fawcett to Rosemead Boulevard, so as to require vehicular traffic westbound upon Fawcett to stop at the edge of Rosemead on Fawcett before entering Rosemead Boulevard"; that at the time of the accident and for several prior years, Rosemead, at the Fawcett intersection and at others for miles north and south of Fawcett, was a major traffic artery and through highway with stop signs at the entrances of all such intersecting streets and highways; that during all such times and especially at night, the conditions at the intersection of Rosemead and Fawcett were such as to require, in the exercise of ordinary care, the maintenance of a stop sign at the westbound entrance of Fawcett onto Rosemead to give warning of the danger of traffic on Rosemead and render such entrance safe for passage of vehicular traffic along Fawcett into Rosemead; that the "natural growth along Fawcett at the southeasterly corner of the intersection, obscuring the vision of a westbound driver to the customarily rapid approach of northbound traffic nearest said intersection" reasonably required the maintenance of a stop sign at Fawcett's entrance to Rosemead; "that Fawcett at such intersection in the absence of such a stop sign was rendered thereby unsafe dangerous and defective."

"IX

"That said stop sign at the westbound approach for westbound traffic on Fawcett approaching Rosemead was the joint, or in the alternative several, jurisdiction and responsibility of the Department of Public Works, Division of Highways and the officers and employees herein, named thereof, and of the County of Los Angeles, and of the Department of the California Highway Patrol and the division officers and employees thereof named herein, with reference to and as to the replacement, maintenance, care, control and condition of said signs thereof. That each and all of the persons named herein and the governmental bodies had the duties to replace, maintain, inspect, care for, and control said two highways, their intersection and approaches, and the stop signs in place, and in a safe condition for their intended use, and furthermore had the duty with reference to the instruction, regulation and operation of the means and methods of carrying out such erection, maintenance, inspection, control and condition thereof, and with reference to the reporting of missing stop signs and of dangerous and defective highway by reason of the condition of the approaches and stop signs thereof, and with reference to the replacement and repair of said stop sign at said approaches.

"That the County of Los Angeles at all such times had the duty to maintain said Fawcett in a safe condition for its intended use, and to remedy the dangerous and defective condition of Fawcett by reason of its approach into Rosemead as herein alleged and to give warning of said dangerous and defective condition.

"That the Department of the California Highway Patrol on said date and for a long period of time theretofore had the duty, and customarily assumed the working practices and duty, of reporting missing stop signs or damaged stop signs, and either replacing same or requesting the Department of Public Works Division of Highways of California, or the County of Los

Angeles, or a municipality under the particular circumstances to replace missing stop signs and otherwise to remedy and give warning to the public of the dangerous and defective conditions claimed by said missing stop sign.

"X

"On December 22, 1953, and for three months, or more prior thereto, the previously erected and maintained stop sign at the westbound approach for westbound traffic, along Fawcett to Rosemead was displaced and missing and not at all in position, so that no warning or notice to stop or warning of the dangers of the through highway, with its usual heavy rapid traffic, not otherwise ordinarily visible without stopping was given in any wise to drivers of traffic proceeding westerly along Fawcett approaching and entering into Rosemead. That on said date the plaintiffs were all occupants of an automobile being driven by the plaintiff Alfred Bartlett in a westerly direction along Fawcett, who was by the absence of the stop sign caused to enter said intersection into Rosemead and to come into collision with a northbound vehicle along Rosemead Boulevard, without stopping for said boulevard, and by reason of said collision each and all of the plaintiffs were seriously permanently and painfully injured and caused to suffer damages as herein alleged.

"That the absence of said stop sign and conditions rendering Fawcett and Rosemead dangerous and defective, as herein alleged, were open and obvious and easily known to the persons complained of and the County of Los Angeles from any routine inspection of the intersection and of stop signs, which routine inspections were regularly carried out by and under the authority of the officers and employees complained of and the County of Los Angeles; and the exercise of ordinary care in the inspection of said stop signs and of

the intersection would have caused actual knowledge of said dangerous and defective condition of the property.

"That in fact at the El Monte offices of the California Highway Patrol where Captain Richard White was located, there was a displaced and missing stop sign for a period of several weeks prior to the collision, which in reasonable probability was the one previously in place at said intersection.

* * * * *

"That each and all of the officers and employees herein named as defendants had notice, either actual or constructive, of the defective and of the dangerous condition of said public property and each and all of it herein described, and had the authority and the duty to remedy such condition at the expense of the political and governmental body responsible therefor, and funds for the purpose were immediately available to each and all of such persons, and within a reasonable time after receiving such notice, and being able to remedy such condition, they failed so to do, and furthermore failed to take reasonable steps to give adequate warning of such dangerous and defective condition of the stop sign and the public highways and approaches thereto, and of the public property herein described."

[1] From the foregoing it should be patent that no liability on the part of respondents exists in favor of appellants. If such be true, the court below properly sustained the demurrer without leave to amend. *Bauer v. County of Ventura*, 45 Cal.2d 276, 291, 289 P.2d 1; *Routh v. Quinn*, 20 Cal.2d 488, 493, 127 P.2d 1, 149 A.L.R. 215; *Saint v. Saint*, 120 Cal.App. 15, 23, 7 P.2d 374.

[2-4] The determination of the point raised by the appeal appears to rest largely with the interpretation of section 1953*

• Government Code, § 1953. Liability of officer for damage or injury from defective or dangerous condition of public property.

"No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous

of the Government Code which appears on the margin hereof. Because that section had its genesis in the Statutes of 1919, chapter 360, section 1 (which chapter was a reenactment of section 1, chapter 593 of the Statutes of 1911) the decisions construing the earlier statutes are persuasive here. The Act of 1911 was not enacted to create a liability of public officers for negligence in the performance of their duties beyond existing liability. *Ham v. County of Los Angeles*, 46 Cal.App. 148, 164, 189 P. 462. Inasmuch as respondents' liability is restricted by the limitations prescribed by section 1953, a valid pleading against such officers requires strict compliance therewith. *Shannon v. Fleishhacker*, 116 Cal.App. 258, 261-262, 2 P.2d 835.

[5] Because the amended complaint does not definitely show that either respondent had the authority to restore the stop sign and that they had the requisite funds available to them from the State or any of its political subdivisions, § 1953, supra, it does not state a cause of action against them.

[6, 7] While it is true that the pleading states fully that respondents knew of the dangerous condition at the intersection of Fawcett Street and Rosemead Boulevard by reason of the absence of the stop sign at the northeast corner, yet the danger alone is not sufficient to make a police officer liable for injuries resulting from the absence of the stop sign. Unless they had the authority to repair the condition and the funds requisite for such performance, a valid cause of action was not alleged

against them. *Hoel v. City of Los Angeles*, 136 Cal.App.2d 295, 306, 288 P.2d 989. If respondents continued to perform their regular duties but neglected to notify the Public Works' officers of the absence of the stop sign and of the resultant danger to the public, they would have been properly subject to discipline by the constituted authority for such neglect. But the entity liable for the presence of such a dangerous condition on a street or highway is the sovereign or such political subdivision as has been authorized to repair conditions defective or dangerous.

[8] Appellants contend that respondents assumed the responsibility of maintaining the stop signs in order and repair and thereby rendered themselves liable for the continued existence of the danger after having knowledge thereof. Such assumption is not justified by either reason or authority. Because an agent goes out of his way to do a good turn for his principal does he thereby assume the duty forever to do so? Because a policeman has for a season conveyed every drunk found on the streets after midnight to the latter's home, is he thereafter liable for the death suffered by an intoxicated man who was allowed to care for himself after midnight with the resultant fall into a manhole? An officer's kindness to the individuals of society will not reasonably enlarge his duties as prescribed by law, even though he has power to "direct traffic as conditions may require." Vehicle Code, § 139.37(b).

[9, 10] Appellants argue that regardless of whether or not a cause of action may be

condition of any public property, unless all of the following first appear:

"(a) The injury sustained was the direct and proximate result of such defective or dangerous condition.

"(b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.

"(c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political sub-

division thereof and that funds for that purpose were immediately available to him.

"(d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.

"(e) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition."

stated against the officers under the applicable provision of the Government Code, a right to relief was alleged against them as individuals for breach of a general duty to exercise due care for the safety of others, citing *Bettencourt v. State*, 139 Cal. App.2d 255, 293 P.2d 472; *Griffin v. Colusa County*, 44 Cal.App.2d 915, 113 P.2d 270; *Dillwood v. Riecks*, 42 Cal.App. 602, 184 P. 35. In the *Bettencourt* case, defendants negligently raised a bridge; In *Dillwood* the government employees carelessly burned weeds. However, in this case appellant is complaining of the inaction of the defendants. Before any common law liability for failure to act may exist, there must have been a duty to act under the circumstances. (Rest., Torts, § 314.) Furthermore, to prevail in their argument that a cause of action was stated against these defendants regardless of noncompliance with Government Code section 1953, appellants must point out a duty to act which is not dependent upon the official status of respondent officers. In this they fail.

[11] Appellants particularly seek to bring their pleading within the rule of *Griffin v. Colusa County*, supra, 44 Cal.App. 2d 915, 113 P.2d 270, which held that two county nurses should have been held answerable for their negligence in failing to care for a patient who had fallen into a delirium. The duty to act was predicated upon the principle that when one undertakes the care of the helpless he must do so with due care while the other is under his charge. (Rest., Torts, sec. 324.) However, the facts alleged indicate no such assumption of personal care here. The amended complaint is devoid of an allegation that respondents undertook to maintain the stop signs or to replace one and were negligent in their attempts.

A Cause of Action Cannot Be Declared Against Respondents.

[12, 13] If the power and duty to erect and maintain stop signs at intersections of a State Highway deemed to be dangerous is vested in the Public Works Department of the State and in local authorities with

respect to streets and highways within their jurisdictions, Veh.Code, §§ 465, 471, there is no reason for assuming that the same power is vested in the Highway Patrol. There is no statutory authority so declaring, neither is there cited any judicial declaration to that effect. It is so clear that the State Department of Public Works is obligated to maintain stop signs at dangerous intersections of a state highway that one who runs may read. It is equally certain that local political subdivisions must maintain such signs on their own streets and highways. But appellants seek to extend the State's obligation to the personnel of the State's Highway Patrol and especially to respondents, members of such patrol. At least, it is contended, the officers of the Patrol "had the duty, and customarily assumed the working practice and duty of reporting missing stop signs or damaged stop signs" and either replacing same or requesting the appropriate governmental personnel to replace them or otherwise to remedy and warn the public of such conditions. In support of such contention, appellants cite *Gillespie v. City of Los Angeles*, 36 Cal.2d 553, 225 P.2d 522. However, it was there pointed out that in that case as well as in the case of *Rose v. County of Orange*, 94 Cal.App.2d 688, 211 P.2d 45, "the city or county had authority at least to warn of the dangers. They had control over their own highways and authority therefore to post warnings along those highways of the dangers created by conditions contiguous thereto." *Gillespie v. City of Los Angeles*, supra, 36 Cal.2d at page 557, 225 P.2d at page 525. Now, if the officers of Highway Patrol have no control over the maintenance of State highways, they have no duty to post warnings of the presence of dangerous conditions on Rosemead Boulevard. They have no such duty; therefore, they were free from negligence in not maintaining or restoring absent stop signs at the intersection of county roads with such state highway.

Section 473 of the Vehicle Code merely authorizes officers of the Highway Patrol to remove unauthorized signs, signals or

lights, but does not require them to erect or maintain authorized signs. The nearest approach to authority placing responsibility upon the Highway Patrol to restore missing stop signs is Streets and Highways Code, section 127. But that merely requires the patrol to cooperate with the Department of Public Works in the enforcement of the closing or restriction of the use of any street or highway. While it is true that it has been held, *White v. Towers*, 37 Cal.2d 727, 733, 235 P.2d 209; 28 A.L.R. 2d 636, that duties of public office include (1) those lying squarely within its scope, (2) those essential to the accomplishment of the main purposes of the office and (3) those incidental to a proper fulfillment of the office which serve to promote its principal purpose, yet such holding refers merely to the scope of activities in which a public officer may engage while in the performance of his own duties and still be immune against civil liability for malicious prosecution. The granting of such immunity is to encourage officers in the performance of their duties. To impose civil liability upon members of the Highway Patrol for failure to maintain stop signs in the absence of a statutory duty to do so would be calculated to hinder them in the performance of their duties and to discourage their performance of clearly defined duties.

Inasmuch as the statutes have expressly imposed upon the State Department of Public Works, and not upon respondents, the duty of maintaining state highways, Veh. Code, §§ 465, 471, it could not have been intended to require another agency to do the same thing. Such requirement would not have been consonant with the doctrine of division of labors. Also, it would create a conflict of statutes and "lead to anomalous and unreasonable results." *Gillespie v. City of Los Angeles*, supra, 36 Cal.2d 553, 559, 225 P.2d 522, 526. It cannot be that the Legislature could have intended to throw such an important field of activity into confusion as would result from the efforts of two coordinate agencies to dis-

charge their duties over the same highway. To do so would have been to defeat the uniformity of the state highway system. (*Ibid.*)

Funds Available.

[14] Appellants alleged that "each and all of the officers and employees herein named as defendants * * * [1] had the authority and the duty to remedy such condition at the expense of the political and governmental body responsible therefor, and [2] funds for the purpose were immediately available to each and all such persons."

No facts are alleged as a basis for the two conclusions. On the contrary, the facts of which the court takes judicial notice contradict the allegations. *Griffin v. Colusa County*, supra, 44 Cal.App.2d 915, 918, 113 P.2d 270. Inasmuch as the accident of appellants occurred December 22, 1953, it fell within the fiscal year 1953-1954. The budget for that year only may be consulted in order to ascertain whether the Legislature had set aside funds for the Highway Patrol to use in maintaining stop signs. No such provision appears from the Statutes of 1953 chapter 971, p. 2348 or from the budget to have been made. The only item in the budget for that fiscal year relating to signs is at line 69, page 829 and is the sum of \$1,750,693.06 for safety devices and signs allocated to the Division of Highways of the Department of Public Works.

It necessarily follows, then, that appellants cannot allege a cause of action against respondents under Government Code section 1953, subdivision (c), for the reason that there were no funds available for them to use for the erection of stop signs. The entire pleading is founded upon liability for a dangerous condition of public property under section 1953, supra.

There was no error in sustaining the demurrer without leave to amend.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

144 Cal.App.2d 728

Mildred TURNBOO, Hallie Payne and Vera King, Plaintiffs and Appellants,**v.****COUNTY OF SANTA CLARA, Defendant and Respondent.****Civ. 17269.**District Court of Appeal, First District,
Division 2, California.

Sept. 28, 1956.

Action by county to recover welfare assistance payments made to respective spouses who signed reimbursement agreements. The Superior Court, County of Santa Clara, Byrl R. Salsman, J., allowed recovery and plaintiffs appealed. The District Court of Appeal, Kaufman, J., held that where there was no indication in reimbursement agreements, under which statute of limitations was waived in regard to any action to recover welfare payments and liens were created on signers' property, that agreements covered any relief received by any other member of signers' family, welfare assistance payments to spouses were not covered under the agreements and in addition such payments were not recoverable under applicable statute where there was no evidence or finding that there was financial ability on part of parties here sought to be charged with support of relatives to furnish such support at the time such support was rendered.

Judgment reversed.

1. Limitation of Actions \Rightarrow 196(4), 199(3)

Whether a writing contains a sufficient acknowledgment is a question of law to be determined from evidence and upon all circumstances surrounding the transaction and parol evidence is admissible if there is any uncertainty in a writing which is alleged to contain such an acknowledgment or new promise to pay.

2. Limitation of Actions \Rightarrow 151(1)

Reimbursement agreements which were entered into by father and daughter with county for welfare assistance

extended by county, but which gave no indication that waiver of statute of limitations in regard to any action to recover amounts extended them and creation of liens on their property to the extent of amounts so extended covered any debt for relief received by any other member of the signers' family, covered nothing but aid directly furnished to the persons signing the agreements in the absence of any evidence of other circumstances surrounding execution of the instruments which might tend to expand meaning of their terms. West's Ann.Welfare & Inst.Code, § 2576.

3. Paupers \Rightarrow 51

Welfare and Institutions Code is controlling in an action by county to recover welfare assistance payments made to individuals under reimbursement agreements. West's Ann.Welfare & Inst.Code, §§ 2224, 2576, 2603.

4. Paupers \Rightarrow 51

Under Welfare and Institutions Code section providing that spouse, parent and adult child of recipient of welfare assistance shall be charged with such welfare payments if pecuniarily able to support or contribute to support of recipient during time aid was received, liability to reimburse county is created on part of named relative or relatives when and only when there was at time aid was extended an ability on part of such relative or relatives to support or contribute to support of welfare recipients. West's Ann.Welfare & Inst.Code, § 2576.

5. Paupers \Rightarrow 51

Under Welfare and Institutions Code section providing that welfare aid rendered by county shall be charged against spouse, parent and adult child of recipient thereof, county was not entitled to recover from individuals who signed reimbursement agreements which were applicable only to aid payments made to signers, other aid payments made to respective spouses of such individuals, where there was no evidence or finding that there was financial ability on part of individuals.

sought to be charged to support spouses at time such support was rendered. West's Ann.Welfare & Inst.Code, § 2576.

6. Paupers ☞51

Welfare and Institutions Code section providing that if a person for support of whom public moneys have been expended acquires property, county shall have claim against him to amount of reasonable charge for moneys so expended, applies to recipient himself and not to relatives who may be liable for his support. West's Ann.Welfare & Inst.Code, § 2603.

Maurice L. Martin, San Jose, for appellants.

Peter J. Mancuso, San Jose, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of Santa Clara County in an action which was submitted to that court as an agreed case. The judgment decreed that reimbursement agreements executed by James E. Payne and his daughter, Vera King, created liens in favor of Santa Clara County upon the real property of each party at the time said liens were executed for welfare assistance that had been rendered to their respective spouses some years previously; and further, that said agreements constituted a waiver of the defense of the Statute of Limitations in regard to the debts for welfare assistance theretofore rendered to the spouses of the parties signing the agreements, as well as to the debts for aid to the parties themselves.

Plaintiffs and appellants, Mildred Turnboo, Hallie Payne and Vera King are the children of James E. Payne and Effie Payne, both deceased. Effie Payne died on December 4, 1950, at the County Hospital of Santa Clara County. Services valued at \$925 were rendered to her between November 1943 and the date of her

death in said hospital. On or about November 5, 1952, James E. Payne entered the County Hospital and on that date executed an "Agreement to Reimburse" which was recorded on November 12, 1952. Services were rendered to him in the sum of \$179, and appellants concede that the agreement relates to this sum, and a claim for this latter sum has been paid by the estate of James E. Payne. The claim for \$925 for services rendered by the county to Effie Payne was rejected.

The reimbursement agreement signed by James E. Payne reads as follows:

"I, James E. Payne do hereby acknowledge that I have received relief, care and maintenance and/or medical aid from the Board of Supervisors, County of Santa Clara, State of California (hereinafter called Promisee), and that I agree and intend to make reimbursement for this and all other aid and assistance rendered me during the period of my dependency.

"I do hereby waive the limitation of any statute for the presentation of any claim for the repayment of said relief, care and maintenance and/or medical aid.

"I do hereby agree that any and all monies so paid me by the promisee shall be secured by a lien on the following described property, or any and all other property that I may become seized of in the future; and in the event of my coming into possession of any funds or property of any kind, and if at time of my death I leave any estate whatsoever, I agree that said promisee shall be paid for all monies paid me for my relief, care, maintenance and medical aid, and my executor, administrator, or personal representative is directed to pay out of my said property and estate all of said monies paid me for my relief, care, maintenance and medical aid.

"The following is a true and correct description of all property, both

real and personal, and all interest in property owned by me.

Personal property

(description) None

Real property

(Legal Description) 475 Jerome Street,
San Jose, California"

In 1942, James E. Payne and Effie Payne, as joint tenants, had purchased the real property located at 475 Jerome Street, San Jose, which was described in the reimbursement agreement which James Payne signed. Said joint tenancy was terminated on the death of Effie Payne. On January 11, 1954, James E. Payne deeded said property in joint tenancy to his children, the above named appellants, and a son, Elmer, who predeceased him.

Appellant, Vera King, had been married to Herbert Buttons prior to 1935, and was living with him until his death in May, 1946. Between 1935 and his death in 1946, disbursements were made by the Welfare Department of Santa Clara County for indigent aid to the account of Herbert Buttons in the sum of \$2,937.93. Prior to his death in May, 1946, services were rendered to Herbert Buttons by the County Hospital in the sum of \$90.50.

Ed and June Buttons were children of Herbert Buttons and Vera King. Ed Buttons reached majority on February 9, 1950. Prior thereto the County Hospital had rendered services to him of a value of \$17. Subsequent to that date he received services at said hospital valued at \$71. County hospital services were rendered to June Buttons during her minority in the sum of \$9.50.

On or about April 12, 1954, Vera King entered the County Hospital where she received services of a value of \$160.50. At that time she executed an agreement to reimburse identical in language to that signed by James E. Payne and set forth above, except that the real property described therein was located at 3061 Wall Street, San Jose. Vera King admits that there

is a lien against her property to the extent of \$160.50 for hospital services rendered to her, personally.

Appellants contend that the reimbursement agreements herein can be considered a waiver of the statute of limitations only as to debts incurred for services rendered directly to the person signing the agreements. Each agreement states that "I * * * do hereby acknowledge that I have received relief * * * and/or medical aid * * * and that I agree and intend to make reimbursement for this and all other aid * * * rendered *me* during the period of *my* dependency." It continues: "I do hereby waive the limitation of any statute for the presentation of any claim for the repayment of *said* relief * * * and/or medical aid." Further, "I do hereby agree that * * * monies so paid *me* * * * shall be secured by a lien * * * I agree that said Promisee shall be paid for all monies paid *me* for *my* relief, care, maintenance and medical aid." (Emphasis ours.) Each of these agreements were signed by the respective parties when they were admitted to the County Hospital for medical aid. There is nothing in the agreement that suggests that the party is waiving the statute of limitations in regard to any debts which he may owe the County for aid furnished to another person for whom he may be legally responsible. It has been a principle of welfare administration that aid is granted individually to meet the needs of the recipient, not the needs of the family as a whole or other members thereof. (See, 42 Cal.Law Rev. 473). There is no faint suggestion in the language of these instruments that they covered any debt for relief received by any other member of the signer's family. Having entered the hospital at the time of signing the agreement, the party would have no reason to suspect that his acknowledgment extended to anything except this relief which had been extended and the medical aid and further relief that would be extended during the period of

hospitalization and convalescence. No reasonable interpretation can extend this language to cover any debt that he may have owed the county in the past because of legal responsibility for relief furnished to a relative. It will be remembered that the spouses of both parties who had received the aid for which the county now claims reimbursement, were long since dead at the time these agreements were signed.

[1,2] These agreements clearly waive the statute of limitations for the aid incurred by the person signing and establish a lien for the aid then received and to be received and for any in the past they have personally received. But if these instruments are to cover other debts, then there should be embodied therein a clear reference to such debts. "Whether a writing contains a sufficient acknowledgment is a question of law, to be determined from the evidence and upon all the circumstances surrounding the transaction." (15 Cal.Jur. 584, sec. 179.) Parol evidence is admissible if there is any uncertainty in a writing which is alleged to contain such an acknowledgment or new promise to pay. The agreements here appear without ambiguity to cover nothing but aid directly furnished to the persons signing them, and respondent has not offered any evidence of circumstances surrounding the execution of the instruments which might tend to expand the meaning of their terms, nor argued that they are ambiguous.

It is urged by respondent that Section 2576 of the Welfare and Institutions Code creates a primary liability for aid furnished to a spouse or child. That section reads in part as follows:

"All aid rendered by the county under this chapter shall be a charge against the spouse, parent and adult child of the recipient thereof and the county rendering aid shall be entitled to reimbursement therefor.

"The board of supervisors of the county rendering aid shall determine if the spouse, parent or adult child, or any of

them have financial ability to support or contribute to the support of the recipient and were *pecuniarily able to support or contribute to the support of the recipient during the time aid was rendered*. If in the opinion of the board of supervisors *pecuniary ability existed when the aid was given* and exists when the matter comes before the board of supervisors, the board shall request the district attorney or other civil legal officer of the county granting aid to proceed against *such responsible relative or relatives*." (Emphasis ours.) While the first paragraph of the statute might appear to create a liability against certain relatives regardless of their financial ability to discharge it, the following paragraph demonstrates that the only named relatives *responsible* to the county for reimbursement are those who at the time aid was extended *then* had the ability to furnish some or all of such aid, and those who still have such ability when reimbursement is sought.

[3] Respondent has argued that a liability to the county was created by certain sections of the Civil Code, apart from the provisions of the Welfare and Institutions Code. That the Welfare and Institutions Code is the only code to be looked to in this type of case has been finally determined in *County of San Bernardino v. Simmons*, 46 Cal.2d 394, 296 P.2d 329, 331, where it is said that the Welfare and Institutions Code "is the measure of the extent of the responsible relative's liability to the county. It is to it we must look to ascertain whether the relative is required, in a particular case, to reimburse the county." The Supreme Court in that case also disapproved inconsistent implications in the cases of *Garcia v. Superior Court*, 45 Cal.App.2d 31, 113 P.2d 470; *Kelley v. State Board of Social Welfare*, 82 Cal.App.2d 627, 186 P.2d 429. The opinion also states that the Welfare and Institutions Code "purports to state the *circumstances in which the named responsible relatives are liable to the county* when it has supported or paid aid to indigents" and also states a procedure by

which in proper cases the county can recover from the responsible relatives." (Emphasis ours.) We agree with the footnote of page 398 of 46 Cal.2d, page 331 of 296 P.2d of the cited case, that the system "although not altogether coherent, manifestly purports to cover the entire subject."

[4] The only reasonable interpretation of Section 2576, Welfare and Institutions Code, is that a liability to reimburse the county is created on the part of the named relative or relatives, when and only when, there was at the time aid was extended, an ability on the part of such relative or relatives to support or contribute to the support of the welfare recipient.

[5] There is no allegation or evidence in this record that the Board of Supervisors of Santa Clara County ever made a finding that the parties who signed these agreements were able at the time aid was extended, to reimburse the county, nor is there any evidence in the record of the financial circumstances of these parties at that time. Section 2576 is very similar in content to Section 2224, dealing with proceedings against a spouse or adult child able to support an old age applicant. In a discussion of the liability created by the latter section, one writer has said that "Civil Code section 206 creates a statutory support obligation which comes into existence when the governing conditions occur. A judicial determination is not a prerequisite, and, so far as the language of the section is concerned, judicial support orders can be retroactive. Under the Welfare and Institutions Code on the contrary, liability of responsible relatives may not antedate an administrative finding by the board of supervisors." (42 Cal.Law Rev. 471-472.) There is in the present rec-

ord no evidence nor finding that there was financial ability on the part of the parties here sought to be charged with the support of relatives at the time such support was rendered. There is therefore no proof that any debt to the county was owed by these persons for aid furnished to their spouses or children.

[6] Respondent calls attention to Section 2603 which provides that "If a person *for the support of whom* public moneys have been expended *acquires* property, the county shall have a claim against *him* to the amount of a reasonable charge for moneys so expended * * *." This section clearly applies to the *recipient* himself, not to the relatives who may be liable for his support. County of Los Angeles v. Security First Nat. Bank, 84 Cal. App.2d 575, 191 P.2d 78. If the intent was to make the after-acquired property of responsible relatives subject to a lien, it would have been simple for the Legislature to have so provided.

It is our view, that the judgment must be reversed, first, because the language of the agreements clearly do not cover any debts except those for relief or medical aid incurred by the parties executing them; and second, that even had the language of the instruments been ambiguous and possibly subject to the interpretation that debts incurred because of a legal liability for certain relatives were thereby acknowledged, there is nothing in the record to support a finding that such a liability had arisen under Section 2576 of the Welfare and Institutions Code.

Judgment reversed.

NOURSE, P. J., and DRAPER, Justice pro tem., concur.

144 Cal.App.2d 843

C. Doyle WRIGHT and Betty M. and Benny Ardowski, Petitioners and Appellants,

v.

Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California, Respondent.

Civ. 16968.

District Court of Appeal, First District,
Division 1, California.

Oct. 8, 1956.

Hearing Denied Dec. 5, 1956.

Mandamus proceeding brought for review of on-sale liquor license revocation. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., denied the relief sought, and the petitioner appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to sustain finding that licensee had permitted woman to loiter on premises and that she had solicited patron to buy alcoholic drinks for her.

Affirmed.

1. Intoxicating Liquors ⇨108(5)

Evidence, in proceeding culminating in revocation of on-sale liquor license, was sufficient to sustain finding that licensee had permitted woman to loiter on premises and that she had solicited patron to buy alcoholic drinks for her. West's Ann. Bus. & Prof.Code, §§ 24200(b), 25657(b).

2. Intoxicating Liquors ⇨168

Bartender's knowledge that woman was loitering on premises was chargeable to employer-licensee. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25657(b).

3. Intoxicating Liquors ⇨132

Quoted term, in code section making it unlawful to knowingly permit anyone to "loiter" on premises where alcoholic beverages are sold for purposes of begging or soliciting patrons to buy drinks, has a well-recognized meaning, to wit: "to linger idly by the way, to idle, to loaf". West's Ann.Bus. & Prof.Code, §§ 24200(b), 25657(b).

Cal.Rep. 301-302 P.2d-37

See publication Words and Phrases, for other judicial constructions and definitions of "Loiter".

4. Intoxicating Liquors ⇨108(5)

Evidence should be clear and convincing to justify revocation of liquor license.

5. Intoxicating Liquors ⇨108(4)

Accusation that on-sale licensee had employed, or knowingly permitted, woman to loiter on premises for purpose of begging or soliciting patrons to purchase alcoholic beverages for her consumption was sufficient as against contention that words "employ or permit to loiter" set forth two separate charges in alternative, and that defendants could thus not properly prepare their defense to cause for suspension of revocation of liquor license. West's Ann. Bus. & Prof.Code, §§ 24200(b), 25657(b).

6. Administrative Law and Procedure ⇨312

In administrative proceedings, courts are more interested in fair notice to accused than they are to adherence to technical rules of pleading.

7. Criminal Law ⇨13

Code section, making it unlawful to employ or knowingly permit anyone to loiter on premises where alcoholic beverages are sold for purpose of begging or soliciting any patron to purchase any alcoholic beverages for person begging or soliciting, was not unconstitutionally vague. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25657(b).

Mervyn Schneider, Anthony E. O'Brien, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The Department of Alcoholic Beverage Control revoked the general on-sale liquor license of petitioner. The Appeal Board affirmed. Thereupon, the petitioner sought a writ of mandate to review the propriety of the ruling. From a judgment

denying the petition for a writ of mandate petitioner appeals.

On March 4, 1954, the State Board of Equalization, the predecessor of the Department of Alcoholic Beverage Control, charged the appellants with having violated section 25657(b) of the Business and Professions Code,¹ and thus created a cause for suspension or revocation of their liquor license under section 24200 (b) of that code.²

The accusation, after referring to the two code sections, was couched in the following terms: "On or about March 3, 1954, the above-named licensees, who did then and there hold an on sale general license for the above-described premises and who were then and there engaged in the business of selling alcoholic beverages for consumption on the premises where sold, did employ, or did knowingly permit Janet Hudson to loiter in and about said premises for the purpose of begging or soliciting patrons or customers of said premises to purchase alcoholic beverages for her consumption or use."

At a hearing on June 9, 1954 appellants offered to plead guilty to the charge and to retire from the liquor business if their license was suspended and not revoked.³ Subject to that offer, appellants stipulated to the truth of the matters alleged in the accusation. The Hearing Officer found the charges to be true and recommended an indefinite suspension of the license. The

State Board adopted the proposed decision of the Hearing Officer, but, without further evidence, ordered the license revoked instead of suspended. Thereafter, on petition for a writ of mandate, the Superior Court set aside the revocation order and directed the trial court to grant appellants a full hearing. Thereafter, on December 6, 1954, a full hearing was held. This time the Hearing Officer recommended that the license be revoked. The Department of Alcoholic Beverage Control adopted the recommendation of the Hearing Officer, and revoked the license. The Appeal Board affirmed this ruling. Thereupon, this mandamus proceeding was instituted. The trial court found in favor of the Board and denied the petition. The licensees appeal.

At the hearing but two witnesses were called, both agents of the Board. Other than cross-examining one of these agents, appellants submitted no evidence.

The principal witness was agent Templeman. He testified that on March 3, 1954, he entered the licensed premises at about 10:25 p. m. He sat at the bar and ordered a highball, for which he paid 50 cents. A few minutes later a girl, later identified as Janet Hudson, sat down beside him and asked: "Do you want a drinking companion?" Templeman, who did not then know the young lady, replied: "Sit down." Janet then motioned to the bartender and told him: "Give me a drink," without stating what she wanted. The bartender

1. Section 25657(b) provides that it is unlawful "In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

2. Section 24200 provides: "The following are the grounds which constitute a basis for the suspension or the revocation of licenses: * * *

"(b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a viola-

tion by a licensee of this division, any rules of the board adopted pursuant to Part 14 of Division 2 of the Revenue and Taxation Code or any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors."

3. It was then the policy of the Board to permit a licensee whose license was suspended to sell his business and license. No such privilege was accorded a licensee whose license was revoked.

filled an old-fashion glass with chipped ice and poured over it a drink from a vermouth bottle. Templeman put some money on the bar and the bartender took from it \$1 for the girl's drink. When Janet had consumed her drink the bartender asked Templeman if he wanted to buy the lady another drink. Templeman said that he did, and the bartender prepared a drink similar to the first one, and again charged Templeman \$1.

Templeman then left the premises at about 10:45 p. m., conferred with two other agents, made arrangements that they would enter the premises later and assist him with the arrest, and then re-entered the licensed premises at about 11:15 p. m., again sitting at the bar. Janet immediately sat down beside him. The bartender asked Templeman if he wanted to buy the lady a drink, and, upon receiving an affirmative reply, poured her a drink from a vermouth bottle, charging Templeman \$1 for that drink and 50 cents for his highball. Between 11:15 and 11:45 p. m. this routine was followed at least four times. At 11:45 p. m. the two other agents entered the premises and assisted Templeman in the arrest of the girl and the bartender.

[1-4] Appellants challenge the sufficiency of the evidence, contending that there is no evidence that they permitted Janet Hudson to "loiter" on the premises, or that Janet Hudson "solicited" or "begged" any patron to buy drinks for her, or that Janet Hudson consumed any "alcoholic" beverage on the premises.

The evidence is weak, but it is legally sufficient.

The circumstances recounted by Templeman support the inference that the bartender knew that Janet Hudson was loitering on the premises and soliciting drinks from patrons. The bartender's knowledge is, of course, chargeable to the licensees. *Cornell v. Reilly*, 127 Cal.App.2d 178, 273 P.2d 572. Janet merely told the bartender "Give me a drink." He apparently recognized her, knew what she wanted, and

served it to her. The subsequent actions of the bartender in returning to the agent and asking him if he wanted to buy the girl another drink is also susceptible of the reasonable inference that the bartender knew that the girl was loitering on the premises for the prohibited purpose. This is corroborated by the actions of the bartender and the girl when the agent returned to the premises. The term "loiter" has a well-recognized meaning, and that is "to linger idly by the way, to idle," "to loaf" or to "idle." *Phillips v. Municipal Court*, 24 Cal.App.2d 453, 455, 75 P.2d 548. The evidence is susceptible of the reasonable interpretation that Janet Hudson was "loitering" on the premises and that this was known to the bartender.

That Janet Hudson "solicited" or "begged" a patron to buy her a drink is obvious. The question "Do you want a drinking companion?" under the circumstances, was equivalent to, "Will you buy me a drink?" Knowledge on the part of the bartender is reasonably inferable.

Under the statute it is also required that the drink served be an "alcoholic" beverage. There is no direct evidence that the drinks served Janet Hudson were alcoholic beverages. Templeman testified that the girl asked the bartender for a "drink" and that he poured her one from a vermouth bottle. Vermouth is a wine, sec. 23007, Bus. & Prof.Code, which, of course, is an alcoholic beverage, sec. 23004, Bus. & Prof.Code. It is a reasonable inference that the liquid poured from a bottle labeled "vermouth" was in fact vermouth. In fact, it would have been an illegal act if the vermouth bottle were mislabeled. Secs. 26490 and 26510 of the Health and Safety Code. The inference is bolstered by the fact that the bartender charged \$1 for each drink served from the vermouth bottle, and by the fact that the licensees failed to offer any evidence on the issue, although such evidence was within their power if the liquid was in fact non-alcoholic.

The evidence is, therefore, sufficient to support the finding that Janet Hudson was

loitering on the premises for the purpose of soliciting drinks; that she in fact solicited the purchase of such drinks; that these facts were known to the bartender, and that the drinks served her were alcoholic in nature. Thus, all the elements of the offense were proved. In so holding, the court is well aware of the fact that revocation of a liquor license is a severe and serious penalty, and that to impose such a penalty the evidence should be clear and convincing. In the instant case, the evidence as to the nature of the liquid consumed, is weak. It was in the power of the arresting agents, in a non-emergency case, to secure and produce stronger evidence. Sound police practice suggests that they should have done so. The tendency of some law enforcement officers to be satisfied with the bare minimum of evidence where better evidence is available, is not good police practice. But, whatever we may think of the police methods in the present case and the failure to produce stronger evidence, the evidence produced, although weak, supports the findings and judgment, and that is all that is required.

[5,6] The next contention of appellants is that the accusation is ambiguous and unintelligible. It is urged that the words "employ" and "permit to loiter" in the statute set forth two separate charges in the alternative so that appellants could not properly prepare their defense. Section 11503 of the Government Code requires that the charges be set forth in ordinary and

concise language so that the acts with which the licensee is charged will be sufficiently clear so that the person charged will be able to prepare his defense. In these administrative proceedings the courts are more interested with fair notice to the accused than they are to adherence to the technical rules of pleading. *Marlo v. State Board of Medical Examiners*, 112 Cal.App.2d 276, 246 P.2d 69; *Mast v. State Board of Optometry*, 139 Cal.App.2d 78, 293 P.2d 148; *Taylor v. Bureau of Private Investigators*, 128 Cal.App.2d 219, 275 P.2d 579. Under the rules laid down in these cases the pleading was sufficient.

[7] Appellants also challenge the statute under which they are charged as being unconstitutional, particularly claiming that a statute which prohibits "permitting anyone" to "loiter" about the licensed premises to "solicit" drinks is too indefinite for enforcement, and too broad in its classification. The contention is that the words "loiter" and "soliciting" are too broad or too vague or uncertain. The word "loiter," as already pointed out, is clear and certain. So is the word "soliciting." See *People v. Phillips*, 70 Cal.App.2d 449, 160 P.2d 872; *People v. Levy*, 8 Cal.App.2d Supp. 763, 50 P.2d 509.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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47 Cal.2d 140

**ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY**, a corporation,
Petitioner and Respondent,

v.

KINGS COUNTY WATER DISTRICT, and
Elbert Montgomery, Louis Giacomazzi,
Louis E. Hansen, Frank J. Martin, and
Earle A. Howe, as the Board of Directors
of Kings County Water District, and Ralph
S. Morgan, Secretary of Kings County
Water District, Respondents and Appel-
lants.

L. A. 24184.

Supreme Court of California.

In Bank.

Oct. 11, 1956.

As Modified on Denial of Rehearing

Nov. 8, 1956.

Proceeding on railroad's application for exclusion of its roadbed and right of way from inclusion in water district. The county water district board denied railroad's petition for exclusion of property and railroad petitioned for mandamus. The Superior Court, Kings County, W. G. Machetanz, J., ordered issuance of writ of mandate to compel such exclusion and water board appealed. The Supreme Court, Spence, J., held that fact that roadbed and right of way were not being devoted primarily to agricultural purposes at present time did not give railroad a right of exclusion of such land from water district having as its function the protection of future as well as present underground water resources, and where such land could at option of railroad be devoted to agri-

culture, land had a substantial and direct benefit by inclusion within water district.

Reversed.

Opinion, 295 P.2d 8 vacated.

1. Mandamus ⇨172

While mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board, court's power of review is confined to determining whether there was substantial evidence before the board to support its decision. West's Ann.Code Civ.Proc., § 1094.5(c).

2. Waters and Water Courses ⇨183½

In proceeding for exclusion of certain land from county water district, board is not specifically required to make formal findings of fact where exclusion is denied. West's Ann.Water Code, §§ 30000-33901, 31020-31033, 32200.

3. Waters and Water Courses ⇨183½

Where railroad applied to water district board for exclusion of its roadbed and right of way from water district and board denied such exclusion without entry of formal findings of fact, there was an implied finding that the prerequisites for exclusion had not been shown and in fact land would be substantially and directly benefited by its continued inclusion in the district. West's Ann.Water Code, § 32222.

4. Waters and Water Courses ⇨183½

The "substantial and direct benefit" which must be present in order to justify the retention of land in a county water district means substantial and direct bene-

fit to the land in question. West's Ann. Water Code, § 32222.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial and Direct Benefit".

5. Waters and Water Courses ⇐183½

The benefit which might accrue to a railroad through added freight revenues resulting from increased crop production and prosperous agricultural operations in a farming community occasioned by conservation of water would be an indirect benefit rather than a "substantial and direct benefit", which must be present in order to justify retention of railroad land in county water district. West's Ann. Water Code, § 32222.

6. Waters and Water Courses ⇐183½

The protection, conservation and replenishment of underground water supplies is one of the main functions of the county water district and such district has functions and powers other than that of furnishing water to any particular land. West's Ann. Water Code, § 31082.

7. Waters and Water Courses ⇐183½

Fact that railroad's roadbed and right of way through county water district had no water wells on the land in question and there was no intention to drill any thereon, and such land was not devoted to agricultural uses, was immaterial in so far as its obligations as a landowner in a county water district having authorized functions and operations that were substantially and directly benefiting railroad's land in protecting underground water rights of the entire district. West's Ann. Water Code, §§ 30092, 31082.

8. Waters and Water Courses ⇐183½

Fact that landowners within county water district may presently be devoting portions of their land to nonagricultural uses does not create a right on the part of such landowners to demand exclusion of that land from the district. West's Ann. Water Code, §§ 30092, 31082.

9. Waters and Water Courses ⇐183½

In proceeding on railroad's application to county water district for exclusion of its roadbed and right of way from water district, evidence showing that such land could at option of railroad be used for agricultural purposes was sufficient to show that it was substantially and directly benefited by its continued inclusion in water district, notwithstanding fact that at present time railroad proposed no agricultural use of land. West's Ann. Water Code, § 32222.

Walch & Griswold and Lyman D. Griswold, Hanford, for appellants.

Robert W. Walker, John J. Balluff, Los Angeles, Sidney J. W. Sharp, Herbert M. Braden and Lawrence W. Clawson, Hanford, for respondent.

George H. Johnston, Willard S. Johnston and Johnston & Johnston, San Francisco, as amici curiæ on behalf of respondent.

SPENCE, Justice.

[1] This is an appeal from a judgment ordering the issuance of a peremptory writ of mandate requiring the board of directors of the Kings County Water District to exclude therefrom certain property constituting a right-of-way owned by the Atchison, Topeka and Santa Fe Railway Company. The board, following an extended hearing, had denied Santa Fe's petition for exclusion of the property. While mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board, *Walker v. City of San Gabriel*, 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383; *Naughton v. Retirement Board of San Francisco*, 43 Cal.App.2d 254, 257, 110 P.2d 714, the court's power of review is confined to determining whether there was substantial evidence before the board to support its decision. Code Civ.Proc. § 1094.5, subd. (c); *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 315, 144 P.2d 4; *Odden v. County Foresters, etc., Board*, 108 Cal.App.2d 48, 49, 238 P.

2d 23; Conroy v. Civil Service Commission, 75 Cal.App.2d 450, 457, 171 P.2d 500. Under this settled rule, we have concluded that the judgment of the trial court must be reversed.

The Kings County Water District was organized February 24, 1954, under the County Water District Law, Water Code, §§ 30000-33901. It comprises approximately 150,000 acres. It was organized primarily to protect the underground water supplies of the area from excessive pumping and to guard against the transportation of the underground water to areas outside the district. Its purposes and functioning generally have been in accordance with the aims and methods approved by law for such an organization. Coachella Valley County Water District v. Stevens, 206 Cal. 400, 274 P. 538; Water Code, §§ 31020-31033.

The right-of-way owned by Santa Fe runs through the water district. It is approximately 16½ miles long and 100 feet wide. A center strip, 30 feet wide, contains the track and roadbed proper; and on each side are strips 35 feet wide, which are more or less adaptable for agricultural purposes. Pursuant to section 32200 of the Water Code, Santa Fe petitioned the board of directors of the district for exclusion of the entire 100-foot strip. Section 32222 of said code provides for exclusion of land when the board determines, after hearing, either: "(a) * * * that the land will not be substantially and directly benefited by its continued inclusion in the district"; or "(b) * * * the exclusion to be for the best interests of the district." The board held an extended hearing and then denied the petition. Santa Fe thereafter successfully sought from the superior court a writ of mandate directing the board to exclude the 100-foot strip right-of-way from the district. The record of the testimony and proceedings at the hearing before the board was introduced in evidence and constituted the record before the trial court.

[2,3] There were no formal findings of fact by the board in connection with

its order denying exclusion of Santa Fe's right-of-way. They are not specifically required when exclusion is denied, Water Code, §§ 32220-32227; cf. the requirement for findings in proceedings for the subsequent inclusion of added land to an existing county water district, Water Code, § 32447, but they would be helpful as an explicit record of the determination of facts by that body. However, the board's decision denying the petition to exclude Santa Fe's land carried with it the implied finding that the prerequisites for exclusion had not been shown; that rather, as contemplated by the statute, Santa Fe's land would be "substantially and directly benefited" by its continued inclusion in the district.

The controlling question is whether this implied finding of the board is "supported by substantial evidence in the light of the whole record." Code Civ. Proc. § 1094.5, subd. (c); Corcoran v. San Francisco, etc., Retirement System, 114 Cal.App.2d 738, 740-741, 251 P.2d 59. The determinative language is the statute's requirement that the land in controversy be "substantially and directly benefited". Water Code, § 32222. "Substantially" means "in a substantial manner; really; solidly; competently." 40 Words and Phrases, Substantially, p. 504. Webster's New International Dictionary, Second Edition, defines the word "substantial," in part, as follows: "* * * material; * * * not seeming or imaginary; * * * real; true; * * * important; essential; * * * having good substance; strong; stout; solid; firm." "Substantial" is a relative term, its measure to be gauged by all the circumstances surrounding the matter in reference to which the expression has been used. In re Scroggin, 103 Cal.App.2d 281, 283, 229 P.2d 489. "Directly" means "in a direct way without anything intervening, not by secondary, but by direct, means." 12A Words and Phrases, Directly, p. 141. The word "benefit" denotes "any form of advantage." 5 Words and Phrases, Benefit, p. 331.

[4, 5] The substantial and direct benefit which must be present to justify retention of land in a county water district means substantial and direct benefit to the land in question. Benefits which might accrue to a railroad through added freight revenues resulting from increased crop production and prosperous agricultural operations in a farming community occasioned by the conservation of water would be indirect benefits and therefore immaterial.

As the basis for exclusion of its 100-foot right-of-way, Santa Fe argues as follows: The 30-foot center strip constitutes a roadbed, so dedicated in line with the performance of its duties as a common carrier, and the presence of underground waters would not provide any direct or substantial benefit to maintenance of such structure. On either side of the roadbed is a 35-foot strip, available in varying degrees for agricultural development. Certain portions thereof are leased for cultivation and some crops are actually growing thereon. However, such farm leasing by Santa Fe is not done with the object of gaining revenue, as only nominal amounts are received therefrom, but rather for the purpose of avoiding the otherwise costly process of destroying weeds which would grow annually on the 35-foot strips in the absence of cultivation and care by tenant farmers. Thus, the agricultural use of any portion of these strips is primarily for weed control and is purely incidental to Santa Fe's main purpose of maintaining its right-of-way.

Agreeing with Santa Fe's position, the trial court found that the entire right-of-way is "permanently devoted to other uses than agriculture, horticulture, viticulture or grazing," and accordingly "will receive neither a substantial nor direct benefit by its continued inclusion in the district"; that "the evidence adduced at the hearing before the * * * board" showed these facts "as a matter of law"; and therefore Santa Fe's right to have such land excluded from the district could not be denied. *Bank of Italy v. Johnson*, 200

Cal. 1, 31, 251 P. 784; *Ferrill v. Ellis*, 50 Cal.App.2d 743, 746, 123 P.2d 857.

But it is not the present, immediate use of the land which is the criterion for exclusion under the statute. The determining factor is whether any substantial and direct benefit accrues to the land itself, as distinguished from the particular use which a landowner may choose to make of the land. The record shows that shortly after its formation, the Kings County Water District obtained a court decree settling various disputes affecting the district's underground water supplies and pumping therefrom; that the district engages in studies and research as to the water needs of lands therein and possible future sources of supply; and that successful agricultural development of land in the district is dependent on the supplementary underground waters for purposes of irrigation. These functions of the district, acting on behalf of all landowners in the district, are of substantial and direct benefit to all land similarly situated within the district.

[6, 7] The protection, conservation and replenishment of the underground water supplies is one of the main functions of the water district in question. Water Code, § 31082. This is not a case involving an irrigation district, where the right to exclusion of the land formerly depended on whether the land was being furnished water for irrigation purposes by the district. *Harrelson v. South San Joaquin Irr. Dist.*, 20 Cal.App. 324, 128 P. 1010; but see *Hobe v. Madera Irrigation Dist.*, 128 Cal.App.2d 9, 274 P.2d 874. A county water district has other functions and powers than the furnishing of water to any particular land. The controlling statute expressly so distinguishes a county water district in providing that no land therein situated shall be released from "any of the burdens, obligations, or liabilities" of such district "because of its inclusion within an irrigation district". Water Code, § 30092. Thus, the fact that Santa Fe has no water wells on the land in question, does not now intend to drill any thereon because of the land's use as a right-of-way, and is not presently devoting the land to agricultural uses is immaterial insofar as concerns its obliga-

tions as a landowner in the county water district, whose authorized functions, activities, and operations are "substantially and directly" benefiting Santa Fe's land in protecting the underground water rights of the entire district. See *Coachella Valley County Water District v. Stevens*, supra, 206 Cal. 400, 409-410, 274 P. 538.

[8] Presumably all land which was included in the district overlays the underground water supplies to be conserved, and can have access to and can use such supplies; and all activities of the district in conserving those supplies will substantially and directly benefit all land so situated. The land itself is obviously benefited by such protective acts, regardless of present use thereof by the particular landowner. In the final analysis, it is therefore the potential rather than the present use of the particular land which must control. To hold otherwise, and permit the present non-agricultural use of the land to determine the right to its exclusion from the district, would result in the creation of excluded "islands" of varying shapes and sizes within an integrated county water district, consisting of land similarly situated, merely because of lack of need for the water in the present use, if any, of particular land rather than because of lack of benefit to, and consequent enhancement of the value of, the land itself. Manifestly the purposes of a county water district include the conservation of the water supply for future as well as present use. Water Code, § 31021. Many landowners within the district may be presently devoting portions of their land to such purposes as roads, structures, and other nonagricultural uses, but such circumstances do not create a right on the part of such landowners to demand exclusion of their land from the district.

[9] It is further significant that the statute does not provide a means whereby once land is excluded from the district, the board, as distinguished from the landowners, Water Code, § 32400 et seq., may reinclude the land on its own initiative.

Thus the board, if present nonagricultural use required exclusion from a county water district, would be powerless to reinclude on its own initiative such land upon a subsequent change of the use thereof to full agricultural use. The statute only requires that the land, rather than the present use thereof, be "substantially and directly benefited" by inclusion in the district. Such appears to be the situation with respect to the land in question. There was no showing that it did not have access to and could not use, at the option of the landowner and in the same manner as the other lands in the district, the water to be conserved through the activities of the district. Upon the evidence before it the board therefore properly denied the petition for exclusion, and the trial court erred in ordering issuance of the writ of mandate to compel such exclusion.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



47 Cal.2d 167

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Stephen STUART, Defendant and Appellant.

Cr. 5892.

Supreme Court of California,
In Bank.

Oct. 11, 1956.

Prosecution for manslaughter and for deviation from terms of a prescription which resulted in death. The Superior Court of Los Angeles County, Stanley Mosk, J., rendered judgment of conviction, and pharmacist appealed from the judgment and from the order denying his mo-

tion for a new trial. The Supreme Court, Traynor, J., held that evidence was insufficient to sustain conviction.

Judgment and order reversed.

Opinion, 295 P.2d 426, vacated.

1. Criminal Law ☞20

Union of act and intent, or criminal negligence, is an invariable element of every crime unless it is excluded expressly or by necessary implication. West's Ann. Pen.Code, § 20.

2. Homicide ☞68

Public welfare statutes are not ordinarily governed by statute requiring that in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence, but it does not follow that violations of the public welfare statutes, committed without criminal intent or criminal negligence, are unlawful acts within manslaughter statute. West's Ann. Health & Safety Code, §§ 26235(4) (a, b), 26240, 26280; West's Ann. Pen.Code, §§ 20, 192.

3. Homicide ☞68

To be an unlawful act within manslaughter statute, act in question must be dangerous to human life or safety, and there must exist a union or joint operation of act and intent, or criminal negligence. West's Ann. Pen.Code, §§ 20, 192.

4. Homicide ☞68

Where prescription called for the addition of pure sodium citrate, and pharmacist, in filling prescription, used compound from a bottle labeled sodium citrate, but bottle in fact contained a mixture of sodium citrate and sodium nitrite, and medicine was administered to child and caused child's death because of the presence of sodium nitrite, pharmacist, who was ignorant of fact that bottle contained sodium nitrite, was not guilty of manslaughter. West's Ann. Pen.Code, § 192; West's Ann. Health & Safety Code, §§ 26235(4) (a, b), 26240, 26280.

5. Statutes ☞241(1)

When language which is reasonably susceptible of two constructions is used

in a penal law, ordinarily that construction which is more favorable to offender will be adopted. West's Ann. Pen.Code, § 380.

6. Druggists ☞12

Where prescription called for the addition of sodium citrate and pharmacist used compound from bottle which was labeled sodium citrate but which in fact contained a mixture of sodium citrate and sodium nitrite, and a child died as a result of the mistake, pharmacist who did not know that sodium citrate bottle also contained sodium nitrite, was not guilty of violating section of Penal Code making it a felony if death ensues because a pharmacist willfully or negligently deviates from terms of prescription. West's Ann. Pen.Code, § 380.

John N. Frolich, William Levin, Los Angeles, and Bruce McMullen, San Francisco, for appellant.

Dean M. McCann, Upland, as amicus curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was charged by information with manslaughter, Pen.Code, § 192, and the violation of section 380 of the Penal Code. He was convicted of both offenses by the court sitting without a jury. His motions for a new trial and for dismissal, Pen.Code, § 1385, were denied, sentence was suspended, and he was placed on probation for two years. He appeals from the judgment of conviction and the order denying his motion for a new trial.

Defendant was licensed as a pharmacist by this state in 1946 and has practiced here since that time. He holds a B.S. degree in chemistry from Long Island University and a B.S. degree in pharmacy from Columbia University. In April, 1954, he was employed as a pharmacist by the Ethical Drug Company in Los Angeles.

On July 16, 1954, he filled a prescription for Irvin Sills. It had been written by Dr. D. M. Goldstein for Sills' eight-day-old child. It called for "Sodium phenobarbital, grains eight. Sodium citrate, drams three. Simple Syrup, ounces two. Aqua pepperment, ounces one. Aqua *distilate* QS, ounces four." Defendant assembled the necessary drugs to fill the prescription. He believed that the simple syrup called for was unavailable and therefore used syrup of orange. The ingredients were incompatible, and the syrup of orange precipitated out the phenobarbital. Defendant then telephoned Dr. Goldstein to ask if he could use some other flavoring. Dr. Goldstein told him that since it was midnight, if he could not find any simple syrup "it would be just as well to use another substance, elixir mesopine, P.B." Defendant spoke to a clerk and learned that there was simple syrup behind the counter. He mixed the prescription with this syrup, put a label on the bottle according to the prescription, and gave it to Sills. Sills returned home, put a teaspoonful of the prescription in the baby's milk and gave it to the baby. The baby died a few hours later.

Defendant stipulated that there was nitrite in the prescription bottle and that "the cause of death was methemoglobinemia caused by the ingestion of nitrite." When he compounded the prescription, there was a bottle containing sodium nitrite on the shelf near a bottle labeled sodium citrate. He testified that at no time during his employment at the Ethical Drug Company had he filled any prescription calling for sodium nitrite and that he had taken the prescribed three drams of sodium citrate from the bottle so labeled.

On August 11, 1954, another pharmacist employed by the Ethical Drug Company filled a prescription identical with the Sills' prescription. He obtained the sodium citrate from the same bottle used by defendant. The prescription was given to an infant. The infant became ill but recovered. In the opinion of Dr. Goldstein, it was suffering from methemoglobinemia. An analysis of this prescription by a University of

Southern California chemist disclosed that it contained 5.4 grams of sodium nitrite per 100 cc's and 4.5 grams of sodium citrate per 100 cc's.

An analysis made by the staff of the head toxicologist for the Los Angeles County Coroner of the contents of the bottle given to Sills disclosed that it contained 1.33 drams of sodium citrate and 1.23 of sodium nitrite. An analysis made by Biochemical Procedures, Incorporated, a laboratory, of a sample of the contents of the bottle labeled sodium citrate disclosed that it contained 38.9 milligrams of nitrite per gram of material. Charles Covet, one of the owners of the Ethical Drug Company, testified that on the 17th or 18th of October, 1954, he emptied the contents of the sodium citrate bottle, washed the bottle but not its cap, and put in new sodium citrate. A subsequent analysis of rinsings from the cap gave strong positive tests for nitrite. Covet also testified that when he purchased an interest in the company in April, 1950, the bottle labeled sodium citrate was part of the inventory, that no one had put additional sodium citrate into the bottle from that time until he refilled it after the death of the Sills child and that he had never seen any other supply of sodium citrate in the store.

There is nothing in the record to indicate that the contents of the bottle labeled sodium citrate could have been identified as containing sodium nitrite without laboratory analysis. There was testimony that at first glance sodium citrate and sodium nitrite are identical in appearance, that in form either may consist of small colorless crystals or white crystalline powder, that the granulation of the crystals may vary with the manufacturer, and that there may be a slight difference in color between the two. The substance from the bottle labeled sodium citrate was exhibited to the court, but no attempt was made to compare it with unadulterated sodium citrate or sodium nitrite. A chemist with Biochemical Procedures, Incorporated, testified that the mixture did not appear to be homogeneous but that from visual observation alone

he could not identify the crystals as one substance or the other. Defendant testified that he had no occasion before July 16th to examine or fill any prescription from the sodium citrate bottle.

[1] No evidence whatever was introduced that would justify an inference that defendant knew or should have known that the bottle labeled sodium citrate contained sodium nitrite. On the contrary, the undisputed evidence shows conclusively that defendant was morally entirely innocent and that only because of a reasonable mistake or unavoidable accident was the prescription filled with a substance containing sodium nitrite. Section 20 of the Penal Code¹ makes the union of act and intent or criminal negligence an invariable element of every crime unless it is excluded expressly or by necessary implication. *People v. Vogel*, 46 Cal.2d 798, 299 P.2d 850. Moreover, section 26 of the Penal Code lists among the persons incapable of committing crimes "[p]ersons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent", subd. 4, and "[p]ersons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." Subd. 6; see also Pen.Code, §§ 195, 199. The question is thus presented whether a person can be convicted of manslaughter or a violation of section 380 of the Penal Code in the absence of

any evidence of criminal intent or criminal negligence.

The answer to this question as it relates to the conviction of manslaughter² depends on whether or not defendant committed an "unlawful act" within the meaning of section 192 of the Penal Code when he filled the prescription. The Attorney General contends that even if he had no criminal intent and was not criminally negligent, defendant violated section 26280 of the Health and Safety Code and therefore committed an unlawful act within the meaning of section 192 of the Penal Code.

Section 26280 of the Health and Safety Code provides: "The manufacture, production, preparation, compounding, packing, selling, offering for sale, advertising or keeping for sale within the State of California * * * of any drug or device which is adulterated or misbranded is prohibited."³ In view of the analyses of the contents of the prescription bottle and the bottle labeled sodium citrate and defendant's stipulation, there can be no doubt that he prepared, compounded, and sold an adulterated and misbranded drug.

[2] Because of the great danger to the public health and safety that the preparation, compounding, or sale of adulterated or misbranded drugs entails, the public interest in demanding that those who prepare, compound, or sell drugs make certain that they are not adulterated or misbranded, and the belief that although an occasional nonculpable offender may be punished, it is necessary to incur that risk by imposing

1. "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

2. "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts commit-

ted in the driving of a vehicle. * * *

Pen.Code, § 192.

3. "A drug shall be deemed to be adulterated * * * (4) if any substance has been (a) mixed or packed therewith so as to reduce its quality or strength; or (b) substituted wholly or in part therefor." Health and Safety Code, § 26235.

"The term 'misbranded' shall apply to all drugs or devices, the package or label of which bears any statement, design, or emblem regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular * * *." Health and Safety Code, § 26240.

strict liability to prevent the escape of great numbers of culpable offenders, public welfare statutes like section 26280 are not ordinarily governed by section 20 of the Penal Code and therefore call for the sanctions imposed even though the prohibited acts are committed without criminal intent or criminal negligence. See *People v. Vogel*, supra, 46 Cal.2d 798, 299 P.2d 850, note 2; Sayre, *Public Welfare Offenses*, 33 Colum.L.Rev. 55, 72-75; Hall, *Prolegomena To A Science of Criminal Law*, 89 U. of Pa.L.Rev. 549, 563-569.

[3] It does not follow, however, that such acts, committed without criminal intent or criminal negligence, are unlawful acts within the meaning of section 192 of the Penal Code, for it is settled that this section is governed by section 20 of the Penal Code. Thus, in *People v. Penny*, 44 Cal.2d 861, 877-880, 285 P.2d 926, 936, we held that "there was nothing to show that the Legislature intended to except section 192 of the Penal Code from the operation of section 20 of the same code" and that the phrase "without due caution and circumspection" in section 192 was therefore the equivalent of criminal negligence. Since section 20 also applies to the phrase "unlawful act," the act in question must be committed with criminal intent or criminal negligence to be an unlawful act within the meaning of section 192. By virtue of its application to both phrases, section 20 precludes the incongruity of imposing on the morally innocent the same penalty, Pen. Code, § 193, appropriate only for the culpable. Words such as "unlawful act, not amounting to felony" have been included in most definitions of manslaughter since the time of Blackstone (4 Bl.Comm.Homicide *191; see Riesenfeld, *Negligent Homicide: A Study in Statutory Interpretation*, 25 Cal.L.Rev. 21-22) and even since the time of Lord Hale, "unlawful act" as it pertains to manslaughter has been interpreted as meaning an act that aside from its unlawfulness was of such a dangerous nature as to justify a conviction of manslaughter if done intentionally or without due caution. (See, Moreland, *Law of Homicide*

186-187, 244, citing 1 Hale, *Pleas of the Crown* (ed. of 1778) 471-475; Foster, *Crown Law* (2d ed. 1791) 259; 1 East, *Pleas of the Crown* (1803) 257.) To be an unlawful act within the meaning of section 192, therefore, the act in question must be dangerous to human life or safety and meet the conditions of section 20. See *People v. Mitchell*, 27 Cal.2d 678, 682-684, 166 P.2d 10; *People v. Pearne*, 118 Cal. 154, 158, 50 p. 376; *Thiede v. State*, 106 Neb. 48, 182 N.W. 570, 572, 15 A.L.R. 237; *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373, 374, 35 A.L.R. 741; *Potter v. State*, 162 Ind. 213, 70 N.E. 129, 131, 64 A.L.R. 942; *State v. Cope*, 204 N.C. 28, 167 S.E. 456, 458; *Dixon v. State*, 104 Miss. 410, 61 So. 423, 45 L.R.A., N.S., 219.

[4] It follows, therefore, that only if defendant had intentionally or through criminal negligence prepared, compounded, or sold an adulterated or misbranded drug, would his violation of section 26280 of the Health and Safety Code be an unlawful act within the meaning of section 192 of the Penal Code. Thus, in *People v. Penny*, supra, in discussing section 7415 of the Business and Professions Code, which prohibits the use by licensed cosmetologists of a solution of more than 10% phenol on a human being, we said that had the defendant been a licensed cosmetologist, she would have been guilty of violating section 7415 and therefore of an unlawful act within the meaning of section 192 of the Penal Code. The defendant in that case knew that she was using such a solution. The intentional or criminally negligent use of such a solution on a human being by a licensed cosmetologist in violation of section 7415 of the Business and Professions Code would clearly meet the conditions of section 20 of the Penal Code and would therefore be an unlawful act within the meaning of section 192. When, as in this case, however, the defendant did not know, and could not reasonably be expected to know, that the sodium citrate bottle contained nitrite, those conditions are not met and there is therefore lacking the culpa-

bility necessary to make the act an unlawful act within the meaning of section 192.

The crucial question with respect to defendant's conviction under section 380 of the Penal Code⁴ is whether he "ignorantly" deviated from Dr. Goldstein's prescription. The Attorney General contends that defendant acted "ignorantly" because he did not know and was therefore "ignorant" of the fact that the sodium citrate bottle contained nitrite, and that it is therefore immaterial that he had the professional knowledge that one should have to dispense drugs and could not reasonably be expected to know that the sodium citrate bottle contained nitrite. Defendant, on the other hand, contends that he did not act "ignorantly," since he had the knowledge of drugs and the technical skills required to dispense them, that he could not reasonably be expected to know that the sodium citrate bottle contained nitrite or to make a chemical analysis of its contents before filling the prescription, and that since there was nothing to show that he lacked the knowledge he was required to have or that he failed to use that knowledge, section 380 does not apply.

[5, 6] A definitive answer to these conflicting contentions cannot be gleaned from the dictionary, on which both parties rely, for the definitions therein can be read to support either contention.⁵ "When language which is reasonably susceptible of

two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." *People v. Ralph*, 24 Cal.2d 575, 581, 150 P.2d 401, 404. This rule is particularly pertinent here, where one of the proposed constructions would impose absolute criminal liability and make a felony of an act that involves no culpability whatever. We do not base our decision on that ground alone, however, for we are convinced that it is clear from the history and purpose of section 380 that it did not impose criminal liability without fault.

Section 380 was enacted in 1872 when anyone could lawfully sell drugs in this state. It was based on section 445 of the Penal Code of New York 1864, and a footnote to that section, adopted by the California Code Commissioners as a note to section 380, stated, "The frequent occurrence of accidents, involving, often, even the loss of human life, through mistakes in putting up prescriptions, render necessary some legislation to enforce care and caution on the part of dealers in drugs." (Italics added.) There was no intimation of a purpose to impose criminal liability without fault, and the qualifying words of the section "willfully, negligently, or ignorantly" belie any such purpose. As the Commissioners' note indicates, the legislation was designed to enforce "care and caution" on the part of dealers in drugs. Obviously a person does not act with "care and caution"

consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony."

4. At the time defendant filled the prescription section 380 provided: "Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in

5. Webster's New International Dictionary, 2d ed. Unabridged, 1948, defines "ignorance" as "want of knowledge in general, or in relation to a particular subject." It defines "ignorant" as "[d]estitute of knowledge; uninstructed or uninformed * * * [u]ninformed (in); *unaware (of)*; as, I am ignorant in this subject; *he was ignorant of that fact*" and states that "[o]ne is ignorant who is without knowledge, whether in general or of some particular thing." (Italics added.) The italicized words lend support to one contention, the remaining words lend support to the other.

who dispenses drugs in ignorance of their properties and proper uses, and we believe that it was to protect the public against such ignorance that section 380 was enacted.

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v.

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The Legislature's preoccupation with such ignorance is also indicated by its enactment in the same year of the first pharmacy law in this state designed to confine the dispensing of drugs to those of proven knowledge and competency. Stats. 1871-1872, p. 681. This law, known as the San Francisco Pharmacy Act, regulated the practice of pharmacy and the dispensing of medicines and poisons in the City and County of San Francisco. It confined the right to dispense drugs or fill prescriptions to graduate pharmacists, licentiates in pharmacy, practicing pharmacists, and practicing assistant pharmacists, and prescribed the educational qualifications and experience that each must have. This act was repealed in 1883, but a state-wide act based thereon was enacted in 1891. Stats. 1891, p. 86. Other legislation followed, and in 1937 the present state-wide statute for the protection of the public against ignorance in the handling of drugs was enacted. Bus. & Prof. Code, §§ 4000-4256, as amended. In 1955, after the alleged offense herein was committed, the Legislature amended section 380 by deleting the word "ignorantly" and substituting therefor "without consideration of those facts which by use of ordinary care and skill he should have known." This change removed the ambiguity arising from the use of the word "ignorantly" and made it abundantly clear that it was never the purpose of the statute to impose criminal liability without fault for accidents having no relation to a failure to use the knowledge and skill required for the dispensing of drugs. See, *Elbert, Ltd. v. Gross*, 41 Cal.2d 322, 327, 260 P.2d 35, and cases cited.

The judgment and order are reversed.

GIBSON, C. J., and SHENK, CARTER,
SCHAUER, SPENCE, and McCOMB, JJ.,
concur.

Action by a husband for annulment of his marriage and determination of spouses' property rights. Defendant wife cross-complained for divorce and settlement of property rights. From an order of the Superior Court, Los Angeles County, Philbrick McCoy, J., quashing execution and restraining sheriff from selling plaintiff's property to enforce a provision of parties' property settlement agreement, made part of annulment decree, for monthly payments by plaintiff to defendant, defendant appealed. The Supreme Court, Spence, J., held that the agreement was so merged in annulment decree as to make it sufficiently certain to render such provision enforceable by execution on decree.

Order reversed.

Carter, Schauer and Shenk, JJ., dissented.

Opinion, 285 P.2d 108, vacated.

I. Marriage §§ 65, 66

The nature of spouses' property settlement agreement, attachment thereof as exhibit to their stipulation for judgment annulling marriage, filing of both documents with Superior Court, and plain language of stipulation and judgment settling parties' property rights as per terms and conditions of agreement, approved by court and embodied in and made part of judgment by reference; conclusively showed that merger of agreement in judgment was intended, and in absence of contrary evidence, Superior Court's conclusion that merger was not intended is not binding on Supreme Court on appeal from order quashing execution.

2. Marriage ⚭55

Incorporation of spouses' property settlement agreement in marriage annulment decree by reference does not preclude merger of agreement in such decree.

3. Marriage ⚭65

A property settlement agreement, incorporated in decree annulling parties' marriage, is as effectively a part of decree as if recited therein in *haec verba*.

4. Marriage ⚭65

The fact that spouses' property settlement agreement, incorporated in marriage annulment decree by reference, was complete in itself, was immaterial, as it lost its identity in decree, by which parties' rights and obligations were declared in provision adjusting their property rights as per such agreement approved by court and embodied in judgment by such reference.

5. Execution ⚭7

A marriage annulment decree, incorporating parties' property settlement agreement as part of decree by reference, did not lack potency to support execution process because precise terms of husband's monetary obligations to wife did not appear on face of decree.

6. Execution ⚭1

"Execution" is a process in action to carry into effect the directions in a decree or judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Execution".

7. Execution ⚭4

Execution is allowed in enforcement of provisions of spouses' property settlement agreement, where compliance therewith is ordered by marriage annulment decree.

8. Marriage ⚭65

While marriage annulment decree, settling parties' property rights as per terms and conditions of their property settlement agreement providing for monthly payments to wife by husband, should state amount to be paid with certainty, it is sufficient if amount may be definitely ascertained by inspection of record.

9. Judgment ⚭535

The amount for which judgment was rendered may be aided by reference to pleadings in case or jury's verdict.

10. Marriage ⚭65

When spouses' property settlement agreement is intended to become merged in marriage annulment decree, better practice is to set forth terms of agreement in *haec verba* in decree or by exhibit attached thereto and employ explicit language in decree showing that parties' rights and obligations are adjudicated thereby in accordance with terms of such agreement.

11. Execution ⚭7

Spouses' property settlement agreement, filed in Superior Court with their stipulation that decree annulling their marriage might be entered, was so merged in such decree adjusting parties' property rights as per terms and conditions of agreement, made part of decree, as to make decree sufficiently certain to render provision of agreement for monthly payments to wife by husband enforceable by execution on decree.

Richard A. Ibanez, Los Angeles, for appellant.

Herman Wildman, Los Angeles, for respondent.

SPENCE, Justice.

Defendant appeals from an order quashing execution and restraining the sheriff from selling plaintiff's property. The only question to be determined is whether a property settlement agreement had been so merged into an annulment decree that its provision for monthly payments became an operative part thereof, enforceable by execution. The trial court held that it had not but the record does not sustain its ruling.

The parties separated fourteen years after their marriage. Plaintiff husband then commenced this action for "annulment of marriage and determination of property rights." Defendant wife cross-complained for divorce and the settlement of property

rights. Thereafter and on July 21, 1943, the parties entered into a property settlement agreement and stipulated that an annulment decree might be entered declaring the marriage null and void from its inception. The property settlement agreement provided, among other things, that plaintiff pay defendant \$50 a month for life or until her remarriage. The agreement was attached as an exhibit to the stipulation, and both documents were filed with the court. The annulment decree was entered July 22, 1943. Following the wording of the stipulation, the decree ordered and adjudged: "That the properties and property rights of plaintiff and defendant herein are adjusted, settled and distributed as per the terms and conditions of that certain agreement dated July 21st, 1943, executed by plaintiff and defendant herein, a full and true copy of which agreement is on file herein attached to said Stipulation marked 'Exhibit "A"', and which is hereby approved by the Court and by this reference embodied in and made a part of this Judgment."

Plaintiff failed to make the prescribed payments and became indebted to defendant in the sum of \$2,405. Upon affidavit setting forth plaintiff's default, defendant procured the issuance of a writ of execution on June 21, 1954. After levy had been made by the sheriff on plaintiff's property, plaintiff made a motion to quash the writ, based upon his affidavit reciting the circumstances of the parties' agreement. Both parties in their affidavits referred to the agreement as "embodied in and made part of the judgment." The court granted the motion, thereby holding that the parties' agreement had not merged in the decree so as to be enforceable by execution. We have concluded that the trial court's order granting the motion must be reversed.

[1] The nature of the agreement, its attachment to the stipulation for judgment, the filing of both documents with the court, and the plain language of the stipulation and the judgment entered thereon make the conclusion inescapable that merger was intended, thereby substituting rights and

duties under the decree for those under the agreement. See Rest., Judgments, § 47, com. a.; Flynn v. Flynn, 42 Cal.2d 55, 58, 265 P.2d 865; Hough v. Hough, 26 Cal.2d 605, 609-610, 160 P.2d 15; 1 Armstrong, California Family Law, pp. 810-811. Since there is no evidence to the contrary, the trial court's conclusion that merger was not intended is not binding on this court. Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825.

[2-4] It was held in the Flynn case that incorporation of a property settlement agreement into a decree by reference does not preclude a merger. Flynn v. Flynn, supra, 42 Cal.2d at page 59, 265 P.2d at page 866. When an agreement has been incorporated into a decree, it is as effectively a part thereof as if recited therein *in haec verba*. It is of no consequence here that the agreement was complete in itself, for it lost its identity in the decree. It is now the decree that declares the rights and obligations of the parties, for it "ordered and adjudged * * * that the properties and property rights of [the parties] are adjusted, settled and distributed as per the * * * agreement * * * and which is hereby approved by the court and by this reference embodied in and made a part of this judgment."

[5-9] Nor is the decree lacking in potency to support the execution process because the precise terms of plaintiff's monetary obligations do not appear on its face. Execution has been defined as "a process in an action to carry into effect the directions in a decree or judgment." Painter v. Berglund, 31 Cal.App.2d 63, 69, 87 P.2d 360, 363. It has been allowed in enforcement of the provisions of settlement agreements where compliance was ordered by the decree. Di Corpo v. Di Corpo, 33 Cal.2d 195, 201, 200 P.2d 529; Cochrane v. Cochrane, 57 Cal.App.2d 937, 938, 135 P.2d 714; Shields v. Shields, 55 Cal.App.2d 579, 582, 130 P.2d 982. While the decree should state with certainty the amount to be paid, 28 Cal.Jur. 2d, § 76, p. 710; Kittle v. Lang, 107 Cal. App.2d 604, 612, 237 P.2d 673; Wallace v.

Wallace, 111 Cal.App. 500, 506-507, 295 P. 1061; D'Arcy v. D'Arcy, 89 Cal.App. 86, 92, 264 P. 497, it is sufficient if the amount may be definitely ascertained by an inspection of the record. 49 C.J.S., Judgments, § 76, pp. 198-199. Thus, the amount for which a judgment was rendered may be aided by reference to the pleadings in the case or the verdict. 1 Freeman on Judgments, 5th Ed., § 84, pp. 148-149. Likewise here, the monthly payments owing by plaintiff as adjudged by the decree may be ascertained from the parties' agreement, which was attached to their stipulation for judgment and filed as part of the record.

Plaintiff unavailingly relies on cases involving the enforcement of support decrees by contempt proceedings, requiring therefor an express order to pay the money due. E.g. Plummer v. Superior Court, 20 Cal.2d 158, 163, 124 P.2d 5; Miller v. Superior Court, 9 Cal.2d 733, 737-740, 72 P.2d 868. Contempt proceedings are criminal in nature, and the prescribed procedural safeguards must be accorded the alleged contemner. City of Culver City v. Superior Court, 38 Cal.2d 535, 541, 241 P.2d 258. The prime purpose of such proceedings is punishment for disobedience of a valid order directing performance of a specified act. Liability for such drastic punishment "should not rest upon implication or conjecture" but rather upon an order expressing in "clear, specific and unequivocal" language the act required. Plummer v. Superior Court, supra, 20 Cal.2d at page 164, 124 P.2d at page 8. It was therefore said in the Flynn case that "Greater certainty and clarity may be required to support [contempt] proceedings than are necessary to support other judgment remedies * * *". Flynn v. Flynn, supra, 42 Cal.2d 55, 60, 265 P.2d 865, 867.

[10, 11] Whenever it is intended that a property settlement agreement shall become merged in the decree, it is undoubtedly the better practice to have the terms of the agreement set forth *in haec verba* in the decree or by way of exhibit attached thereto, and to have the court employ explicit language in the decree showing that the

rights and obligations of the parties are adjudicated by the decree in accordance with the terms of the agreement. And while "greater certainty and clarity" may well be required to support contempt proceedings, we are satisfied that the language of the decree here shows that the agreement, filed with the stipulation, was merged in the decree, and that the manner in which the merger was effected makes the decree sufficiently certain to render it enforceable by execution. To hold otherwise would require the parties to engage in needless further litigation to merge the agreement into another decree or judgment in order to obtain the enforcement thereof by any legal process. Such idle act should not be required.

The order appealed from is reversed.

GIBSON, C. J., TRAYNOR, J., and PETERS, J. pro tem., concur.

CARTER, Justice.

I dissent.

The majority opinion holds that the property settlement agreement involved here was so incorporated in the annulment decree that its provisions for monthly payments are enforceable by the issuance of a writ of execution on the decree. The property settlement agreement was *attached as an exhibit to a stipulation* entered into by the parties that their marriage was null and void from the beginning. The annulment decree provided: "That the properties and property rights of plaintiff and defendant herein are adjusted, settled and distributed as per the terms and conditions of that certain agreement dated July 21st, 1943, executed by plaintiff and defendant herein, a full and true copy of which agreement is on file herein attached to said Stipulation marked 'Exhibit "A"', and which is hereby approved by the Court and by this reference embodied in and made a part of this Judgment."

It is said in the majority opinion, relying upon the case of Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865, that "The nature of the agreement, its attachment to the

stipulation for judgment, the filing of both documents with the court, and the plain language of the stipulation and the judgment entered thereon make the conclusion inescapable that merger was intended, thereby substituting rights and duties under the decree for those under the agreement." The judgment in the case under consideration contains no order of any kind save the order that the marriage of the plaintiff and defendant is "hereby annulled and decreed null and void from its inception." In the Flynn case, *supra*, the interlocutory decree specifically provided that "'defendant is hereby *ordered* to make all of the payments provided therein [agreement] to be paid by him * * * and plaintiff and defendant are hereby ordered to comply in all respects with each and all of the terms and provisions of said agreement and to perform all their obligations thereunder as therein provided.'" In that case a majority of this court said, 42 Cal.2d at page 58, 265 P.2d at page 866:

"The question as to what extent, if any, a merger has occurred, when a separation agreement has been presented to the court in a divorce action, arises in various situations. Thus, it may be necessary to determine whether or not contempt will lie to enforce the agreement, whether or not other judgment remedies, such as execution or a suit on the judgment, are available, whether or not an action may still be maintained on the agreement itself, and whether or not there is an order of the court that may be modified under the provisions of section 139 of the Civil Code.

"In any of these situations it is first necessary to determine whether the parties and the court intended a merger. If the agreement is expressly set out in the decree, and the court orders that it be performed, it is clear that a merger is intended. *Plummer v. Superior Court*, 20 Cal.2d 158, 165, 124 P.2d 5; *Lazar v. Superior Court*, 16 Cal.2d 617, 620, 107 P.2d 249. * * *

In the absence of an express order to

perform all or part of the agreement, it may be difficult to determine whether or not a merger was intended."

I, of course, am firmly of the opinion that if the decree does not embody the agreement either in substance or *in haec verba*, or unless a copy of the agreement is physically attached to the decree, it is not an operative part of it and may not be enforced as a part of the decree. "This is true even though the agreement may have been introduced in evidence and approved by the court. If the agreement is merely introduced in evidence as an exhibit, as it undoubtedly was here (42 Cal.2d 55, 63 [265 P.2d 865]), it could be withdrawn or destroyed and interested parties could not, by searching the records of the court 'construct a complete picture of the rights and obligations of the parties' (*Price v. Price*, 85 Cal.App.2d 732, 735, 194 P.2d 101)."

Exhibits may be, and as a matter of practice usually are, withdrawn, and thus are no longer a matter of record which may be "inspected." When Exhibit "A" in the instant case is withdrawn there is nothing whatsoever in the judgment to show the rights and liabilities of the parties. In a case such as this, where there is no incorporation and no order of the court directing compliance with any of the provisions of the agreement, any action for relief must be on the agreement itself which should be accorded the same dignity as other contracts, but not the same dignity as a judgment of a court of record. There are here no "directions in a decree or judgment", *Painter v. Berglund*, 31 Cal.App.2d 63, 69, 87 P.2d 360, 363; there was no order to comply with the provisions of a settlement agreement in the decree, *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 201, 200 P.2d 529; *Cochrane v. Cochrane*, 57 Cal.App.2d 937, 938, 135 P.2d 714; *Shields v. Shields*, 55 Cal.App.2d 579, 582, 130 P.2d 982; the decree did not state with certainty the amount to be paid plaintiff, 28 Cal.Jur.2d § 76, p. 710, and since exhibits are ordinarily withdrawn, the amount to be paid would be a matter of speculation and conjecture. Why not just take the

complaining party's word for what the defendant owes? The majority holding here will lead to endless difficulty—affidavits and counter-affidavits will have to be filed setting forth the terms of the property settlement agreement since those terms are not matters of record. In every instance, since the majority has held, and continues to hold, that it is a question of fact whether the court and the parties intended an incorporation, that matter will have to be determined and then re-determined by an appellate court and finally by this court which can say, blandly and without even a tinge of conscience, that "Since there is no evidence to the contrary, the trial court's conclusion [or the appellate court's conclusion] that merger was not intended is not binding on this court. *Fox v. Fox*, 42 Cal.2d 49, 52, 265 P.2d 881; *In re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825. It is obvious from the concluding paragraph of the majority opinion that even the majority of this court feel apologetic about what is being done in this case. It is said: "Whenever it is intended that a property settlement agreement shall become merged in the decree, *it is undoubtedly the better practice to have the terms of the agreement set forth in haec verba in the decree or by way of exhibit attached thereto, and to have the court employ explicit language in the decree showing that the rights and obligations of the parties are adjudicated by the decree in accordance with the terms of the agreement.*" (Emphasis added.)

By a sort of roundabout reasoning it is also concluded here that while (speaking of the contempt process) "Liability for such drastic punishment 'should not rest upon implication or conjecture' but rather upon an order expressing in 'clear, specific and unequivocal' language the act required. *Plummer v. Superior Court*, supra, 20 Cal. 2d [158, 163], at page 164, 124 P.2d [5, 7] at page 8", implication and conjecture may be indulged in where merely the execution process is involved. Apparently, by implication, we are to assume that execution may be utilized by indulging in conjecture

and speculation even though there is no clear, specific and unequivocal language in the decree. No other conclusion can be reached when the facts of this case are taken into consideration.

In the instant case, as has been heretofore noted, the property settlement agreement was attached merely to the stipulation—not to the judgment—and the agreement and stipulation were described as Exhibit "A". We said in *Bank of America Nat. Trust & Savings Ass'n v. Standard Oil Co.*, 10 Cal.2d 90, 94, 73 P.2d 903, 905, that "As between the petitioner and the ranch company, the judgment which is now on appeal is only an adjudication that the owners of the bonds originally secured by the deed of trust, or their successors, are entitled to the trust fund as against other claimants. It does not completely fix the liability of the petitioner to the ranch company. 'A final decree in equity must state in plain figures the amount which a party must pay in the way both of debt or damages and costs, as well as every other matter adjudicated.' [Citation.] When the amount is not so stated and does not appear in the judgment roll, it cannot be supplied by an affidavit submitted *ex parte*. The superior court had no authority to order a writ of execution to issue upon the facts stated in the affidavit made on behalf of the ranch company, and its writ should be recalled." It was also said: "Before an execution may properly issue the judgment must be for money and the amount due and the persons to whom payable must be determined with exactness. Code Civ.Proc. sec. 682; *Feldmeier v. Superior Court*, 12 Cal.2d 302, 307, 83 P.2d 929, 119 A.L.R. 927; *Bank of America [Nat. Trust & Savings Ass'n] v. Standard Oil Co.*, 10 Cal.2d 90, 73 P.2d 903. The judgment of the superior court went no further than to approve the arbitration award. * * * It is thus clear that the money due could not be determined from the judgment. * * * Thus, the execution was improperly issued for the reason that by the judgment plaintiff McKay was not entitled to any money, nor was the amount due the employees and

their identity fixed by the judgment." *McKay v. Coca-Cola Bottling Co.*, 110 Cal. App.2d 672, 677, 243 P.2d 35, 38. This, contrary to certain language in the majority opinion, is not a case where the amount may be determined from the pleadings or the verdict.

The majority opinion in this case goes farther than any of the other ill-considered decisions of this court in this field, *Fox v. Fox*, 42 Cal.2d 49, 265 P.2d 881; *Flynn v. Flynn*, 42 Cal.2d 55, 265 P.2d 865; *Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873; *Messenger v. Messenger*, 46 Cal.2d 619, 297 P.2d 988, since here there was no incorporation of the agreement whatsoever nor any order by the court directing compliance therewith. Yet it is held that an incorporation was "intended" and that execution may issue.

For the reasons heretofore set forth, I would affirm the order.

SCHAUER, Justice (dissenting).

As stated in the majority opinion, "The only question to be determined is whether a property settlement agreement had been so merged into an annulment decree that its provision for monthly payments became an operative part thereof, enforceable by execution. The trial court held that it had not * * *." The majority reverse.

In my view the record as related in the majority opinion supports, and the better practice requires, the conclusion reached by the trial court. (See *Messenger v. Messenger* (1956), 46 Cal.2d 619, 297 P.2d 988; *Flynn v. Flynn* (1954), 42 Cal.2d 55, 61-62, 265 P.2d 865.) Accordingly, I would affirm the judgment.

SHENK, Justice (dissenting).

I concur in the reasoning and conclusions of Mr. Justice CARTER in his dissenting opinion.

I desire to emphasize that this proceeding was commenced by the application by Mrs. Foust for a citation directed to Mr. Foust to show cause why he should not be punished for contempt for failure to pay past due support payments provided for in a

property settlement agreement incorporated by reference in the annulment decree. A citation for contempt was signed by a Judge of the Superior Court and the matter was referred to a commissioner. It was doubtless obvious to the trial court that the proceeding was not properly one in contempt for the reason that no order of court had been violated. However a writ of execution was issued for the amount of the delinquent payments as shown by the affidavit of Mrs. Foust. This amount could be ascertained only by an examination of that document and the property settlement agreement in which Mr. Foust had agreed to pay \$50 per month during the life of Mrs. Foust or until her lawful remarriage. Nowhere in the decree is there an order that Foust pay a definite or any sum of money as support or for such other purpose, nor is there any provision in the decree to carry into effect or directing compliance with the property settlement agreement. There was therefore no order or judgment of the court upon which execution could issue, and the order quashing the writ should be sustained.



145 Cal.App.2d 115

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William S. POWELL and Harvey Nessel,
Defendants,

Harvey Nessel, Defendant and Appellant.
Cr. 5633.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1956.

Prosecution of defendants for conspiracy to commit grand theft and the offense of grand theft. The Superior Court, Los

Angeles County, Charles W. Fricke, J., entered judgments of conviction and order denying motions for new trial and defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained defendants' convictions of conspiracy to commit grand theft and the crime of grand theft arising out of a scheme whereby defendants purportedly sold greeting card distributorships to victims.

Affirmed.

Conspiracy Ⓒ47

False Pretenses Ⓒ49(1)

Evidence sustained convictions of defendants for conspiracy to commit grand theft and the offense of grand theft arising out of scheme whereby defendants purportedly sold greeting card distributorships to victims.

Jack Altman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The appellant and William S. Powell were charged by information in Count I with Conspiracy to Commit Grand Theft, in that they conspired with each other and with A. Diamond, and Phillip Martin and other persons unknown, to commit the crime of Grand Theft; in Count II with Grand Theft of \$300 from Murdo Mackay; in Count III with Grand Theft of \$483.60 from Murdo Mackay; in Count IV with Grand Theft of \$733.60 from Charles A. Giboney, Jr.; and in Count V with Grand Theft of \$783 from Ben Louie.

Each pleaded not guilty to each count. The jury which heard the evidence returned verdicts of guilty as charged in each count of the information as to each defendant.

As recited in respondent's brief, "On June 15, 1954, a request for a classified advertisement was brought to the counter girl at the main office of the Los Angeles Times at Second and Spring Streets, by a person

giving his name as A. Diamond. It was to run four times, starting on Wednesday, the 16th. It was to be billed to 'Floray Co., % William H. Spencer, 4063 Radford Avenue, Studio City.' The advertisement was as follows:

"Men to Service

"Large Corp. interested in dependable local parties to service accounts to be established in this area. Applicants will act as jobber. Distributors with exceptional opportunity for a sound secure future.

"High earnings possible for select-ed parties. Any applicants must be able to make light deliveries, have exceptional reputation & be in a position to make an immediate cash outlay of \$783 (deposit secured by mdse. & returnable) representing 25% of total investments, with company handling balance for proper parties.

"Submit only name, address & phone number to arrange personal interview to Box L-165, Times."

"On June 22, 1954, the appellant and Powell went to the office of the Lawrence Office Service, an answering and office service, at 7960 Beverly Boulevard. They wanted the service offered by that organization. They told Mrs. Joseph, who ran it, that the name of the organization for which they wanted the service was the National Distributing Company. Mrs. Joseph asked the name and a home telephone number so that they could be reached by her. She was told that Mr. William S. Powell was the head of the organization, and that there were four associates, Al Diamond, Harvey Nessel, Paul Riley and Phil Martin, from whom she might hear, and to whom she should give messages. Powell gave her a home address, 1585 Ocean Boulevard, Balboa, and a telephone number, Harbor 0363-M. They paid her for the service for a month in advance. During the period from June 22, 1954 through August 22, 1954, Mrs. Joseph's organization performed services for the appellant and Powell. The organization received telephone calls and mail,

and the appellant and Powell received mail from them. Mrs. Joseph received a second month's payment. She sent the bills for the service to 1585 Ocean Boulevard, Balboa. The one sent in September was not paid. About October, she sent another bill, and it was returned."

Mr. Mackay answered the ad by mail. Appellant and a Mr. Diamond visited Mackay's house. "The appellant told Mr. Mackay that he was sales representative for the National Distributing Company, and Diamond was the location man for the same company. He said that Mr. William S. Powell was general manager in the area, and that Mr. Mackay would meet him later.

"The appellant told Mr. Mackay that the National Distributing Company was an authorized branch of the U. S. Greeting Card Houses of East Pike Street, Seattle, Washington, and that they were opening up territory in this area in which greeting cards would be retailed through super-markets. He said the total price of the business was about thirty-one hundred dollars, and it included twenty-four greeting card houses or display racks set in twenty-four locations, about forty-eight advertising signs, and three thousand greeting cards. He said that Mr. Mackay's part would be to keep the racks full; buy cards through the company, and collect the profits. The appellant told Mr. Mackay that 25% of the approximately \$3100.00 would be wanted as a down payment, and Mr. Mackay would then become a distributor for the National Distributing Company. Thereafter, the rest of the \$3100.00 would be paid to the National Distributing Company at about \$65.00 a month if the gross profits from the sale of the cards were over \$800.00. If the gross retail sales did not amount to \$800.00, then Mr. Mackay did not have to pay anything that month." Mr. Mackay then signed a printed "Application and Order" for the products and made a payment of \$300.00, the balance of \$2,350.00 to be paid in monthly installments. A few days later Mackay received a letter acknowledging the payment, signed by Wm. S. Powell. The letter closed with the sentence, "Please

advise us immediately when we can expect the balance due of \$2350.80 so that we may make our arrangements accordingly."

Mr. Mackay attempted several times to get in touch with the appellant and Powell by telephoning the number on the letterhead. The telephone was answered, but he did not speak to either the appellant or Powell. Each time he left a message, but never received a return of his calls.

A day or two after he received the letter of July 15th, Mr. Mackay drafted a letter as follows:

"Murdo Mackay
"1925 S. Mariposa St.,
"Los Angeles Calif.
"July 23, 1954.

"National Distributing Co.,
"7960 Beverly Blvd.,
"Los Angeles, Calif.,
"Dear Mr. Powell,

"I wish to thank you for your letter which arrived this morning.

"There is a little matter, which being a very busy man you must have overlooked—my deposit of \$783.60, which should have accompanied your refusal of my application as per contract dated 6-23-54.

"I fail to see what benefit you may accrue by procrastinating in this matter and so as to cause you the least inconvenience possible return my deposit immediately.

"Sincerely Yours
"Murdo Mackay."

He then copied it word for word, put it into an envelope, addressed it to the National Distributing Company at 7860 Beverly Boulevard, Los Angeles, stamped it, and put it into a mail box. It was never returned.

He heard nothing from the National Distributing Company, Powell or the appellant. He called the telephone number on the letterhead again several times, and each time there was an answer but he did not speak to either Powell or the appellant. He received no communication from either Powell or the appellant in response to the calls.

All efforts to get in touch with appellant failed.

The other alleged victims had the same experience according to the record.

It is contended on appeal that:

"I. There was not sufficient evidence to support the verdict of guilty of conspiracy to commit grand theft, in that there was no showing of any agreement to commit an illegal act.

"II. There was not sufficient evidence to support the verdict of guilty of grand theft in that there was no showing of an intent to defraud Murdo Mackay, or of fraud against him, or false pretenses used to perpetrate a fraud upon his, or of his reliance upon any false representations in parting with his money.

"III. The Court erred in failing to direct a verdict of acquittal on Counts IV and V, relating to the transactions with Mr. Louie and Mr. Giboney, as it was not shown that he had any connection with those transactions.

"IV. The Court erred in instructing the jury on Civil Code Sections 1670 and 1671, relating to liquidating damages."

In reply to these contentions respondent points out, and it is supported by the record, that, "Neither Mr. Mackay, Mr. Giboney nor Mr. Louie ever heard from Powell, the appellant, or Martin again; none received any greeting cards, racks, signs or his money back.

"The form of 'Application and Order' which was signed by Messrs. Louie, Mackay and Giboney was never authorized by U. S. Greeting Cards Incorporated.

"The U. S. Greeting Card Company received no applications or orders from Murdo Mackay, Charles A. Giboney, Jr., Ben W. Louie, Harvey Nessel, William S. Powell or the National Distributing Company during June or July, 1954. Neither did

they receive any money from any of them during that period.

"We submit that in view of the friendship of the appellant and Powell; the use by them of a company name formerly used by the appellant; their appearance together when the printing order was given and the telephone service was subscribed to; their use of names of prospects secured from an advertisement apparently inserted in the paper by Diamond, and Diamond's accompanying the appellant to Mr. Mackay's house and Powell to Mr. Giboney's house; the similarity of the sales talk given each of the prospects by the appellant, Martin and Powell; and the eagerness of each to get the 'down payment' in certified or cashier's checks, the jury could reasonably draw the inference that they were operating with a common understanding, and pursuant to an agreement between them. It could further infer that, in accordance with their mutual understanding, each made false and fraudulent representations with respect to material matters, as, for example, that the National Distributing Company was an authorized branch or distributor of U. S. Greeting Card Houses Incorporated."

It would serve no useful purpose to go into further details. It may be noted that the evidence was sufficient to support the verdict of guilty of conspiracy to commit grand theft as well as the offense of grand theft. Nor does the record reveal that the court erred in failing to direct an acquittal verdict as to Counts IV and V. It does not appear that the instructions were erroneous in any respect.

The judgment and the order denying defendants motion for a new trial are, and each is affirmed.

FOURT, J., concurs.

WHITE, P. J., concurs in the judgment.

145 Cal.App.2d 110

Application of Mike LAHAM, for a Writ of Habeas Corpus.

Cr. 5776.

District Court of Appeal, Second District,
Division 1, California.

Oct. 15, 1956.

Habeas corpus proceedings, whereby petitioner sought release from custody upon ground that judgment of contempt entered against him was void and beyond jurisdiction of court entering same. The District Court of Appeal, Nourse, J. pro tem., held that party charged with contempt has right to have witnesses called against him fix time and place of occurrence with particularity, but held that it is not necessary that charging affidavits so fix that time.

Writ discharged.

1. Divorce ☞87

Husband's forcible taking of child from possession of wife constituted an annoyance and molestation of wife, within proscription of divorce court order restraining husband from annoying or molesting wife in any manner.

2. Contempt ☞54(4), 60(3)

At hearing upon charge of contempt, party charged has right to have witnesses called against him fix time and place of occurrence with particularity, in order that he may introduce evidence that he was not present at scene, since failure to do so may deprive him of that opportunity; but it is not necessary that charging affidavits so fix that time. West's Ann.Pen.Code, § 955.

3. Contempt ☞60(2), 61(3)

Where defendant admitted at hearing on order to show cause that occurrence which court found constituted violation of its order had taken place upon third of July, any evidence as to his whereabouts on another day had no materiality whatsoever; and defendant could not successfully attack judgment of contempt by complain-

ing that commissioner found that violation had taken place on July 3 whereas show cause order charged violation on July 6, and that he had thereby been deprived of proving an alibi as to July 6.

Hahn, Ross & Saunders, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner, having been found in contempt of an order of the Superior Court of the State of California, in and for the County of Los Angeles, and sentenced to serve a term of five days in the county jail, seeks a release from custody upon the ground that the judgment of contempt was void and beyond the jurisdiction of the superior court. His specific attacks upon the legality of the order will be hereinafter mentioned.

Petitioner is the defendant and cross-complainant in an action for divorce commenced by his wife, Nadia. On March 9, 1956, by stipulation of the parties and in the presence of petitioner, an order was made and entered that "both parties are restrained from annoying or molesting the other in any manner." On July 30, 1956, Nadia filed in the divorce action her affidavit charging, among other things, that on or about July 6 and on July 21, 1956, petitioner willfully and without cause violated the court's order by going to the home of plaintiff and trying to by force take the minor children of the plaintiff, who had been awarded to her, from her.

Upon the basis of this affidavit an order to show cause was issued and served upon the defendant requiring him to show cause why he should not be held in contempt of the order of March 9. The matter was heard before a commissioner of the court who found that petitioner did molest and annoy Nadia on July 3 by, through force, taking one of the children of the parties from the custody of Nadia and by engaging

in an argument with her. At the hearing before the commissioner both petitioner and his wife fixed the time of this occurrence as July 3.¹

The commissioner recommended that the defendant be found in contempt of court for having willfully violated the order of March 9 on Tuesday, the 3rd day of July, and again on Saturday, the 21st day of July, and that the matter be continued to September 21, 1956, for hearing before Judge Fox for the purpose of sentence. The findings and recommendations of the commissioner were approved by Judge Evans, and on September 21 petitioner was sentenced by Judge Fox.

Petitioner attacks the judgment of contempt upon two grounds. His first ground is that the affidavit and order to show cause charged him with contempt of the order restraining him from annoying and molesting his wife, but that the commissioner found that he was in contempt for violating an order as to custody of the children.

[1] There is no factual basis for this contention. It is true that the commissioner found that one of the acts committed by petitioner on July 3 consisted of forcibly taking one of the children from the possession of Nadia, but he found that this constituted an annoyance and molestation of Nadia—and that such an act would annoy her and constitute a molestation is too apparent for argument.

[2, 3] The other contention made by petitioner is that the affidavit of Nadia upon which the order to show cause *in re* contempt was based charged him with the violation of the court's order on or about July 6, 1956, while the commissioner found that the violation took place on July 3, 1956, and that he was thus deprived of proving an alibi as to July 6.

There is no merit in this contention. At the hearing on the order to show cause the time of the occurrence was fixed by

both parties as occurring on Tuesday, July 3. Any evidence as to his whereabouts on July 6, therefore, was entirely immaterial. It is not necessary that an affidavit fix with exactness the hour or day upon which a violation of the order occurs. At the hearing upon a charge of contempt, the party charged has the right to have the witnesses called against him fix the time and the place of the occurrence with particularity in order that he may introduce evidence that he was not then present at the scene, for unless the time is fixed with reasonable exactitude he would be deprived of that opportunity; but it is not necessary that the charging affidavit so fix that time. *Selowsky v. Superior Court of Napa Co.*, 180 Cal. 404, 407, 181 P. 652, Pen.Code, sec. 955.

Petitioner cites, in support of his contention, the case of *People v. Morris*, 3 Cal.App. 1, 10, 84 P. 463. That case, however, is clearly distinguishable from the case at bar. There the defendant was charged with the crime of statutory rape. The information charged the criminal act as having taken place on December 25, 1903. The evidence produced by the prosecution fixed the time that the act took place at 4 p.m. on that day. The defendant produced several witnesses who testified that the defendant was at another place than that where the act was alleged to have occurred from half past 2 until nearly 6 o'clock on that day. The court instructed the jury that it was only necessary that they believe from the evidence to a moral certainty, and beyond a reasonable doubt, that the defendant committed the act on the date charged in the information. The court held that this instruction was erroneous inasmuch as the evidence offered by the People had fixed the time of the offense at a certain hour of the day in question and that therefore the instruction in effect deprived the defendant of the right to introduce evidence to establish an alibi which might create, in the

1. The commissioner also found that the petitioner again violated the order on July 21, but as the petitioner was not

sentenced for that violation it is of no materiality here.

minds of the jury, a reasonable doubt as to his guilt.

In the present case, the defendant having admitted that the occurrence which the court found constituted a violation of its order took place upon the 3rd of July, any evidence as to his whereabouts on another day had no materiality whatsoever. See *People v. Ralls*, 21 Cal.App.2d 674, 678, 70 P.2d 265.

The writ is discharged and petitioner is remanded to the custody of the Sheriff of Los Angeles County.

WHITE, P. J., and FOURT, J., concur.



145 Cal.App.2d 76

William CLINKSCALE and Ida Clinkscale,
his wife, Plaintiffs, Cross-Defendants,
Appellants and Cross-Respondents,

v.

W. J. GERMERSHAUSEN, Defendant,
Cross-Complainant, Respondent and
Cross-Appellant.

Civ. 8750.

District Court of Appeal, Third District,
California.

Oct. 11, 1956.

Action for personal injuries and property damage arising out of collision with plaintiffs' disabled automobile which was stopped on causeway. The Superior Court, Solano County, Harlow V. Greenwood, J., rendered judgment for defendant, and for the plaintiff on defendant's cross-complaint, and plaintiffs and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to support the judgment in favor of the plaintiffs on the cross-complaint, and the judgment in favor of defendant.

Judgment in favor of defendant and judgment in favor of plaintiffs on the cross-complaint affirmed.

Opinion, 295 P.2d 551, vacated.

1. Appeal and Error ⇨1001(1)

Before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of evidence adduced, together with every inference favorable to prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment.

2. Appeal and Error ⇨930(1)

On appeal, evidence must be construed most strongly against the losing party.

3. Appeal and Error ⇨930(1)

Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party.

4. Appeal and Error ⇨930(1), 989

Prevailing party's evidence must ordinarily be accepted as true on appeal, and evidence which is contradictory must be disregarded.

5. Automobiles ⇨245(43)

Driving 50 feet behind another automobile at speed of 45 miles an hour in heavy traffic on four lane causeway was not unreasonable as a matter of law. West's Ann.Vehicle Code, § 531.

6. Negligence ⇨136(9, 14)

Generally, negligence is a question of fact for the jury and it is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as a matter of law.

7. Negligence ⇨136(9)

Where the inferences to be drawn are in any degree doubtful, the only proper rule is to submit the matter of negligence to the jury under proper instructions.

8. Negligence Ⓒ1

"Negligence" is not an absolute term but a relative one, and in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all surrounding circumstances shown by the evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

9. Automobiles Ⓒ245(40)

Evidence that defendant's automobile was traveling at a speed of 45 miles per hour about 50 feet behind automobile which began to swerve when it was about 50 feet from plaintiffs' disabled vehicle, and that defendant, being unable to swerve because of condition of traffic, immediately applied the brakes and made 65 feet of skid marks before the collision, raised the question for jury as to defendant's negligence.

10. Automobiles Ⓒ245(83)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on causeway, the failure to anticipate that automobile would become disabled because of an overheated engine, or to give greater warning to oncoming traffic raised question for jury as to plaintiffs' contributory negligence. West's Ann.Vehicle Code, § 582.

11. New Trial Ⓒ159

Trial judge in passing upon a motion for new trial is not bound by the same rules as appellate court.

12. Appeal and Error Ⓒ1001(1)

Where it could not be held as a matter of law that the judgment lacked substantial support, the appellate court would not interfere with the verdict even though the evidence preponderated in favor of the plaintiffs on the issue of defendant's negligence as well as on the issue of the contributory negligence of the plaintiffs.

13. Negligence Ⓒ83.1

Under the doctrine of "last clear chance" the plaintiffs must be negligent and as a result of their negligence they must be in a position where they cannot escape from their perilous position by the

exercise of ordinary care, and the defendant must be aware of their danger so that he realizes, or ought to realize, that the plaintiffs are unable to escape, and the defendant must then have a clear chance to avoid injuring the plaintiffs by the exercise of ordinary care.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

14. Automobiles Ⓒ245(91)

In view of defendant's testimony that he had applied his brakes as soon as he observed plaintiffs' vehicle stopped on causeway and could not swerve to avoid the collision because of the condition of the traffic, defendant did not have last clear chance to avoid accident, as a matter of law.

15. New Trial Ⓒ39**Trial** Ⓒ255(10)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on a causeway, where plaintiffs offered no instruction on the doctrine of last clear chance, the trial court did not err in not giving such an instruction or in not granting a new trial on that ground, even though the court could have considered the doctrine along with the other rules of law.

16. Trial Ⓒ251(2)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on causeway, instruction relating to manner in which the plaintiffs' automobile was parked on the causeway and also on issue of whether or not automobile should have been stopped and parked before it got onto the causeway, was not erroneous as interjecting issues into case which were not present.

17. Automobiles Ⓒ245(83)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on a causeway, the question of whether plaintiffs were justified in stopping and parking on causeway under all circumstances was a question of fact for jury.

18. Automobiles Ⓒ246(27)

In action arising out of collision with plaintiffs' disabled automobile which was

stopped on a causeway, instruction that plaintiffs could not recover if they were negligent or careless in the manner in which they attempted to warn defendant that their automobile was stopped, was proper on the issues of negligence and proximate cause.

19. Automobiles ⇨246(60)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on a causeway, instruction which required plaintiffs to explain why their automobile stopped on causeway was not improper on the ground that it shifted the burden of proof as to negligence and contributory negligence. West's Ann.Vehicle Code, § 582.

20. Automobiles ⇨173(2)

Under statute governing stopping on highway with exception relating to highway bounded by curbs, a "curb" is a stone or row of stones, or similar construction of concrete, wood, or other material, along the margin of the roadway, as a limit to the roadway and a restraint upon and protection to the adjoining sidewalk space.

See publication Words and Phrases, for other judicial constructions and definitions of "Curb".

21. Automobiles ⇨173(2)

Where north side of causeway had a barrier consisting of steel pipes imbedded in concrete with openings in the concrete so that the water could flow off the causeway, and south side had a two foot walkway with wooden boards about eight inches high separating the walkway from the vehicular part of causeway, causeway was bounded by an adjacent "curb" as a matter of law within statute governing stopping on highways but excepting highways bounded by curbs. West's Ann.Vehicle Code, § 582.

22. Appeal and Error ⇨1064(1)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on a causeway bounded by curbs, giving instruction relating to statutory duties of person who parks, or leaves standing a vehicle on the highway in an unincorporated area, and referring to the risk of being found negligent in so doing, unless

he affirmatively shows the impracticability of handling vehicle otherwise, was not prejudicial error even though such statute specifically excepted highways bounded by curbs, in view of provisions of statute prohibiting person from leaving any vehicle on a causeway except when necessary to avoid conflict with other traffic or in compliance with the direction of a police officer. West's Ann.Vehicle Code, §§ 582, 586.

23. Automobiles ⇨244(14)

In action arising out of a collision with the plaintiffs' disabled automobile, which was stopped on a causeway, the evidence was sufficient to support the judgment for defendant and the judgment for plaintiffs on defendant's counterclaim. West's Ann. Vehicle Code, §§ 582, 586; West's Ann. Const. art. 6, § 4½.

24. Automobiles ⇨244(45)

In action arising out of a collision with plaintiffs' disabled automobile, which was stopped on a causeway, wherein defendant filed a cross-complaint, the evidence was sufficient to support the implied finding that defendant was guilty of contributory negligence.

Robert M. Cole, Davis, for appellants.

Russell A. Harris, Sacramento, for cross-appellant.

SCHOTTKY, Justice.

Plaintiffs commenced an action for damages for personal injuries and property damage sustained by plaintiff Ida Clinkscale and for property damage sustained by her husband, plaintiff William Clinkscale, when the automobile which he was driving and in which she was a passenger became involved in an accident with an automobile driven by defendant, W. J. Germershausen. Plaintiffs appeal from that portion of the judgment entered in favor of the defendant upon a jury verdict, and defendant appeals from the same judgment in favor of the cross-defendant, William Clinkscale. A nonsuit was granted to cross-defendant Ida Clinkscale, and the cross-complainant, W. J.

Germershausen, has not appealed from that order.

At the time the accident occurred, the plaintiffs were traveling east on U. S. Highway 40 over the Yolo Causeway, which is a form of bridge over a by-pass and runs in a general easterly and westerly direction, being 3 to 4 miles in length. The highway is at least 15 to 20 feet from the ground and consists of four perfectly straight and level traffic lanes, two in each direction, each divided by a white line with a double line in the center. At the south side of the causeway is a two-foot walkway separated from the pavement by a wooden barrier. The plaintiffs had traveled to San Francisco on the morning of the accident and on the way down, near Fairfield, the car sputtered and the temperature of the engine was abnormally high, so they stopped at a filling station to put water in the radiator.

After driving around in San Francisco for a few hours, the plaintiffs left to return to their residence in Broderick, Yolo County, California. They did not notice any trouble with the car until it stopped in the middle of the Yolo Causeway, in the outside eastbound lane against the wooden barrier.

It was a sunny Sunday afternoon in June, around 5 p.m., and the traffic was heavy in all four lanes. Clinkscale set his emergency brake, looked under the hood and discovered that smoke was coming off the engine and the radiator was steaming. He checked the temperature gauge and found it to be at the boiling point. He had not checked the gauge before crossing the causeway, nor at the time he passed a service station located on the highway at Davis, nor at any time since leaving the filling station at Fairfield on the way to San Francisco. After unsuccessfully trying to start the car, he stationed himself at the left rear fender to flag cars around his stopped automobile. Ida Clinkscale remained seated in the right front seat.

Clinkscale directed about 20 to 25 cars by his stopped car before it was struck in the rear by the automobile driven by the defendant who was approaching from the

west traveling east in the outside or southerly lane. Defendant had remained in this lane at all times prior to the accident and had been following several cars. He did not observe cars fanning out to pass the plaintiffs' car and the traffic was moving evenly. The defendant was following the car ahead of him by approximately 50 feet when the car swerved sharply to the left into the inside lane just prior to the time the defendant saw the plaintiffs' parked automobile. The defendant determined that it was unsafe for him to swerve into the inside lane because of the traffic passing by, going in the same direction, and being only several car lengths away from the plaintiffs' car, he applied his brakes hard and skidded into the rear of it. The skid marks were 65 feet in length up to the point of impact and continued on approximately 12 feet. The defendant's car stopped so that it was resting on the walkway which is located on the south side of the causeway with the right front next to the iron rail which serves as a barrier at the extreme south edge. As a result of the impact the Clinkscale automobile was propelled 400 feet east on the causeway.

Clinkscale testified that when he first saw defendant's car it was traveling at an estimated rate of speed of 55 to 60 miles per hour. However, the defendant testified that he kept a constant speed of approximately 45 miles per hour in crossing the causeway. Defendant also testified that although he saw Clinkscale standing at the left rear of his automobile prior to the accident, he did not notice him make any movement.

Appellants' first major contention is that the evidence is insufficient to support the judgment in favor of respondent because respondent was negligent as a matter of law and appellants were free from negligence as a matter of law. We are unable to agree with this contention.

[1-4] It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full

force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

In support of their contention that defendant was negligent as a matter of law, plaintiffs argue that the defendant did not exercise ordinary care to observe traffic conditions on the causeway ahead of him; that he was following the vehicle ahead of him more closely than was reasonable and prudent, in violation of section 531 of the Vehicle Code; that according to the testimony of the traffic officer defendant stated that he was looking at the rice checks and was tired and sleepy; that because of these things defendant did not see the Clinkscale car until he was too close to stop in order to avoid an accident.

Plaintiffs rely strongly on the case of *Huetter v. Andrews*, 91 Cal.App.2d 142, 204 P.2d 655, where it was held that the conduct of defendant in driving into plaintiff's car ahead constituted negligence as a matter of law. However, the facts in the *Huetter* case were quite different from those in the instant case. In the *Huetter* case the defendant had a clear view of the highway, with no vehicles intervening, for 850 feet preceding the point of impact with plaintiff's car. Plaintiff had stopped, backed on to the shoulder, and was executing a left turn into a crossover on a divided, four-lane highway. Defendant drove this 850 feet looking straight ahead but did not see plaintiff's automobile until he was within 75 to 100 feet of it. He still continued a straight course and left no skid marks until he struck plaintiff's car broadside at a speed of 35 to 40 miles an hour.

[5] As a further point in support of the plaintiffs' position that the defendant was guilty of negligence as a matter of law, it is contended that the defendant violated section 531 of the California Vehicle Code which provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway." Plaintiffs argue that defendant was traveling too close to the automobile ahead of him because he was not able to stop in time. However, *Landrum v. Severin*, 37 Cal.2d 24, 230 P.2d 337, states the rule in its headnote to be: "It is for the jury to determine whether, within the terms of Veh.Code, § 531(a), a motorist followed another automobile at a distance less than what was reasonable and prudent, except where the space between the vehicles was such as to establish whether there was a violation of such provision as a matter of law." See also *Driver v. Norman*, 106 Cal.App.2d 725, 236 P.2d 6, and *Giles v. Happely*, 123 Cal.App.2d 894, 267 P.2d 1051. In view of these decisions, it cannot be said as a matter of law that a space of 50 feet at a speed of 45 miles per hour, under traffic conditions existing here, is unreasonable.

[6-8] The general rule is that negligence is a question of fact for the jury. It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as a matter of law, and where the inferences to be drawn are in any degree doubtful the only proper rule is to submit the matter to the jury under proper instructions. As is so often stated in instructions to juries in negligence cases, negligence is not an absolute term but a relative one, and in deciding whether there was negligence in a given case the conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence.

[9] It would serve no useful purpose to review the decisions cited by plaintiffs as the factual situations in those cases were different from those in the instant case.

Each case must be considered on its own facts. Bearing in mind the familiar rules hereinbefore mentioned, we cannot say that the evidence in the instant case compelled a finding that defendant was guilty of negligence as a matter of law. The jury could have concluded that since defendant was about 50 feet behind the car ahead of him and that car was 50 feet from plaintiffs' car when the other car began to turn out, defendant's car was about 100 feet from plaintiffs' car when he first observed it, and since defendant's car made 65 feet of skid marks to the point of impact, that therefore defendant must have been looking down the highway at the time the car ahead of him pulled out to pass. Defendant testified that he did not see plaintiffs' car until he was several car lengths from it, and that as soon as he saw it he applied his brakes; that he could not swerve into the inside lane because of traffic going in the same direction. We believe that the question of whether or not defendant was guilty of negligence was one of fact for the jury.

Furthermore, even if the evidence compelled a finding that defendant was negligent as a matter of law, we do not believe that the evidence compels a finding that plaintiff Clinkscale was free from negligence as a matter of law.

Defendant points out that the record shows that on the day of this accident the plaintiff, Mr. Clinkscale, before starting on this trip to San Francisco, had gas and water put in his automobile, presumably in Broderick, and that on the way down by the time he reached Fairfield, California, his engine acted "funny" and "kind of stubborn," as if it were going to cut out on him, so he pulled into a service station near Fairfield and the attendant put water into the radiator. Clinkscale knew that the car was hot at this time and observed that the heat gauge was high; that although while en route home he was traveling from a cool area into a warm area, appellant Clinkscale testified that at no time after leaving Fairfield on the way to San Francisco did he ever check the temperature gauge on his

automobile, that he knew he had to cross the Yolo Causeway, and that he did not make any observations with respect to that temperature gauge before crossing the causeway; that he passed right by the large Standard Oil service station at Davis and apparently gave no thought to the advisability of checking his temperature gauge or checking the water in his radiator before leaving that area to pass on down the highway towards the causeway. Defendant argues that since Clinkscale testified that he did not look at his temperature gauge after leaving Fairfield on the way down to San Francisco, and since he testified that he did not look at that gauge before crossing the causeway, the jury could have believed that he was contributorily negligent because he in fact did not look at that gauge, or they could have concluded that he did look at the gauge and was not telling the truth with respect to what it indicated, but instead decided to try to make it across the causeway, and that the jury could reasonably conclude from the evidence that in view of the difficulty which Clinkscale had on the way down to San Francisco, and from the other facts herein outlined, Clinkscale did not act with ordinary care in attempting to cross the causeway under these circumstances, and that therefore his car was not "disabled" within the language of section 582 of the California Vehicle Code, so as to exempt him from contributory negligence.

[10] The defendant argues further that the jury could have concluded that the plaintiff Clinkscale was contributorily negligent in failing to station himself farther to the rear of his automobile in order to give approaching motorists, including the defendant, more time and distance in which to discover the fact that his car was stopped and to either stop or turn into the inside lane, and might have prevented the accident. Defendant testified that he did not see plaintiffs' automobile until the car ahead of him turned out, and while it is possible that defendant might not have observed plaintiffs' automobile if plaintiff Clinkscale had been stationed 50 or 75 feet further west,

it is also probable that he would have observed it in time to have avoided the accident. Plaintiff Mr. Clinkscale stationed himself at the left rear fender while plaintiff Mrs. Clinkscale remained seated in the front seat of the automobile. In view of the fact that it was 5 p.m. on a hot Sunday afternoon when the traffic was heavy, we cannot say that the jury may not have properly concluded that under all the circumstances plaintiffs failed to exercise ordinary care in failing to give greater warning to oncoming traffic.

We believe that whether or not plaintiff Mr. Clinkscale was guilty of contributory negligence was a question of fact for the jury and we are unable to agree with defendant's contention that reasonable men could only draw the conclusion that plaintiffs were not free from contributory negligence.

[11] We are frank to state that in our opinion the record indicates strongly that the evidence preponderates in favor of plaintiffs on the issue of defendant's negligence as well as on the issue of the contributory negligence of plaintiffs, and that in view of the verdict of the jury the case was one in which the trial court might well have granted a new trial. A trial judge in passing upon a motion for a new trial is not bound by the same rules as an appellate court. We quote what was said in *Brush v. Pacific Electric Ry.*, 58 Cal. App. 501, at page 506, 208 P. 997, at page 1000:

"But, while an appellate court will not review a verdict where the evidence shows a substantial conflict, the trial court is guided by very different considerations. If the trial judge, notwithstanding a conflict in the testimony, is satisfied that the verdict is against the weight of the evidence, he may, indeed he should, grant a new trial, although upon the same conflict an appellate court would be bound by the verdict. And even though there be no conflict in the testimony, the probative force and effect of the evidence is ultimately for the determina-

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tion of the trial judge upon the hearing of a motion for a new trial. *Meinberg v. Jordan*, 29 Cal.App. [760] 762, 157 P. 1005, 1007. The judgment of the trial judge is not based upon the cold record which comes to an appellate court. He hears the evidence and has ample opportunity to observe the demeanor and manner of the witnesses and to judge their credibility. If, therefore he is dissatisfied with the verdict and is of the opinion that it clearly is against the weight of the evidence, he may set it aside and grant a new trial, even though there be substantial evidence to support the verdict. He—"is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend. * * * It is for these and other reasons which might be mentioned that a wide discretion is accorded to trial courts in the disposition of motions for new trials." *Bates v. Howard*, 105 Cal. [173] 178, 38 P. 715. Though the parties are entitled to the judgment of the jury in the first instance, they are, upon a motion for a new trial, equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. *Green v. Soule*, 145 Cal. [96] 102, 78 P. 337."

[12] So while we regard the instant case as one in which the trial court might well have granted plaintiffs' motion for a new trial, we are satisfied that it cannot be held as a matter of law that the judgment lacks substantial support in the record.

[13, 14] Plaintiffs contend that the doctrine of last clear chance should have been applied by the trial judge on the motion for new trial, and that he should have set aside the verdict as a matter of law. Under that doctrine the plaintiffs must be negligent and as a result of their negligence they must be in a position where

they cannot escape from their perilous position by the exercise of ordinary care, and the defendant must be aware of their danger so that he realizes, or ought to realize, that the plaintiffs are unable to escape, and the defendant must then have a clear chance to avoid injuring the plaintiffs by the exercise of ordinary care. The defendant testified that as soon as he observed the plaintiffs he applied his brakes hard and attempted to stop his automobile, and that he could not swerve into the inside lane because of the condition of the traffic to his left. Whether or not he had the last clear chance to have avoided the accident is quite doubtful, but in any event this court cannot say as a matter of law that he did have such an opportunity.

Counsel for plaintiffs states: "The doctrine of last clear chance should have been applied in this case, and even if the doctrine was too complex for the Jury to apply, the Judge on the motion for a new trial should have applied the doctrine as a matter of law, and should have set aside the verdict of the jury."

[15] It is apparent from the record that the doctrine of last clear chance was not relied upon by plaintiffs at the trial for they offered no instruction on it. No decision has been cited which holds that it is reversible error for a court to fail to give such an instruction when it is not offered or requested. While the trial court upon the hearing of the motion for a new trial could have considered the doctrine of last clear chance along with all other rules of law and might well have granted the motion for a new trial on the ground that the verdict was against the weight of the evidence, we cannot say that upon the record in the instant case the court erred in not giving an instruction on the doctrine of last clear chance or in not granting a new trial upon that ground.

Plaintiffs next contend that certain erroneous and highly prejudicial instructions were given by the court.

Plaintiffs contend that the giving of Instruction No. 10 was prejudicially erroneous because it interjected issues into

the case which were not present. This instruction reads:

"If you believe from the evidence that Mr. Clinkscale was careless and negligent in the manner in which he stopped and parked his Studebaker automobile on the Yolo Causeway prior to the accident and that said carelessness and negligence on his part proximately contributed to this accident, then I instruct you that the plaintiffs, Mr. and Mrs. Clinkscale, cannot recover from Mr. Germershausen."

[16, 17] However, this instruction advised the jury that if they found that the car was "stopped and parked" in a careless and negligent manner and if this carelessness and negligence proximately contributed to the accident, then the plaintiffs could not recover. It contained both the element of negligence and the element of proximate cause, and was a correct statement of the law. The question of whether or not the plaintiffs were justified in stopping and parking on the causeway under all of the circumstances in the case was a question of fact for the jury, and the instruction does not relate only to the manner in which the car was parked on the causeway, but it relates to the issue of whether or not the car should have been stopped and parked before it got onto the causeway.

Plaintiffs complain also that there was prejudicial error in giving Instruction No. 11 which reads:

"If you believe from the evidence that William Clinkscale was careless and negligent in the manner in which he attempted to warn Mr. Germershausen of the fact that the Studebaker automobile was stopped on the Yolo Causeway and if you further believe that said careless [sic] and negligence on the part of said William Clinkscale contributed proximately to the accident, then I instruct you that the plaintiffs, Mr. and Mrs. Clinkscale can not recover from Mr. Germershausen."

[18] This instruction related to the warning which was given by Mr. Clinkscale to the defendant, and that was an element in the case. The instruction correctly stated the law and contained both the elements of negligence and proximate cause.

If plaintiffs' contention that Clinkscale was free from negligence as a matter of law was upheld, then Instructions 10 and 11 would have been improper. However, since we have come to the conclusion that Clinkscale's negligence was a question of fact, these instructions correctly presented the issues to the jury.

Far more serious is plaintiffs' contention that the court committed prejudicial error in giving Instruction No. 17. This instruction which is based on section 582 of the Vehicle Code is identical with Instruction No. 143 of B.A.J.I., Civ., '50 Supp., which reads as follows:

"At the time of the accident involved in this case, our Vehicle Code provided as follows:

"Upon any highway in unincorporated areas no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles, and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway. This section shall not apply upon a highway where the roadway is bounded by adjacent curbs.

"This section shall not apply to the driver of any vehicle which is disabled in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main traveled portion of a highway."

"In weighing the evidence in this case, you will be guided by a rule now

to be stated: If and when it has been established by the evidence that a person stopped, parked or left standing any vehicle, whether attended or unattended, upon the main traveled portion of a highway in an unincorporated area, or that he stopped or parked or left standing a vehicle upon the main traveled portion of such a highway in such a position as not to leave an unobstructed width of the highway opposite said vehicle for the free passage of other vehicles or in such a place that a clear view of said vehicle was not available from a distance of 200 feet in each direction upon the highway, such evidence is a prima facie showing of negligence on the part of the person who so handled the vehicle and will support a finding that he was negligent in such conduct, unless that showing together with any other proved facts that support it, fails to preponderate over evidence that it was impracticable to stop, park, or leave the vehicle off the main traveled portion of the highway or evidence that the vehicle was disabled in such a manner and to such an extent that it was impossible to avoid stopping and temporarily leaving it on that portion of the highway or at a place where the clearance of unobstructed highway opposite it or the clear view of it from the highway was not such as is required by the law that I just read to you.

"To state the point in another way: The law places upon a person who stops, parks or leaves standing a vehicle on a highway in an unincorporated area, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability of the impossibility, as just stated, of handling the vehicle otherwise. If however, he makes such a showing, the inference of negligence to which I previously referred may thereby be disproved and removed from the case.

"The accident involved in this case occurred in unincorporated area."

[19] Plaintiffs argue that since defendant had the burden of proving contributory negligence, the above instruction, which required that the plaintiffs explain why the car was stopped on the causeway, shifted the burden of proof to the plaintiffs on this issue, and therefore violated the fundamental rule of law with respect to the burden of proving contributory negligence. However, we think it is clear that the instruction does not in any way shift the burden of proof either as to the negligence of defendant or the contributory negligence of plaintiffs.

Plaintiffs also argue that the instruction was improper because section 582 of the Vehicle Code specifically states that it "shall not apply upon a highway where the roadway is bounded by adjacent curbs." It therefore becomes necessary to determine whether or not the roadway across the causeway is "bounded by adjacent curbs." On the north side of the causeway is a barrier consisting of steel pipes imbedded in concrete with openings in the concrete so that the water can flow off the highway. On the south side is a two-foot walkway with wooden boards about 8 inches high separating the walkway from the vehicular part of the highway.

[20] The Vehicle Code itself does not give any definition of the term curb, no doubt because it is a term which is so commonly used and so generally understood. Nor have we found any California case that defines the term. However, what seems to us to be a correct definition is given by the Supreme Court of Illinois in *Lyman v. Town of Cicero*, 222 Ill. 379, 78 N.E. 830, as follows:

"The common meaning of the word 'curb,' as applied to a street, is a stone or row of stones, or a similar construction of concrete, wood, or other material, along the margin of the roadway, as a limit to the roadway and a restraint upon and protection to the adjoining sidewalk space."

And in *Domke v. Gunning*, 62 Wash. 629, 114 P. 436, at page 438, the Supreme Court of Washington said:

"The respondent pleaded and proved an ordinance of the city of Spokane making it the duty of a person driving an automobile on the streets of the city, 'upon turning the corner of any street,' to 'leave a space of at least six feet between the curb and the * * * automobile * * *.' It appeared that on the lot fronting on the street where the accident happened a building was being erected; that debris therefrom had been piled in the corner of the street around which a fence or barricade had been constructed, and pedestrians traveling along the street on reaching the corner would be obliged to leave the regular walk, step into the street, and walk around the outside of this fence or barricade. The court charged the jury that this fence became the curb within the meaning of the ordinance, and that the appellant was guilty of violating the ordinance when he drove along the street if he did not keep his automobile six feet therefrom. This instruction is assigned as error, but we think it correct. The purpose of the ordinance was to keep vehicles in rounding corners out of the path usually taken by foot passengers, and the word 'curb' was used as the most convenient term to mark one of the boundaries of the path, and not in a technical sense. When a fence was used to mark the boundary of this path, it became the curb within the meaning of the ordinance."

[21] Defendant argues that the question of whether or not the causeway is bounded by curbs was a question of fact for the jury to determine. However, we believe that it must be held as a matter of law that the highway across the causeway is a highway where the roadway is bounded on the south side by adjacent curbs. We can reach no other conclusion when we consider the definition of "curbs" and the

undisputed physical facts. If the legislature had intended to make a distinction between curbs on a highway across a causeway or bridge and those on other roadways it could easily have done so. If we are correct in this conclusion, then section 582 does not apply to the roadway here involved and the instruction should not have been given.

We granted a rehearing in this case because we wished to reconsider the question of whether the error in giving the foregoing instruction was sufficiently prejudicial to require a reversal of the judgment. In our former opinion we did not take into consideration the provisions of section 586 of the California Vehicle Code, which, so far as here pertinent, reads:

"No person shall stop, park or leave standing any vehicle whether attended or unattended, except when necessary to avoid conflict with other traffic or in compliance with the directions of a peace officer or traffic control signal device, in any of the following places:
* * * (j) In a tube or tunnel or upon a bridge".

No instruction was offered or given on said section 586, but in considering whether the giving of defendant's proposed instruction No. 17 embodying the provisions of section 582 was reversible error we must take into consideration the above quoted provisions of section 586.

[22] It cannot be doubted that the roadway across the causeway must be regarded as a bridge within the meaning of the provisions of section 586. Therefore, the stopping of an automobile on the causeway would be prima facie evidence of negligence under section 586. And while section 582 was inapplicable because it specifically states that it shall not apply upon a highway where the roadway is "bounded by adjacent curbs", it is difficult to understand how plaintiffs could have been prejudiced by the instruction given by the court on it, in view of the provisions of section 586. For the instruction given told the jury that section 582 should not apply to the driver of any vehicle which is disabled in

such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main traveled portion of a highway; and further told the jury that "The law places upon a person who stops, parks or leaves standing a vehicle on a highway in an unincorporated area, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability or the impossibility, as just stated, of handling the vehicle otherwise, but that if he makes such a showing the inference of negligence "may thereby be disproved and removed from the case."

We believe that the instant case presents a question which is peculiarly within the purview of section 4½ of Article VI of our state constitution which provides:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[23] To hold that the giving of said instruction No. 17 was reversible error would in our opinion be to fly in the face of this section of the constitution, for said instruction was really more favorable to plaintiffs than an instruction embodying the provisions of section 586 would have been. The evidence on all phases of the case was fully presented to the jury and would support a verdict for either party, and we are satisfied that no miscarriage of justice resulted from the giving of said instruction.

[24] As to the cross-appeal of defendant from the judgment in favor of plaintiffs on defendant's cross-complaint, it is stated in defendant's brief that such appeal was taken "purely to preserve cross-complainant's right, in the event that this

Court should reverse the judgment in favor of the defendant and against the plaintiffs." However, it is clear that there is ample evidence in the record to support the implied finding of the jury that defendant was guilty of contributory negligence and that the judgment against defendant upon his cross-complaint should be affirmed.

The judgment in favor of defendant upon plaintiffs' complaint and the judgment in favor of plaintiffs upon defendant's cross-complaint are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



145 Cal.App.2d 197

Alex SLOBODEN, Plaintiff and Respondent,
v.

TIME OIL COMPANY, a corporation, Doe Company, a corporation, Doe & Roe, a co-partnership, et al., Defendants and Appellants.

No. 17172.

District Court of Appeal, First District,
Division 2, California.

Oct. 19, 1956.

Welder's action for injuries received from gas explosion in tank trailer upon which he was working and which was owned by defendants. The Superior Court, County of Contra Costa, Wakefield Taylor, J., entered judgment for welder and defendants appealed. The District Court of Appeal, Draper, J. pro tem., held that where application of *res ipsa loquitur* doctrine depended upon question of fact as to what was the nature of the oral agreement between defendants and welder's employer regarding cleaning gas residue from tank in preparation for welding, although instruction on *res ipsa loquitur* was somewhat confusing, it was not prejudicially erroneous where record showed that jury re-

turned and requested a rereading of testimony as to oral agreement.

Affirmed.

1. Explosives ⇐7

If oral contract between owner of tank trailer and welding company required owner to deliver tank trailer cleaned and prepared for welding, doctrine of *res ipsa loquitur* would apply in welding company's employee's action against tank trailer owner for injuries received from gas explosion in tank upon which he was working.

2. Explosives ⇐7

In action by welder against tank trailer owner for injuries received from gas explosion in tank trailer upon which he was working, evidence as to terms of oral contract between owner of tank trailer and welder's employer as to owner's responsibility to steam clean tank trailer and prepare same for welding, presented jury question as to whether owner was required to deliver the tank trailer prepared for welding.

3. Appeal and Error ⇐1064(1)

In welder's action for injuries caused by gas explosion in tank trailer upon which he was working, where application of *res ipsa loquitur* doctrine depended upon question of fact as to what was nature of the oral agreement between tank trailer owner and welder's employer regarding whose duty it was to clean gas residue from tank in preparation for welding, although instruction on *res ipsa loquitur* was somewhat confusing, it was not prejudicially erroneous when record showed that jury had returned and requested a rereading of testimony as to nature of oral agreement.

4. Negligence ⇐121(2)

Res ipsa loquitur is based in great degree upon probabilities and is a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, rather than a rigid legal formula designed largely for exclusionary purposes.

Frederick M. Van Sicklen, James C. Calkins, Alameda, for appellants.

Hoberg & Finger, Russell F. King, San Francisco, for respondent.

DRAPER, Justice pro tem.

Plaintiff had judgment, following verdict of a jury, in this personal injury action. Defendant appeals, assigning as error the giving of an instruction upon *res ipsa loquitur*. This is the second appeal in this case, an order granting plaintiff's motion for new trial having been previously affirmed. *Sloboden v. Time Oil Co.*, 131 Cal.App.2d 557, 281 P.2d 85.

Defendant-appellant is a motor carrier of petroleum products. Welding repairs upon its tank trucks and trailers were performed from time to time by Richmond Tank Car Company, which employed respondent as a welder. Welding of the tanks carried by these vehicles could be safely performed only after the containers had been cleaned, so as to remove explosive gases and any residue of fuel.

Until 1949, appellant's tanks were cleaned by Richmond before it did the welding jobs. In that year, appellant acquired a steamer and made an oral agreement with Richmond under which appellant was to clean its own tanks before sending them to Richmond for welding.

The testimony is in conflict as to the terms of this oral agreement. There was testimony that appellant desired to do the cleaning itself to save money, and advised Richmond that appellant would steam clean each tank and prepare it for welding. Appellant, on the contrary, offered evidence that it had undertaken the steaming only to accommodate Richmond, and that the latter still was to insure that the tanks were prepared for welding. There was testimony that a proper test would require removal of the dome of the tank and inspection of the interior by a man entering the tank for that purpose. Only this method would reveal possible patches of rust and scale, behind which pockets of fuel, sufficient to cause explosion, could remain. Richmond contended that since the agree-

ment was designed to reduce the amount of work to be paid for by appellant, this type of testing was not to be performed by Richmond. Appellant contends that Richmond, by the agreement, assumed full responsibility for complete testing, if required by good welding practice.

It is undisputed that Richmond did, before welding, test each tank of appellant with a "snifter." This device is inserted into the tank, extending but a short distance from the opening thereof. Richmond contends that the "snifter" test is superficial, and was conducted only to assure that the tank delivered was not, through error, one which had not been subjected to any cleaning process at all.

In 1952, a tank trailer which had been steamed by appellant was delivered to Richmond for welding. A fellow employee of respondent made the "snifter" test, which was negative. Respondent then commenced welding on the exterior of the tank. The first weld was completed without incident, but in the course of the second weld the tank exploded, causing serious injury to respondent.

The court instructed the jury:

"If, and only in the event, you should find that there was an accidental occurrence as claimed by the plaintiff, namely: that the defendants undertook to furnish to the plaintiff's employer, Richmond Tank Company, a tank steam cleaned and prepared for welding, and if you should find that from the accidental event herein as a proximate result thereof, plaintiff has suffered injury, then you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendants."

Then followed the remainder of the instruction set forth in California Jury Instructions—Civil, 4th Ed. (BAJI) 206, together with No. 206C.

[1,2] If the oral contract between appellant and Richmond required the former to deliver the tank trailer "prepared for

welding," there can be no question that the doctrine of *res ipsa loquitur* applies. *Hinds v. Wheadon*, 19 Cal.2d 458, 121 P.2d 724; and see full discussion of the modern California rule in *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344 and *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. The conflict in the evidence as to the terms of this agreement involved only the language used by the parties, rather than its construction, and thus was a question of fact. The claim that Richmond was negligent must, on the record, be based upon its failure to thoroughly test the tank and, if necessary, clean it further, before welding it. But if appellant, by its agreement, had undertaken to supply the tank prepared for welding, no such obligation rested upon Richmond. Instruction upon *res ipsa loquitur*, conditioned that it shall be applied by the jury only upon its finding of a fact necessary to invoking of the doctrine, has been approved. *Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 432, 260 P.2d 63.

If the instruction clearly advised the jury that the doctrine should be applied only if the jury found that the agreement was to furnish tanks "prepared for welding," it was proper.

[3] The instruction is somewhat confusing in referring to defendant's undertaking as an "accidental occurrence," and is therefore not to be recommended. However, the record here makes plain that the jury was not confused. After almost an hour's deliberation, the jury asked the court for a reading of "the testimony of the oral agreement between the Time Oil Company and the Richmond Tank Car Company." The colloquy among judge and jurors made clear that the reference was to the 1949 agreement above referred to. The testimony requested was read. It is plain that the jury recognized the importance of the agreement. Thus the error in the instruction, if any, was not prejudicial.

[4] Appellant also argues that the *res ipsa loquitur* instruction was erroneous because the tank was not in the "exclusive control" of appellant. But the evidence

seems clear that the explosion was caused by explosive gases inside the tank. Richmond's employees did not touch the tank's interior. Further, appellant's employees who delivered the tank to Richmond remained near it. Even if there were a full relinquishment of control to Richmond, it does not follow that the doctrine cannot apply. *Res ipsa loquitur* is based in great degree upon probabilities. As is clear from the full discussion in *Hardin v. San Jose City Lines, Inc.*, supra; and *Zentz v. Coca Cola Bottling Co.*, supra; it is "a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience," rather than "a rigid legal formula" designed largely for exclusionary purposes. *Ybarra v. Spangard*, supra, 25 Cal.2d at page 489, 154 P.2d at page 689. Applying the reasoning of these decisions, we cannot distinguish this case from *Hinds v. Wheadon*, supra.

We find no error in the questioned instruction. The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



145 Cal.App.2d 151

William P. HOWARD, Plaintiff and Respondent,

v.

Joseph BARTOLOTTI, Defendant and Appellant.

Civ. 17199.

District Court of Appeal, First District, Division 2, California.

Oct. 18, 1956.

Rehearing Denied Nov. 16, 1956.

Hearing Denied Dec. 12, 1956.

Action for injuries sustained by a bakery wagon driver who fell over a lettuce crate left upon the sidewalk by owner of grocery store to whom the driver was de-

livering bakery products. Judgment for plaintiff in the Superior Court, County of Contra Costa, Hugh R. Donovan, J., and the defendant appealed. The District Court of Appeal, Draper, J. pro tem., held that the questions of negligence and contributory negligence were for the jury and that there were no reversible trial errors.

Judgment affirmed.

1. Municipal Corporations Ⓒ821(17, 20)

In action for injuries sustained by bakery wagon driver who fell over a lettuce crate left on sidewalk by owner of grocery store to which the driver delivered bread daily, the grocery store owner's negligence and the driver's contributory negligence were for jury.

2. Appeal and Error Ⓒ204(6)

Where defendant failed to object to the introduction of an ordinance, he could not assert on appeal error in its admission into evidence.

3. Municipal Corporations Ⓒ821(19)

In action for injuries sustained by bakery wagon driver who fell over a lettuce crate left on sidewalk by owner of grocery store to which driver delivered bread daily, whether violation of ordinance against blocking sidewalk was proximate cause of the driver's injury was properly submitted to the jury.

4. Appeal and Error Ⓒ999(1)

Where finding of the jury is within its province, it will not be disturbed on appeal.

5. Municipal Corporations Ⓒ692

An ordinance against the blocking of sidewalks was designed for the protection of users of the sidewalks and it allowed a reasonable license or exemption from use of the walks for necessary commercial purposes.

6. Appeal and Error Ⓒ882(12)

In action for injuries based on violation of an ordinance, where defendant permitted the ordinance to go into evidence without any objection, defendant was not entitled to urge on appeal error in instruc-

tions upon the ordinance where he failed to produce a record showing that he did not himself invite the alleged error by submitting instructions upon the ordinance.

Edward A. Friend, San Francisco, for appellant.

Nichols, Richard, Williams, Morgan & Digardi, Anthony R. Brookman, Oakland, for respondent.

DRAPER, Justice pro tem.

Defendant appeals from judgment for plaintiff following jury verdict in this personal injury action. Respondent was a bakery wagon driver. Appellant operated a grocery store, to which respondent delivered bread each weekday at about the same time. Crates and sacks of produce delivered to appellant's store habitually were left upon the sidewalk, and later taken into the store by appellant. On the day of the accident here involved, a shipment of produce was left on the sidewalk outside appellant's store some time before 9:30 a. m. When appellant was not busy waiting on customers, he took crates and sacks into the store. By 11:15 a. m., a large lettuce crate was left on the sidewalk. At that time, respondent drove up to make his delivery of bread. Carrying a tray of bread, he stepped backward from his truck, took one step, and fell over the lettuce crate, sustaining severe injuries.

[1] Appellant argues that the evidence is insufficient to establish his negligence. But there is evidence that appellant knew of and consented to deliveries upon the sidewalk, and knew also of respondent's customary arrival time and manner of delivery of his products. The obstruction of a highway, *Stockton Automobile Co. v. Confer*, 154 Cal. 402, 97 P. 881, or a sidewalk, *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 216, 157 P.2d 372, 158 A.L.R. 872, even in the absence of a statutory prohibition, will permit a finding of negligence when injuries proximately result from the obstruction. The likelihood of injury to plaintiff was clearly foreseeable.

The evidence fully justifies the jury's finding that appellant was negligent.

Appellant contends, also, that respondent was, as a matter of law, guilty of contributory negligence. There is no merit in this argument. Respondent testified that he looked at the sidewalk when he was parking his truck, and again before he stepped from the vehicle. Whether he exercised due care for his own safety under all the circumstances was a question of fact for the jury, and not a question of law. *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826; *M & M Livestock Transport Co. v. Cal. Auto Transport Co.*, 43 Cal.2d 847, 279 P.2d 13.

An ordinance provided:

"No person shall place or cause to be placed anywhere upon any * * * sidewalk and no person owning, occupying or having the control of any premises shall suffer to remain in front thereof upon the sidewalk * * * any boxes, bales, barrels, wood, lumber, goods, wares and merchandise * * * or any other thing obstructing the free use of or passage of said * * * sidewalk. Provided, however, that goods, wares and merchandise in transit may be allowed on the outer three feet of the sidewalk for a period not exceeding one half hour."

This ordinance was introduced in evidence without objection by appellant. The jury was instructed that if appellant violated the ordinance, a presumption arises that he was negligent; that this presumption could be overcome by evidence showing that appellant's conduct was excusable and justifiable; and that violation of the ordinance was of no consequence unless it was a proximate cause of respondent's injury.

[2] Appellant does not attack the instructions and, having failed to object to introduction of the ordinance, he cannot assert error in its admission into evidence. He does, however, contend that the evidence shows no violation of the ordinance by him. This argument is based upon the view that the ordinance proviso does

not require that each and every article be removed from the sidewalk within a half hour, and that since appellant commenced removal of his produce within the limited period, he brings himself within the exception even as to articles left on the walk for nearly two hours. To state this contention is to refute it.

[3,4] Appellant also argues that, even if he violated the ordinance, such violation was not a proximate cause of respondent's injury. But we cannot say, as a matter of law, that the violation was not a proximate cause. The jury was fully instructed as to proximate cause, and found against appellant. That finding is within the province of the jury, and will not be disturbed here. *Mosley v. Arden Farms Co.*, *supra*.

[5,6] It may be that appellant intends to argue that the ordinance is not one designed to protect a class of which respondent is a member, that it therefore establishes no duty upon appellant as to respondent, and that for this reason all instructions upon the ordinance were in error. This argument would be based upon the view that the ordinance permits obstruction of the sidewalk for a period of 30 minutes, that injury to a particular user of the walk is quite as likely to occur within 30 minutes of the placing of the obstruction as at a later time, and that therefore the ordinance is not intended for the protection of sidewalk users. However, we are disinclined to accept such a contention. Rather, it appears to us that the ordinance is designed wholly for the protection of users of the sidewalk, and that it allows a reasonable license or exemption for use of the walks for necessary commercial purposes, such exemption being strictly limited by its own terms. In any event, appellant is in no position to advance such a contention. In the first place, he permitted the ordinance to go into evidence without any objection on his part. If he now seeks to urge error in the instructions upon the ordinance, he is similarly without basis for complaint, because he has failed to produce a record here which shows that he did not himself invite

the alleged error by submitting the instructions upon the ordinance. *People v. Letourneau*, 34 Cal.2d 478, 493, 211 P.2d 865.

The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Donald Richard RANDAZZO, Defendant
and Appellant.*

Cr. 5264.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1956.

Rehearing Denied Oct. 30, 1956.

Hearing Granted Nov. 14, 1956.

Defendant was convicted of robbery and kidnapping for purpose of robbery. The Trial Court, Kenneth C. Newell, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., 132 Cal.App.2d 20, 281 P.2d 289, affirmed order and judgment. On motion to recall remittitur, the District Court of Appeal, 299 P.2d 307, vacated judgment and put appeal on the calendar for consideration of an amended petition for rehearing. The District Court of Appeal held that where affirmation of sentence had been erroneously predicated upon statute as it existed prior to defendant's alleged criminal act, and at time of such act statute did not make it an offense, separate from robbery, to hold or detain a person for purpose of committing robbery, judgment as to such count would be reversed.

Judgment reversed in part.

* Opinion vacated 310 P.2d 413.

1. Kidnapping ☞

Under 1951 amendment to Penal Code, it is not an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, and person, whose criminal act was committed after enactment of amendment, could not be sentenced to life imprisonment, without possibility of parole, for crime of kidnapping with intent and for purpose of committing robbery. West's Ann.Pen.Code, § 209.

2. Criminal Law ☞1186(1)

Where affirmation by District Court of Appeal of sentence of life imprisonment, without possibility of parole, following conviction for kidnapping with intent and for purpose of committing robbery, was erroneously predicated on statute as it existed prior to defendant's alleged criminal act, and at time of such act statute did not make it an offense, separate from robbery, to hold or detain person for purpose of committing robbery, judgment as to such count would be reversed. West's Ann.Pen.Code, § 209.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

PER CURIAM.

[1,2] It appearing that the opinion of this court, filed March 29, 1955, affirming a conviction of "life imprisonment without possibility of parole" for the crime of kidnapping "with intent and for the purpose of committing robbery", under Section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, and prior to defendant's alleged criminal acts, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, and the remittitur in said case having been recalled as to Count II by order of this court filed on July 11, 1956 and the judgment as to Count II having

been vacated by said order, and the matter now being submitted for decision.

It is hereby ordered, good cause appearing therefor, that the judgment appealed from, in respect to Count II, is hereby reversed.



145 Cal.App.2d 113

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

David SOLORIO and Claudine Scott,
Defendants,

Claudine Scott, Defendant and Appellant.
Cr. 1127.

District Court of Appeal, Fourth District,
California.

Oct. 15, 1956.

Defendants were convicted in the Superior Court, San Bernardino County, Carl B. Hilliard, J., of assault with intent to commit robbery, and one defendant appealed from the judgment of conviction and from a purported order denying a new trial. The District Court of Appeal, Griffin, J., found that no new trial motion had been made and agreed with the Attorney General that any attempt of appellant to inject into appeal matters not presented to trial court was of no avail.

Judgment affirmed and attempted appeal from purported order denying new trial dismissed.

Criminal Law ⇨1028

Defendant could not inject into appeal from conviction for assault with intent to commit robbery matters not presented to trial court. West's Ann.Pen.Code, § 220.

Charles G. Potter, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants David Solorio and Claudine Scott were convicted by the court, sitting without a jury, of the crime of assault with intent to commit robbery, in violation of Section 220 of the Penal Code. Appellant Scott admitted a prior conviction of a felony and was sentenced to State's prison. Defendant Solorio's appeal was dismissed on September 5, 1956, after he abandoned it.

Appellant Scott appeared in propria persona and gave notice of appeal and later, at his request, counsel was appointed to represent him on this appeal.

The victim testified that on January 29, 1956, at about 6 p. m., he was crossing Third Street at D Street in San Bernardino, and as he neared an alley "two guys grabbed me and dragged me into the alley"; that he did not recognize their faces but one was a Mexican and the other was colored; that they threatened him, knocked him down, injured him and dragged him up the alley and went through his pockets; that an officer came along about that time and he told him these men had "rolled" him; that he had between \$45 and \$50 on him at the time and then it was gone.

The police officer testified he saw these defendants drag the complaining witness into the alley and that the complaining witness appeared to be intoxicated at the time; that he saw both defendants kneeling over the complaining witness, and appellant Scott told him that the victim (Courson) was trying to "roll" him (Scott) and the officer told Scott it looked more like he (Scott) was trying to rob Courson. Other officers were summoned to the scene. They found the complaining witness's wallet lying at defendant Solorio's feet. The officer picked up the complaining witness and took him to a near-by police car and just then the officer looked around and saw the appellant Scott throw a wallet on the ground. He picked it up and it was Scott's wallet. Scott was searched and he had only a few cents

on his person. Later he was questioned at the police station and said that Solorio noticed the complaining witness and started after him; that he (Scott) told him to leave him alone but Solorio said: "No, he has some money"; that Solorio approached the complaining witness, grabbed him and forced him back into the alley, knocked him down, and took his wallet from him; and that he, Scott, was only in the alley to pull Solorio off of the complaining witness.

When Solorio was interviewed by the same officer he told him that appellant Scott approached the complaining witness and asked for a match; that Scott grabbed him and took him back into the alley; and that he, Solorio, did not enter the alley.

The two defendants were later brought together and both were asked to tell their stories, which they did. On the witness stand Scott said he had previously seen the complaining witness in a liquor store drinking wine; that as he approached defendants, Scott asked him for a cigarette and the complaining witness started to run down the alley and fell a couple of times; and that he did not touch him nor take any money from him. Neither he nor defendant Solorio denied making the statements to the officers above indicated, and Solorio's story was similar in substance to that related to them.

Apparently appellant Scott now contends that since his conviction he has obtained some evidence indicating that Solorio has since made statements to others in the Chino prison to the effect that appellant Scott had nothing to do with the robbery; that he had no knowledge of the above-named crime; that Solorio took the complaining witness's money and submitted to a search by the officers, but they did not find it, because Solorio was "too slick". He offered to furnish the names of the witnesses who would so testify and accompanied his request with the names of two inmates of the institution. He stated they would swear under oath that these statements were true, and enclosed their affidavits to this effect.

Counsel appointed for appellant made full investigation and reported to this court that from his examination of the record on appeal his opinion was that there was no substantial question of law which could be raised on this appeal; and that the rulings of the trial judge were fair and proper. The Attorney General reported accordingly and claimed that any attempt of appellant to inject into this appeal matters not presented to the trial court were of no avail in this proceeding.

We have fully examined the record of the evidence and we are in accord with the reports. No motion for new trial was made and the attempted appeal therefrom is dismissed.

Judgment affirmed.

BARNARD, P. J., concurs.



145 Cal.App.2d 41

Merle A. WILBUR and Marian E. Wilbur,
Plaintiffs and Appellants,

v.

Dale Eugene CULL, Ross E. Cull and
Mildred L. Cull, Defendants,

Dale Eugene Cull, Defendant and
Respondent.

Civ. 8684.

District Court of Appeal. Third District.
California.

Oct. 10, 1956.

Action for wrongful death of minor child. The Superior Court, Sutter County, Arthur Coats, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that where there was substantial evidence which, if believed, would have upheld the verdict in favor of plaintiffs under doctrine of last clear chance, it was prejudicial error for

trial court to refuse to so instruct and to send case to jury solely upon question of contributory negligence of child six and one-half years of age.

Judgment reversed.

1. Appeal and Error Ⓒ928(1)

On plaintiffs' appeal on ground that trial court erred in refusing to instruct on doctrine of last clear chance, District Court of Appeal would review the evidence in the light most favorable to plaintiffs, who were entitled to such instruction if the evidence so viewed could establish the elements of the doctrine.

2. Trial Ⓒ203(1)

It is the duty of a trial court to instruct on every theory of a case finding support in the evidence.

3. Automobiles Ⓒ246(38)

Where 15 year old driver was following another automobile on a highway, and such driver after preceding automobile swerved left to avoid hitting a six and one-half year old child who was riding a bicycle along the shoulder of the road in the same direction, struck the child with his automobile after the child turned onto the paved portion of the road and started to cross it diagonally, plaintiffs were entitled to have death action against 15 year old driver submitted under doctrine of last clear chance, rather than on issue of child's contributory negligence.

J. Adrian Palmquist, Oakland, Stevenson, Hauck & Del Pero, Yuba City, and Francis T. Cornich, Berkeley, for appellants.

Russell A. Harris, Sacramento, for respondent.

PEEK, Justice.

The sole contention made by plaintiffs in this appeal is that the trial court erred in refusing to instruct the jury on the doctrine of last clear chance.

[1] When we view the evidence, as we must, in the light most favorable to plaintiffs, "since plaintiff[s] [are] entitled to an

instruction thereon if the evidence so viewed could establish the elements of the doctrine", *Selinsky v. Olsen*, 38 Cal.2d 102, 103, 237 P.2d 645, 646, the following is disclosed: Defendant Dale Cull, a minor, 15 years of age, was driving a Nash Rambler convertible westerly along the north side of Butte House Road in Sutter County at a speed variously estimated to have been from 40 to 65 miles an hour. Riding with him in the car at that time were six others of approximately the same age. Four of the group, including Cull, were in the front seat; the other three were in the rear seat. He first saw the victim of the fatal accident, Marty Wilbur, age six and one-half, from a distance of 300 or more feet away. Marty was riding a medium size, 20-inch wheel bicycle in a westerly direction along the right shoulder of the highway. In front of defendant, and traveling in the same direction, was a second car. As that vehicle approached Marty, he turned to the left onto the paved portion of the highway. The driver sounded his horn and swerved left to avoid hitting Marty who then turned back to his former position on the shoulder. The evidence as to the distance between the two cars at that time is both vague and conflicting; that is, there is testimony by the defendant, under section 2055 of the Code of Civil Procedure, that the distance was 300 feet or more, and other testimony by him when he later testified in his own behalf that only a distance of two car lengths separated them. In any event the evidence shows that after the first car was past, Marty again turned his bicycle to the left onto the paved portion of the highway and continued diagonally across the same to a point on the left shoulder where he was struck by defendant's car. Marty gave no signal of his intention to turn, nor did he at any time look to the rear. The evidence is again vague as to what defendant did after first noticing Marty's intention to turn onto the paved traffic lanes. He did testify, however, that he did not sound his horn at any time; that at some point he took his foot off the gas; and that when he first applied the brakes he was traveling at a

speed of approximately 35 miles per hour. Tire marks on the highway showed that the car skidded for a distance of 100 feet and then continued on off the left shoulder of the highway and into a tomato field for a total distance of 196 feet. The point of impact was upon the left shoulder of the highway.

It is plaintiffs' contention that the facts summarized establish the necessary elements for application of the last clear chance doctrine. These elements have been stated as follows:

"That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure. It has been said that such failure by defendant to use ordinary care under such circumstances amounts to a degree of reckless conduct that may well be termed willful and wanton, and when an act is thus committed, contributory negligence upon the part of the person injured is not an element which will defeat a recovery." Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917.

[2, 3] The factual situation disclosed by the record as summarized would appear to fall squarely within the rule set forth in the Girdner case. Therefore since it is well established that "[i]t is the duty of the court to instruct on every theory of the case finding support in the evidence", Daniels

v. City & County of San Francisco, 40 Cal. 2d 614, 623, 255 P.2d 785, 791, and since there was substantial evidence which, if believed, would have upheld a verdict in favor of the plaintiffs under the doctrine of last clear chance, it was error for the trial court to refuse to so instruct and to send the case to the jury solely upon a question of the contributory negligence of the small child.

In view of the conclusion which we have reached in this regard, it becomes unnecessary to discuss whether or not the instruction submitted by plaintiffs was erroneous, as contended by defendant, since upon a retrial, the error if any there be in that instruction may be corrected.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



145 Cal.App.2d 206

Esther UNDERWOOD, Plaintiff and Appellant,

v.

Millard Fillmore ALEXANDER, Defendant and Respondent.

Civ. 8837.

District Court of Appeal, Third District, California.

Oct. 19, 1956.

Hearing Denied Dec. 12, 1956.

Action by automobile guest for personal injuries sustained when automobile in which she was riding collided with vehicle being driven by defendant in opposite direction. The Superior Court, Solano County, Harlow V. Greenwood, J., rendered judgment for defendant and guest appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence presented jury issue as to negligence of defendant motorist

in colliding with left turning automobile in which guest was riding on a rainy night.

Affirmed.

1. Automobiles ⇨245(14)

In automobile guest's action for injuries sustained when automobile in which she was riding collided at intersection with defendant's oncoming vehicle while host was attempting a left turn on rainy night, evidence presented jury issue as to negligence of defendant.

2. Automobiles ⇨246(22)

In guest's action for injuries sustained when host's automobile collided with defendant's oncoming automobile, instruction that if jury found the sole proximate cause of accident was due to fact that host made an improper turn into path of defendant's automobile, defendant was completely exonerated from any liability, was not erroneous on ground that it exonerated defendant from liability even though his negligence was the sole proximate cause of the accident, providing only his negligence was due to host making an improper turn.

Philander Brooks Beadle and Myer N. Penn, San Francisco, for appellant.

Alexander, Bacon & Mundhenk and Herbert Chamberlin, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by the plaintiff from a judgment entered upon a jury verdict for the defendant. Appellant brought the action to recover damages for personal injuries received in an intersection collision between an automobile wherein she was riding as a guest, and which was making a left turn at the intersection, and an automobile driven by respondent.

Herein, appellant contends that respondent was negligent as a matter of law and that the trial court committed prejudicial error in giving a certain instruction. The following is a statement of facts sufficient for the resolution of the issues proposed,

culled from the record in accordance with the rule that the evidence is to be considered most strongly for the respondent and without regard to conflicting testimony: The collision occurred at 11:30 P.M. on March 18, 1953 at the intersection of Highway 40 and Georgia Street, a public road in Solano County. The intersection of the two roads is near the City of Vallejo, and Highway 40 runs north and south at that point. Respondent was driving his vehicle south and toward the intersection. Appellant's hostess, a Mrs. Barker, was driving her automobile north toward the intersection. She intended to turn left and proceed on Georgia Street. Highway 40 at the point of the collision and for some distance on either side is a four-lane highway with the north and south lanes separated by a dividing strip. Approaching Georgia Street special lanes were provided for turning onto that street. Traffic at the intersection was controlled by green and red traffic control signals, but unlike other intersections in the vicinity there was no special traffic control signal for left turns. For example, when the signal for southbound traffic on Highway 40 was green at the intersection the signal was also green for northbound traffic on the highway and for traffic desiring to turn left into Georgia Street at the intersection. There was, however, a warning sign bearing the legend "two way signal, watch for opposing traffic". In his southbound course on Highway 40 respondent approached its intersection with Georgia Street at a speed which he estimated to be about 35 miles an hour. (Another eyewitness estimated his speed at 60 miles an hour.) It was dark, rain was falling, the pavement was wet and his windshield wipers were operating. His automobile was in good mechanical condition and equipped with good tires and brakes. He was traveling on the inside traffic lane next to the dividing strip. Visibility ahead had a range of about 300 feet. Respondent was watching the road ahead as he neared the intersection. He had been over the road a number of times and was familiar with the intersection and with the system of traffic

control signals. The light ahead of him was green at all times as he neared the intersection. He first saw the Barker car when he was about 40 feet north of the intersection, and that car was then making a left turn directly into the path of his automobile. It continued to move forward, he applied his brakes and reduced his speed to about 30 miles an hour, at which speed he struck the right side of the other car. In her northbound course on Highway 40 Mrs. Barker approached the intersection at a speed of about 30 miles an hour. She moved into the turn-out or left lane, intending to make a left turn at Georgia Street, which turn would carry her across the southbound lanes of the highway. When she reached the intersection the signal was red and she stopped. She had been through the intersection many time and was familiar with the situation confronting her. She so testified; but it is in evidence that she told an arriving traffic officer she "thought the green light was for vehicles turning left". From the stopped position at the intersection Mrs. Barker saw respondent's automobile approaching. She remained in this stopped position for a few seconds, even after the signal had turned to green and then started to make her left turn. She said that before she started she saw respondent's automobile about 350 feet away and that as her car began facing west the approaching car was around 275 feet distant. She continued to drive forward and make the left turn at a speed testified to as being from 8 to 25 miles per hour. She did not again see the respondent's car until it was 10 feet away from her. There was testimony that the collision occurred in the inside southbound traffic lane and other testimony that the collision occurred in the outside southbound lane.

[1] We think the contention of the appellant that respondent was guilty of negligence as a matter of law cannot be sustained; and, on the contrary, that the question of his negligence was one for the jury. The jury could, of course, resolve the question of what the true situation

was in one of various ways from the foregoing evidence. For instance, the jury could conclude that respondent had arrived at a point close to the intersection before the Barker car began to turn, so that its turn could not be made without interfering with respondent's progress. In that situation respondent would have the right of way and would be entitled to rely upon opposing traffic to yield until the circumstances were such in the judgment of the jury that he could no longer make that assumption. The jury could further conclude that by the time that situation arose, the approaching car was intercepting his path at such speed that he could not stop and that he did whatever he could to lessen his speed before the impact. We hold that the record will not sustain the contention that respondent was negligent as a matter of law.

[2] Appellant contends that the court prejudicially erred in giving the following instruction to the jury: "If you find that the sole proximate cause of the accident was due to the fact, if it be the fact, that Mrs. Barker suddenly and improperly made a turn into the path of defendant's car, then this completely exonerates defendant from any liability, and under such circumstances your verdict should be in his favor." Appellant says of this instruction that it was a formula instruction which told the jury that under a given condition defendant was completely exonerated from liability, and that the verdict should then be in his favor; that the condition as stated was no more than that the sole proximate cause of the accident was "due to" the fact of Mrs. Barker's suddenly and improperly turning into the path of defendant's car. Says appellant: "If the instruction were followed, defendant was thus exonerated from liability even though his negligence were found to be the sole proximate cause of the accident, providing only that his negligence was due to Mrs. Barker making a sudden and improper turn." We do not think that the jury could have so construed the instruction, particularly in view of the fact that they

had been carefully and fully instructed on the subject of proximate cause and told repeatedly that if the negligence of the defendant, should the jury find him to have been negligent, was a proximate cause of the accident, then their verdict should be for the plaintiff. We think the instruction challenged would have been understood by the jury as saying no more than that if the sole proximate cause of the accident was the improper conduct of Mrs. Barker, then the defendant was entitled to their verdict. So understood, the instruction was correct.

The judgment appealed from is affirmed.

PEEK, J., and McMURRAY, J. pro tem.,
concur.



Elizabeth R. COHEN, Plaintiff and
Respondent,

v.

The PENN MUTUAL LIFE INSURANCE
COMPANY, a Corporation, Defendant
and Appellant.*

No. 16702.

District Court of Appeal, First District,
Division 1, California.

Oct. 11, 1956.

Action by beneficiary to recover on life policy. The Superior Court, County of Marin, Jordan L. Martinelli, J., entered judgment for beneficiary and denied insurer's motion for judgment notwithstanding the verdict and insurer appealed. The District Court of Appeal, 301 P.2d 253, entered judgment for insurer and beneficiary petitioned for rehearing. The District Court of Appeal held that instruction on test as to materiality of representations made by insured in its application, which

* Opinion vacated 312 P.2d 241.

instruction stated that materiality was to be determined solely by probable and reasonable inference of an alleged false statement of fact upon insurer in forming its estimate of the disadvantage of the proposed policy of insurance or in making its inquiries, was not rendered prejudicially erroneous by use of the words "or in making its inquiries".

Petition for rehearing denied.

1. Appeal and Error ⇨1064(1)

In action on life policy, wherein insurer alleged insured made false and material misrepresentations, instruction on test of materiality of representations, which instruction stated that materiality was to be determined solely by probable and reasonable inference of the alleged false statement of fact upon insurer in forming its estimate of the disadvantage of the proposed policy of insurance or in making its inquiries, was not rendered prejudicially erroneous by use of the words "or in making its inquiries". West's Ann. Insurance Code, § 334.

2. Trial ⇨284

A party is entitled to a correct statement in an instruction of an applicable legal principle of law, and he need not interpose a specific objection to an instruction at the time it is given but it will be deemed to have been excepted to. West's Ann. Code Civ. Proc., § 647.

3. Appeal and Error ⇨882(12)

Even if a party requests and the court rejects an erroneous instruction, such rejection does not of itself justify the giving of an erroneous instruction not requested by that party.

Henry C. Clausen, Henry C. Clausen, Jr., Walker Lowry, San Francisco (McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, of counsel), for appellant.

Rockwell & Fulkerson, San Rafael, for respondent.

PER CURIAM.

[1] Upon petition for rehearing plaintiff for the first time calls attention to the fact that one of the three incomplete instructions based on section 334 of the Insurance Code was at the end of a paragraph the preceding sentence of which did state that materiality "is to be determined not by the event, such as whether or not an electrocardiogram was given Sydney J. Cohen in the course of his physical examination made by the United States Army, but rather materiality is to be determined solely by the probable and reasonable influence of that fact upon the defendant insurance company in forming its estimate of the disadvantages of the proposed policy of insurance or in making its inquiries."

We are not persuaded to a different conclusion by the discovery of the words "or in making its inquiries," occurring as they did in the middle of a paragraph and in a separate sentence from the instructions which positively, repetitively, and in clearly expressed terms told the jury that the test of materiality is whether or not the true facts, if known, would have rendered the contract "less desirable" to the insurance company. The very fact that plaintiff did not until now direct our attention to the words "or in making its inquiries" (whether that means that plaintiff did not until now discover them or did not until now attach significance to them) emphasizes the unlikelihood that the jury while listening to the reading of the instructions (all of them) sifted those words out, became sensitive to their full meaning, and with due

consideration and care applied them to the facts of the case.

[2, 3] Another point not urged before (at least, not with the emphasis plaintiff now gives it) is the claim that defendant did not prepare and request an instruction on materiality based upon section 334 of the Insurance Code and, therefore, is in no position to assert error in the instructions on that subject which the court did give. Specifically, the claim is that, at most, the challenged instruction was merely incomplete (in the sense that it may not have gone far enough; yet, did not amount to an incorrect statement of law); hence, if defendant wanted the gap or details filled in, it was under a duty to prepare and submit an instruction designed to accomplish that purpose. As to the erroneous character of the instruction, we are not persuaded to a view different from that expressed in the opinion on file see — Cal.App. —, 301 P.2d 253. In such a case, a party is entitled to a correct statement of the applicable legal principle, at least when an instruction on the subject in question is given. He need not interpose a specific objection at the time the instruction is given. "[G]iving an instruction" is "deemed to have been excepted to." Code Civ.Proc. § 647;¹ *Pipoly v. Benson*, 1942, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515. Indeed, even if a party requests and the court rejects an erroneous instruction, that does not of itself justify the giving of an erroneous instruction not requested by that party. *Jermane v. Forfar*, 108 Cal.App.2d 849, 855-

1. The 1953 amendment of section 647, Stats.1953, ch. 715, p. 1984 introduced a potential ambiguity.

That amendment interpolated (between the expression "any misstatement * * * in commenting upon or in summarizing the evidence," and the concluding declaration "are deemed excepted to") the following: "and, if the party, at the time when the order, ruling, action or decision is sought or made, or within a reasonable time thereafter, makes known his position thereon, by objection or otherwise, all other orders, rulings, actions or decisions".

Did the Legislature thereby intend to require an aggrieved party to make timely objection to each of the many orders and rulings which for several decades had been "deemed excepted to"?

We think not. It reasonably appears that the intentment of the 1953 insert was to deem "all other" orders, rulings, actions and decisions *excepted* if the party "at the time" or "within a reasonable time thereafter" makes "known his position thereon"; not to require any objection; then or later, to any order, action or decision not embraced within the "all other" category.

856, 240 P.2d 351, 30 A.L.R.2d 860, and authorities there cited.

Plaintiff's petition for rehearing is denied.



145 Cal.App.2d 121

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Cleon MONTGOMERY, Defendant and
Appellant.

Cr. 5645.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1956.

Prosecution for second degree burglary. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and overruled motion for new trial and defendant appealed from the judgment and from the sentence. The District Court of Appeal, Doran, J., held that no appeal lies from the sentence, and that evidence was sufficient to sustain the conviction.

Attempted appeal from sentence dismissed and judgment affirmed.

1. Criminal Law §1023(10)

No appeal lies from a sentence.

2. Burglary §41(1)

Evidence sustained defendant's conviction of second degree burglary of machinery found in his possession.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

[1] Defendant is charged with burglary with two prior convictions. The priors were admitted. A jury trial resulted in a conviction of second degree burglary. Defendant appeals from the "judgment sentence". Since no appeal lies from the sentence, the purported appeal therefrom must be dismissed. *People v. Douglas*, 141 Cal.App.2d 33, 296 P.2d 1.

Appellant contends that the "People failed to establish a corpus delicti", that the evidence was insufficient and that a motion for a new trial was improperly denied.

The facts, as recited in respondent's brief, are as follows:

"At approximately 4:10 a. m. on June 7, 1955, two officers of the Los Angeles Police Department encountered appellant and Eddie Lee Sales in an alley in the rear of an apartment house at 4054 South Central. Appellant was in the process of taking a brass roller out of the back of his car. He and Sales had been riding in this car. When appellant saw the police, he walked to the rear of the car, removed a jack from the trunk and started to jack up the car. The police asked appellant if he was going to change a flat tire. He said no, that he was going to rotate his tires. Sales continued taking other pieces out of the car. A large gear and some brass rollers and pieces of brass pipe were observed in the back seat of the car. (The officers at the scene were Conroy and Doss.)

"When the police asked appellant what he was doing in the alleyway, he said he was going home and that he lived there in the apartment building. He did not know the address, however. Subsequently, the police found that he lived some 35 blocks away.

"In reply to questions as to the source of the items in the car, appellant stated that he had bought them from a man at a foundry. * * *

"The gear in the back of the automobile had a tag 'United Piece Dye Works, 5000

Long Beach'. This address was about 14 or 15 blocks from where the officers encountered appellant. * * *

"Walter Wigglesworth, the chief engineer of the United Piece Dye Works, identified the heavy brass gear as part of a stock of spare parts that were kept in a wooden building in the rear of the premises. This building was Mr. Wigglesworth's storehouse. The gear was one of the items found in the rear of the automobile appellant and his companion were unloading the night of the arrest. Various brass rollers and pipes were kept in this building. A few days earlier, when Mr. Wigglesworth had last been in there, the building was intact and the heavy brass gear was present. Upon his examination of the building at 8:00 a. m., June 7, 1955, Mr. Wigglesworth saw a hole in the wall, large enough for a man to crawl through, and found that the heavy brass gear and some brass rollers and pipes were missing. (Beside the gear, several brass rollers and pipes were found in appellant's and Sales' automobile.)

"Mr. Wigglesworth had given no permission to anyone to take the gear nor to break a hole in the building.

"The assistant to the chief engineer, Bert Nold, had a key to the building, as well as Mr. Wigglesworth. He gave no permission to anyone to break into or take anything from the building. He found two holes in the building, each about two feet by three, the morning of June 7, 1955, and missed a gear similar to the one marked People's Exhibit No. 1.

"Officer R. B. Dougherty of the Los Angeles Police Department had a conversation with appellant the morning of June 8, 1955, in connection with the case at bar, in which appellant stated: 'I won't cop out to no burglary because it wasn't a burglary. I will cop out if I can get County Jail time.'"

[2] That the evidence is sufficient, as a matter of law, there is no question. The record establishes, as recited in respondent's brief, that, "The testimony of Officer Con-

roy reflected that appellant was found in possession of the subject of the crime, the brass gear, rollers and pipe.

"Officer Dougherty testified that appellant offered to 'cop out' if he could be sentenced to the County Jail.

"Appellant gave conflicting accounts to the police of where the property was obtained. He gave still another version at the trial. He made a false statement as to where he lived. When he first saw the police, he stopped unloading the gear from the car and jacked up the car, with the explanation that he was going to rotate the tires. This, despite the fact that it was 4:10 a. m.

"The foregoing circumstances of possession and of acts indicative of a consciousness of guilt sufficiently support appellant's conviction."

In the light of the record, it does not appear that denial of the motion for a new trial was error.

The attempted appeal from the sentence is dismissed. The judgment is affirmed.

WHITE, J. P., and FOURT, J., concur.



144 Cal.App.2d 781

Marle LUBIN, Plaintiff and Appellant,

v.

Mollie LUBIN, Executrix of the Estate of
Herbert Lubin, deceased, Defendant
and Respondent.

Civ. 21481.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1956.

Rehearing Denied Oct. 29, 1956.

Hearing Denied Nov. 28, 1956.

Action by divorced wife against estate of former husband for money judgment based upon breach of terms of property

settlement contract or divorce decree of the sister state. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment adverse to wife and wife appealed. The District Court of Appeal, Ashburn, J., held that where effectiveness of entire agreement between husband and wife for property settlement was conditioned upon property settlement contract being embodied in divorce decree of sister state and such decree approved contract and all of terms thereof and made contract by reference a part of decree, incorporation by reference was sufficient to merge contract into divorce decree and to sustain action upon judgment with respect thereto.

Reversed.

1. Divorce ⚡400(1)

Question of whether provisions of agreement relating to entry of divorce decree in sister state and providing for insurance on life of husband for benefit of wife were incorporated in such decree and merger thereby effectuated was one of law of sister state.

2. Evidence ⚡80(1)

Where counsel had made no claim in action on divorce decree of sister state that pertinent laws of sister state differed from local laws on question of incorporation and merger of property settlement agreement in divorce decree and there was no such discussion in trial court and District Court of Appeal's research disclosed no substantial differences, District Court of Appeal would proceed on appeal upon presumption that laws of sister state were same as local laws in all respects pertinent to discussion.

3. Divorce ⚡255

Intention is primary criterion of merger of property settlement agreement into divorce decree.

4. Appeal and Error ⚡1008(3)

Where there was no oral evidence on question whether there was merger of property settlement agreement into divorce

decree, question was one of interpretation of written instruments and trial court's findings were not binding on appeal.

5. Divorce ⚡400(1)

Where effectiveness of entire agreement between husband and wife was conditioned upon property settlement contract being embodied in divorce decree of sister state and such decree approved contract and all terms thereof and made contract by reference a part of decree, incorporation by reference was sufficient to merge contract into divorce decree and to sustain action upon judgment with respect thereto.

6. Husband and Wife ⚡279(1)

Under husband's and wife's property settlement contract making incorporation of contract's provisions in divorce decree a condition precedent to existence or enforcement of any of husband's promises, when court entered divorce decree confirming contract and all terms thereof and making contract by reference a part of decree, promises became effective immediately and right of action accrued to wife upon breach of promises.

7. Limitation of Actions ⚡43

Statute of limitation begins to run in any case upon accrual of cause of action which means a present right to sue thereon.

8. Limitation of Actions ⚡46(5)

Cause of action upon contract which is to be performed upon death of promisor does not accrue until that event occurs.

9. Specific Performance ⚡75

Contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction are not enforceable in equity.

10. Divorce ⚡254

Action to amend divorce decree to set forth property settlement contract would not be available where decree made contract by reference a part of decree.

11. Divorce ⇨400(1)

Sister state's divorce decree making property settlement contract by reference a part of decree would not sustain contempt proceeding to enforce such contract.

12. Divorce ⇨397(3)

A foreign judgment for alimony or the like cannot be enforced by a contempt proceeding.

13. Contempt ⇨40

A contempt proceeding is "not a civil action."

14. Contempt ⇨74

A contempt proceeding cannot result in money judgment in favor of aggrieved party.

15. Limitation of Actions ⇨43

Right to institute contempt proceeding does not start statute of limitation to running upon an unmatured cause of action.

16. Declaratory Judgment ⇨114

Declaratory relief would have been available to divorced wife at any time after former husband breached obligations under property settlement contract made a part of divorce decree by reference.

17. Limitation of Actions ⇨5(3)

Proceeding for declaratory relief does not affect and is not affected by statute of limitation except that it is barred when an action for coercive relief with respect to subject matter is barred and not before that time.

18. Divorce ⇨392

Ten year statute of limitation was applicable to action by divorced wife against former husband's estate for money judgment based on sister state's divorce decree. West's Ann.Code Civ.Proc., § 337.5, subd. 3.

19. Limitation of Actions ⇨46(5)

Under husband's and wife's property settlement agreement which provided that husband will maintain premiums on insurance policies payable on his death to wife and under divorce decree of sister state which made contract by reference a part of decree, wife had no matured cause of action until husband's death on January

29, 1953 and action commenced February 16, 1954 on judgment was not barred by ten year statute of limitations. West's Ann.Code Civ.Proc., § 337.5, subd. 3.

20. Action ⇨63

Defense of laches does not lie in a law action.

21. Pleading ⇨49

Nature of an action is not determined by prayer but by factual allegations of body of complaint.

22. Action ⇨25(2)

Action by divorced wife against former husband's estate for payment of obligation arising from property settlement contract which was made part of divorce decree of sister state was an action at law. West's Ann.Code Civ.Proc., § 1913.

23. Executors and Administrators ⇨437(3)

Wife, who learned prior to July 24, 1933 that husband had allowed policies to lapse contrary to property settlement contract providing that husband would maintain premiums on insurance policies payable to wife on death of husband and decree whereby court confirmed contract, was not barred by laches from maintaining action, filed February 16, 1954 after husband's death on January 29, 1953, for husband's failure to pay premiums.

24. Equity ⇨72(1)

"Laches" is not mere delay but delay that works a disadvantage to another and a person is guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or to abstain from something, whereby the latter might be injured should he be allowed to enforce his rights.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

25. Equity ⇨84

Laches is not applied strictly between near relatives and is not designed to punish a plaintiff but is invoked where refusal would be to permit an unwarranted injustice.

26. Equity ⇨75

A delay in bringing suit will be excused where there exists an actual and substantial impediment thereto.

27. Equity ⇨75

A party cannot be charged with negligent delay in instituting suit so long as his interest is of such a nature that it cannot be enforced by action; so to charge him, his right to sue must be complete.

28. Evidence ⇨592

Where only oral evidence on issue of laches in action by divorced wife against deceased husband's estate on divorce decree or for breach of property settlement agreement was testimony of wife, rejection of wife's testimony could not create affirmative evidence to contrary.

29. Evidence ⇨75

Fact that one testifies falsely may and usually does afford an inference that he or she is concealing the truth, but it does not reveal the truth itself or warrant any inference that the truth is the direct converse of the rejected testimony.

30. Executors and Administrators ⇨437(3)

Husband's estate was not prejudiced by delay of former wife in bringing action less than one year after husband's death for husband's failure to pay premiums on life policies payable to wife upon death of husband in accordance with property settlement contract and divorce decree making contract a part of decree by reference.

31. Contracts ⇨253, 256

Intent to abandon or rescind a contract must be mutual. West's Ann.Civ.Code, § 1689, subd. 5.

32. Husband and Wife ⇨281

In action by divorced wife against former husband's estate for husband's failure to pay premiums on insurance policies payable to wife upon death of husband in accordance with property set-

tlement contract and divorce decree, evidence did not sustain finding of mutual consent to abandonment or rescission of contract.

Meyer Berkowitz, Beverly Hills, for appellant.

Gold & Needleman and Harry M. Fain, Beverly Hills, for respondent.

ASHBURN, Justice.

This case presents the problem of method and effect of incorporating a property settlement agreement into a divorce decree, also that of accrual of a cause of action upon an agreement to maintain insurance to provide support for the wife from and after the husband's death, and other related matters, such as abandonment and rescission of the agreement. Plaintiff wife appeals from a judgment denying her any relief.

Herbert Lubin and plaintiff Marie were married on June 29, 1924, lived together until May 6, 1930 when he deserted her and took their two boys, aged five and two years, with him to Europe. There the three remained until after the making of a property settlement agreement on April 11, 1932. The primary question in this case is whether that agreement was effectually incorporated into the divorce decree which the wife obtained in Chicago on May 6, 1932. The trial court held that it was incorporated and merged into the decree but that the obligation to provide insurance, therein expressed, disappeared in the process.

The agreement, negotiated and drawn by the attorneys for the respective parties while Herbert and the boys were still in Europe, was carefully designed to avoid the making of any promises which would become effective unless or until same were embodied in a decree of divorce entered in an action to be filed by Marie in Chicago.¹ Section "Second" of the doc-

1. Marie then had a divorce action pending in Los Angeles. No claim is made that this agreement is contrary to public pol-

icy and the circumstances indicate that it was not. *Hill v. Hill*, 23 Cal.2d 82, 142 P.2d 417; *Shankland v. Shankland*, 301

ument provides: "In the event that the Court shall determine that said Marie is entitled to a decree in said suit, said Herbert hereby consents to the entry of a decree therein and authorizes his said solicitors to consent to the entry of such a decree, *provided such decree embodies the provisions with respect to the custody of the children of said Herbert and Marie and the property settlement hereinafter contained.*" (Emphasis added.) Each promissory paragraph is preceded by this language or its substantial equivalent: "The parties hereto hereby agree that if the court shall determine that said Marie is entitled to a decree in said action, said decree shall provide" (quoting section "Third"). That portion of the contract covers the matter of custody of the boys in the father, visitation by the mother, place of their residence and like matters. Section "Fourth" contains this: "The parties hereto hereby agree that if the Circuit Court of Cook County shall determine that said Marie is entitled to a decree in said action, said decree shall provide: (a) That Herbert Lubin will immediately provide and (subject to the provisions hereinafter contained) will maintain and pay the premiums on insurance policies upon his life, having an aggregate face value of One Hundred Fifty Thousand Dollars (\$150,000.00). Such policies shall provide for the payment, after the death of said Herbert Lubin, to said Marie Lubin during her lifetime of eight hundred thirty-three dollars and thirty-three cents (\$833.33) per month (including income and principal) for as long a period of her lifetime as can be arranged thereunder, both of the parties agreeing to co-operate in the execution of any instruments necessary to effectuate such form of settlement. Such policies shall provide that any unexpended portion thereof, upon the death of Marie Lubin, shall be paid to the Chicago Title and Trust Company, as Trustee under Trust No. 18686 (the present trust). In

the event of the death of Marie Lubin prior to the death of Herbert Lubin, said policies shall provide that said Herbert Lubin may designate as new beneficiary thereunder, either the said Trustee under Trust No. 18686 and/or the said children; subject, however, to the right of the said Herbert Lubin to reduce the amount of the said life insurance as provided for in sub-paragraph (c) of this Paragraph Fourth." Subparagraphs (b) and (c) thereof provide that Herbert shall pay into a trust a specified percentage of his "unexpended annual income" (computed according to a specified formula), until \$200,000 shall have been placed therein, whereupon he shall have the right to withdraw all life insurance mentioned in subparagraph (a) and have full control and ownership of the same. This latter procedure was never pursued and does not enter into the controversy before us.

Prior to the making of this agreement, in June 1927, Marie had created a trust with Chicago Title & Trust Company of Chicago, Illinois, placing therein property worth \$1,750,000 which apparently yielded her an income of \$10,000 a year, during her lifetime only. For this reason no provision was made in the property settlement agreement for any alimony, and the insurance provision was made in order to afford her support after the husband's death, but not before. Section "Fifth" says: "It is further agreed by and between the parties hereto and said decree shall provide, that *in consideration of the provisions for the support of said Marie herein contained and to be embodied in said decree*, said Marie shall release and relinquish all other rights in and to the property of said Herbert now owned or hereafter acquired by him, including all right of dower, homestead or other statutory rights, and in consideration of such release by said Marie, said Herbert shall likewise release all rights in and to the property of said

Ill. 524, 134 N.E. 67, 69; Kohler v. Kohler, 316 Ill. 33, 146 N.E. 476, 477. The Illinois court found that the agree-

ment "is a fair, equitable and reasonable contract."

Marie now owned or hereafter acquired by her, including all right of dower, homestead or other statutory rights * * *." (Emphasis added.) Herbert also agrees in another section to pay court costs and wife's attorney fees. Marie agrees to dismiss her California divorce proceeding upon Herbert's appearance in the Illinois case, and Herbert agrees to return to the United States with the children upon entry of an Illinois divorce decree.

The divorce case came on for hearing on May 6, 1932, Herbert having appeared and filed an answer. The court found plaintiff Marie entitled to a divorce and granted same. The decree sets forth at length the provisions of the agreement concerning custody, visitation, etc., of the children. There is no specific mention of the insurance phase of the agreement, but the decree does say: "The Court further finds that in and by said contract, the parties hereto have heretofore agreed upon a property settlement which is embodied therein; * * * and the Court further finds that said contract has been fairly entered into and is a fair, equitable and reasonable contract; and the Court hereby approves and confirms said contract *and all of the terms, covenants and conditions thereof, and makes said contract, by reference a part of this decree.*" (Emphasis added.) Also, it adjudges "that all the right, title and interest of the complainant Marie Lubin of every kind, character and description in and to the property or estate of the defendant Herbert Lubin, including the right of alimony, dower and other statutory rights, *except as established in said contract*, is hereby released, discharged and forever barred." (Emphasis added.)

[1, 2] The question of whether the insurance provisions of the agreement were thus incorporated into the decree and a merger thereby effectuated is one of Illinois law, 50 C.J.S., Judgments, § 890, p. 491, but counsel have made no claim that the pertinent laws of that state differ from ours, there was no such discussion

in the trial court, our own research has disclosed no substantial differences, and we therefore proceed upon the presumption that the laws of Illinois are the same as those of California in all respects pertinent to this discussion. *Mercantile Acceptance Co. v. Frank*, 203 Cal. 483, 490, 265 P. 190, 57 A.L.R. 696.

Most of the confusion surrounding the question of incorporation and merger of property settlement agreements in this state has been dissipated by the opinion in *Flynn v. Flynn*, 42 Cal.2d 55, 265 P.2d 865. The matter arose upon an application for reduction in monthly payments of alimony provided in a property settlement agreement. The motion was denied by the trial court because the agreement was incorporated by reference only. The principal question on appeal was whether an incorporation by reference could and did effect a merger. Merger is defined at page 58 of 42 Cal.2d, at page 866 of 265 P.2d, as "the substitution of rights and duties under the judgment or the decree for those under the agreement or cause of action sued upon." The court then said: "The question as to what extent, if any, a merger has occurred, when a separation agreement has been presented to the court in a divorce action, arises in various situations. Thus, it may be necessary to determine whether or not contempt will lie to enforce the agreement, whether or not other judgment remedies, such as execution or a suit on the judgment, are available, whether or not an action may still be maintained on the agreement itself, and whether or not there is an order of the court that may be modified under the provisions of section 139 of the Civil Code. In any of these situations it is first necessary to determine whether the parties and the court intended a merger." Also: "Whether or not a merger is intended, the agreement may be incorporated into the decree either expressly or by reference. * * * If a merger is intended, the purpose of incorporation is, of course, to make the agreement an operative part of the decree." At page 59 of 42 Cal.2d, at page 867 of

265 P.2d: "It is settled that a document may be incorporated either expressly or by apt reference into a judgment or decree so as to make it an operative part of the order of the court. [Citing cases.] Plaintiff contends, however, that a document may not effectively be incorporated by reference unless it is part of the permanent records of the court. She points out that since in this case the agreement was merely introduced in evidence as an exhibit, it could be withdrawn or destroyed, and that therefore interested parties could not by searching the records of the court 'construct a complete picture of the rights and obligations of the parties.' See *Price v. Price*, 85 Cal.App.2d 732, 735, 194 P.2d 101. These considerations may justify modifying the interlocutory decree on appeal to require that the agreement be attached to the decree. We do not believe, however, that they are sufficient to require us to hold that the decree, now final, is insufficient to effect its clearly stated intent." At page 60 of 42 Cal.2d, at page 867 of 265 P.2d: "Thus in this case, the decree may be given its intended effect by referring to an adequately identified document, and the fact that the document is not a part of the permanent records of the court does not vitiate the decree. [Citing cases.] *Price v. Price*, 85 Cal.App.2d 732, 194 P.2d 101, is contrary to the foregoing authorities and is disapproved." (Emphasis added.)

[3-5] Bearing in mind that intention is the primary criterion² of merger it plainly appears in this instance that the contracting parties had no other intent, for the effectiveness of the entire agreement was conditioned upon its being embodied in the divorce decree. (Section "Second" quoted, *supra*.) No question is raised as to the efficacy of the decree to merge the obligations concerning the children because they are set forth at length in substantially the same language as the agree-

ment. But it is argued that the result was different in respect to the insurance obligation because that portion of the agreement was incorporated by reference only. With respect thereto section "Fourth" of the agreement opens as follows; "The parties hereto hereby agree that if the Circuit Court of Cook County shall determine that said Marie is entitled to a decree in said action, said decree shall provide * * *." The decree specifically declares that the property settlement "is embodied therein" (i.e. the parties' contract), and "the court hereby approves and confirms said contract *and all of the terms, covenants and conditions thereof, and makes said contract, by reference a part of this decree.*" (Emphasis added.) The Flynn case leaves no room for doubt that the entire agreement was embodied or incorporated into the decree, part by reference and part by repetition. But counsel for respondent make the argument that although the entire agreement was incorporated by reference and merged into the judgment, the obligation of the insurance provision somehow disappeared because not set forth in *haec verba* and not specifically made the subject of an order to perform. With this line of reasoning we cannot agree. It well may be that that type of incorporation is a necessary basis for enforcement by contempt proceeding, *Lazar v. Superior Court*, 16 Cal.2d 617, 620, 107 P.2d 249; *Plummer v. Superior Court*, 20 Cal.2d 158, 163, 124 P.2d 5, but for other purposes incorporation by reference is enough to make the agreement a part of the judgment with the same effect as if written at large therein.

The unmistakable effect of the ruling in the Flynn case is that incorporation by reference is sufficient to merge the settlement agreement into the divorce judgment and to sustain an action upon the judgment with respect thereto.

2. There being no oral evidence on the subject the question is one of interpretation of written instruments,—a question of law upon which the trial court's finding is not binding here. *In re Es-*

tate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; *Clark v. Tide Water Associated Oil Co.*, 98 Cal.App.2d 488, 490, 220 P.2d 628.

[6] In the instant case plaintiff sues for a money judgment based upon breach of the terms of the agreement or the decree; counsel for plaintiff declined to make an election between the two. To hold that the entire agreement has been incorporated in the decree but that failure to expressly order performance of the insurance provision prevents any recovery for breach of same (which, in effect, is the holding below), would work a regrettably unfair result so far as plaintiff is concerned. The agreement makes incorporation of its provisions a condition precedent to the existence or enforcement of any of the husband's promises; says that the decree shall provide that he will immediately provide and maintain and pay the premiums on insurance policies for the benefit of Marie; that she will release all dower and other rights in the husband's property "in consideration of the provisions for the support of said Marie herein contained and to be embodied in said decree." The court's decree declares that all the terms, covenants and conditions of the contract, and the contract as a whole, are made "by reference a part of this decree;" also that the rights of Marie to any property or estate of Herbert, "including the right of alimony, dower and other statutory rights," are "hereby released, discharged and forever barred," "except as established in said contract." If there is expressed in the decree no enforceable agreement to provide insurance for Marie the consideration for the release of her right to alimony, dower, etc., fails because she has no remedy on the contract or on the decree; that being the case, she goes out of the divorce court empty handed and the major purpose of both parties has been frustrated, namely, that the decree should embody the provisions concerning the custody of the children "and the property settlement hereinafter contained."

We hold that the provisions of section "Fourth" of the agreement were incorporated in the decree by reference, that that was an effective method of its embodiment, that the promises therein contained became

effective immediately upon such incorporation and that a right of action thereon accrued to plaintiff upon breach of same. This brings us to the second major question, the statute of limitations.

[7,8] It is hornbook law that the statute of limitation begins to run in any case upon the accrual of a cause of action, which means a present right to sue thereon. *Maguire v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 719, 733, 146 P.2d 673, 151 A.L.R. 1062. The cause of action upon a contract which is to be performed upon the death of the promisor does not accrue until that event occurs. *Rogers v. Schlotterback*, 167 Cal. 35, 138 P. 728, 732, is in point. That was an action upon an agreement to receive plaintiff into the family of William H. Rogers and wife, raise him as their own child, and further providing that "he should heir and share equally" with their own daughter. The husband was the surviving spouse and he died after having disposed of his property contrary to the said agreement. In response to plaintiff's suit the statute of limitation was interposed. The promise had been made in 1851 and Rogers died in 1906, the action being commenced seasonably thereafter. The court said, in part: "While the matter is not entirely free from doubt, we are of the opinion that the District Court of Appeal was correct in its conclusion that the action was not barred as to the land by any provision of our statute of limitations." 167 Cal. at page 47, 138 P. at page 733. "What James Taylor Rogers was entitled to, in the event that he survived William H. Rogers, was one-half of all the property that William H. Rogers might leave. In view of the construction given by the trial court to the agreement, which we consider warranted, we are of the opinion that, in determining what property was so left, the court properly included the land given to Mrs. Carter and Mrs. Schlotterback by the deed of gift. But James Taylor Rogers had no enforceable right under his contract in regard to such land or any other property prior to the death of William H. Rogers. Whatever rights he had under the

contract, in so far as 'heiring and sharing' in the property are concerned, accrued only on the death of William H. Rogers, and only in regard to such property as may properly be held to come within the scope of the contract, i. e., property left by William H. Rogers." 167 Cal. at page 48, 138 P. at page 734. "His right to maintain any action to enforce the contract accrued only upon the death of William H. Rogers." 167 Cal. at page 49, 138 P. at page 734. To the same effect are *Furman v. Craine*, 18 Cal.App. 41, 47, 121 P. 1007; *Mayborne v. Citizens' Trust & Savings Bank*, 46 Cal.App. 178, 189, 188 P. 1034; *Chilwell v. Chilwell*, 40 Cal.App.2d 550, 105 P.2d 122. See, also, as to accrual of cause of action upon a continuing contract, *Ross v. Tabor*, 53 Cal.App. 605, 613, 200 P. 971; *Miller v. Bean*, 87 Cal.App.2d 186, 189-190, 196 P.2d 596; *Gaskins v. Security-First Nat. Bank*, 30 Cal.App.2d 409, 416, 86 P.2d 681; *Leoni v. Delany*, 83 Cal.App.2d 303, 307, 188 P.2d 765, 189 P.2d 517; *Fancher v. Brunger*, 94 Cal.App.2d 727, 731, 211 P.2d 633.

In those cases where a continuing contract involves the rendering of benefits to the plaintiff before the date for final performance the rule is as stated in 16 Cal. Jur. § 110, p. 511: "In the case of a continuing executory contract, if the parties do not mutually abandon and rescind it, it is optional with the plaintiff to sue immediately upon the breach or to wait until the expiration of the time designated in the contract before commencing his action." The text is supported by such cases as these: *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal.2d 740, 746, 47 P.2d 273; *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 375, 62 P. 39; *Tahoe Pines Co. v. Newman*, 59 Cal.App. 186, 190, 210 P. 445. In the *Union Sugar* case, *supra*, it is said at page 746 of 3 Cal.2d, at page 276 of 47 P.2d: "Respondent was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election to still rely on it, and the statute of limitations could not begin to run until he had made its election." In

the instant case there was no occasion or opportunity for an election because plaintiff was entitled to nothing during Herbert's lifetime. She acted promptly after his death, filed a claim against his estate, it was rejected and she sued within less than a year after his death.

Counsel for respondent urges that plaintiff learned in 1933 that Herbert had defaulted in payment of premiums and that the insurance policies had lapsed, that she thereupon could and should have pursued one of several remedies, hence that the statute then started to run. This, of course, ignores the right of election which she would have had if there had been anything owing to her during Herbert's lifetime. It also proves unavailing for additional reasons. The suggested remedies are specific performance, amendment of divorce decree and proceeding in contempt.

[9] As to specific performance, it appears that shortly after the decree was entered Herbert did turn over to plaintiff policies aggregating \$150,000, as agreed. Thenceforth his obligation was to pay premiums and otherwise maintain in force the said policies for Marie's benefit. This involved a series of acts extending over the balance of his life; he continued to live for twenty years more. "The rule is settled that contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction are not enforceable in equity." *Moklofsky v. Moklofsky*, 79 Cal.App.2d 259, 262, 179 P.2d 628, 631. To the same effect see *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 171, 88 P.2d 698, 89 P.2d 386; *Whipple Road Quarry Co. v. L. C. Smith Co.*, 114 Cal.App.2d 214, 216, 249 P.2d 854; *Bessemer Coal, Iron & Land Co. v. Bullard*, 215 Ala. 433, 111 So. 5, 6; 23 Cal.Jur. § 43, pp. 479, 480.

[10-15] Amendment of the decree would not be an available remedy, for it needed no amendment. As above shown, a setting forth of the insurance obligations in *haec verba* would have added nothing to the decree, nor accelerated the necessity of suit thereon. Moreover, it does not

appear that any basis for amendment, such as mistake, existed. As drawn, the decree would not sustain a contempt proceeding. *Lazar v. Superior Court*, supra, 16 Cal.2d 617, 620, 107 P.2d 249; *Plummer v. Superior Court*, supra, 20 Cal.2d 158, 163, 124 P.2d 5. But if, perchance, the decree were amended by setting forth at length the insurance obligation and thus rendering contempt available, that would not advance respondent's contention to any extent, for a judgment of contempt is not a remedy which plaintiff would possess as a matter of right. She would have to catch Herbert in Illinois and make a personal service of process there, for a foreign judgment for alimony or the like cannot be enforced by a contempt proceeding. *Smith v. Smith*, 115 Cal.App.2d 92, 102, 251 P.2d 720; *Creager v. Superior Court*, 126 Cal.App. 280, 282, 14 P.2d 552. More importantly, it is true that a contempt proceeding is not a civil action, *Groves v. Superior Court*, 62 Cal.App.2d 559, 564, 145 P.2d 355; *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 51, 145 P. 532 and it cannot result in a money judgment in favor of the aggrieved party. The right to institute such a proceeding does not start the statute of limitation to running upon an unmaturing cause of action.

[16, 17] Declaratory relief doubtless would have been available to plaintiff at any time after the first breach of Herbert's obligation, but that type of proceeding does not affect and is not affected by the statute of limitation, except that it is barred when an action for coercive relief with respect to the subject matter is barred, and not before that time. *Taylor v. Marine Cooks & Stewards Ass'n*, 117 Cal.App.2d 556, 561, 256 P.2d 595; *Maguire v. Hibernia Savings & Loan Soc.*, supra, 23 Cal.2d 719, 733-734, 146 P.2d 673, 151 A.L.R. 1062; *Leahey v. Department of Water & Power*, 76 Cal.App.2d 281, 286, 173 P.2d 69; 15 Cal.Jur.2d § 39, p. 168.

[18, 19] This is an action upon the Illinois judgment and Code of Civil Procedure, § 337.5, subdivision (3) is the applicable limitation statute, prescribing a

ten-year period. As above shown, plaintiff had no matured cause of action until Herbert's death. That event occurred on January 29, 1953; she presented a timely claim against the estate which was ultimately rejected and this action was filed on February 16, 1954, less than one year after accrual of her cause of action. The claim of bar by limitation is misplaced.

Conclusion VII of the findings reads: "That plaintiff, Marie Lubin, was guilty of laches in failing to take legal action against said Herbert Lubin prior to January 29, 1953, by reason of which any cause of action which she might have had under or by reason of said Illinois divorce decree of May 6, 1932, is barred."

[20-22] The defense of laches does not lie in a law action, *Hopkins v. Hopkins*, 116 Cal.App.2d 174, 177, 253 P.2d 723; *Brownrigg v. De Frees*, 196 Cal. 534, 539, 238 P. 714, and that is the nature of the case at bar. Respondent says it sounds in equity because of subdivision 3 of the prayer of the complaint, which in its entirety reads as follows: "Wherefore plaintiff prays judgment and decree against defendant as follows: 1. In the sum of one hundred fifty thousand dollars (\$150,000.-00) together with interest thereon. 2. In the sum necessary to provide plaintiff with eight hundred thirty-three dollars and thirty-three cents (\$833.33) per month for life. 3. That this court make its judgment and decree in conformity with the decree of the Illinois court, and order the defendant to comply with such terms as this court may see fit and proper to enforce. 4. For reasonable attorneys fees. 5. For costs of suit and for such other relief as to the court seems proper in the premises."

Of course, the nature of an action is not determined by the prayer, but by the factual allegations of the body of the complaint. This one alleges the Illinois divorce decree, the making of the property settlement agreement, the fact that it was approved and confirmed and made a part of the decree by reference, the obligation of the husband to provide and maintain the \$150,-

000 of insurance, his failure to pay the premiums or to maintain the policies in force, and resultant damage to plaintiff of \$150,000, or "the sum necessary to provide plaintiff with eight hundred thirty-three dollars and thirty-three cents (\$833.-33) per month for life." Paragraphs 1 and 2 of the prayer square with these allegations and with section 1913 Code of Civil Procedure.³ In this instance plaintiff had no rights before Herbert's death; her cause of action fully accrued upon rejection of her claim against the estate; she is entitled to a money judgment and there is no function for an equity court to perform. This action is strictly at law. That an action upon a judgment of a sister state may be at law, rather than in equity, is recognized in *Bruton v. Tearle*, 7 Cal.2d 48, 55, 59 P.2d 953, 106 A.L.R. 580; *Creager v. Superior Court*, supra, 126 Cal.App. 280, 14 P.2d 552; *Handschy v. Handschy*, 32 Cal.App. 2d 504, 90 P.2d 123. See, also, 50 C.J.S., *Judgments*, § 870, p. 445. With respect to an action at law upon a domestic judgment, see *Thomas v. Thomas*, 14 Cal.2d 355, 360, 94 P.2d 810.

[23-25] Moreover, the plea of laches is not sustained by the evidence in the instant case. "Laches is not mere delay, but delay that works a disadvantage to another. A person is guilty of laches only where he has, by his conduct or negligence and delay, induced or suffered another to do or abstain from something, whereby the latter might be injured should he be allowed to enforce his rights. *Taber v. Bailey*, 22 Cal.App. 617, 623, 135 P. 975." *Carlson v. Lindauer*, 119 Cal.App.2d 292, 309, 259 P.2d 925, 934. "It is not applied strictly between near relatives [citations] * * * and '(it) is not designed to punish a plaintiff' but is 'invoked where a refusal would be to permit an unwarranted injustice.' [Citations.]" *Berniker v. Berniker*, 30 Cal.2d 439, 448, 449, 182 P.2d 557, 563.

[26, 27] The record discloses that after delivery of the policies to her plaintiff

learned prior to July 24, 1933, that Herbert had permitted the policies to lapse. She took no affirmative action until after his death. That she had no right to do so at an earlier date appears from the preceding discussion of the accrual of a cause of action. "A delay in bringing suit will be excused where there exists an actual and substantial impediment thereto. A party cannot be charged with negligent delay in instituting suit so long as his interest is of such a nature that it cannot be enforced by action; so to charge him, his right to sue must be complete; * * *." 30 C.J.S. *Equity*, § 121, p. 544.

[28, 29] It is also clear that plaintiff's inaction did not induce any change of position on Herbert's part. She and he discussed the matter many times; he always said he would make it up, take care of it; that she had nothing to worry about; she continued to have confidence in him; believed he would do the proper thing at the proper time. In 1934 or 1935, before he moved to Texas, they were in New York and he offered her certain brewery stock in exchange for a surrender of her rights to the insurance, but she refused the deal. In 1940 her Chicago attorney advised her to sue Herbert because of his breach of the insurance obligation; what sort of suit he contemplated does not appear. She declined to follow this advice for two reasons, (1) she talked to Herbert and he said he would take care of things, and (2) "it was a sensational thing for the boys. I just thought it wouldn't be good for them. I thought Mr. Lubin would live up to his part of the bargain. He was paying the boys' educations, and stuff, you know, and I thought, well, he would live up to his end of the bargain and I would make no trouble." In 1948, after he considered and declared himself uninsurable, Herbert gave evidence that he recognized the insurance obligation as still binding, and Marie definitely showed that she was in the same frame of

3. C.C.P. § 1913. "The effect of a judicial record of a sister State is the same in this State as in the State where it was

made, except that it can only be enforced here by an action or special proceeding * * *."

mind. He proposed to her that she join him in an action to break the Chicago trust and said if they were successful he would see that she got \$150,000 cash out of the proceeds in substitution for the insurance. This offer she rejected immediately. The only prejudice to him which is suggested as a result of plaintiff's inaction is his becoming uninsurable prior to 1948. But it cannot be said that any conduct of plaintiff's induced his continued breach of agreement until that time, or that the parties themselves evinced any belief that that fact had relieved him of his continuing obligation. The only oral evidence at the trial was that of plaintiff. The rejection of her testimony could not improve defendant's situation, for disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony." In *re Estate of Bould*, 135 Cal.App.2d 260, 265, 287 P.2d 8, 10, 289 P.2d 15.

[30] If it be said that Herbert's estate is prejudiced by plaintiff's long delay, the argument is refuted by *Brownrigg v. De Frees*, supra, 196 Cal. 534, 539, 238 P. 714. It there appeared that John M. De Frees, at the time of divorce from his wife, made in lieu of a court order for alimony or child support a written contract whereby he agreed to pay for the support of plaintiff, his child, the sum of \$10 a month, beginning September 1, 1888. The agreement also waived any right to rely on the statute of limitations. He made one payment and no more, dying on September 1, 1918. In due course plaintiff sued on the agreement. Upon the subject of laches the court said, in part, 196 Cal. at page 539, 238 P. at page 716: "No showing was made that the delay had been productive of any hardship or injustice to the defendant or to the other heirs at law of decedent. If the decedent had complied with his contract and had paid the monthly al-

lowances in accordance with his agreement his estate would have been proportionately reduced. The question of laches is always relative to the circumstances of each particular case. *Dufour v. Weissberger*, 172 Cal. 223, 155 P. 984. No circumstance, even considered as an equitable question, appears in aid of respondent in this case." That language has obvious pertinence to the situation at bar.

This action is not barred by laches, for this is an action at law wherein the plea does not lie. Secondly, the evidence does not support the finding.

[31, 32] Finally, we must deal with finding XI to the effect that plaintiff "expressly and impliedly consented to and by her conduct acquiesced in the action of said Herbert Lubin in allowing said life insurance policies to lapse;" and conclusion VI that any obligations Herbert may have undertaken to provide and maintain the life insurance policies "were rescinded by the mutual consent of the plaintiff, Marie Lubin, and said Herbert Lubin." Counsel for respondent would support the finding of rescission by the language of cases such as *McCreary v. Mercury Lumber Distributors*, 124 Cal.App.2d 477, 486, 268 P.2d 762, 767: "An abandonment of a contract may be implied from the acts of the parties and this may be accomplished by the repudiation of the contract by one of the parties and by the acquiescence of the other party in such repudiation. *Dessert Seed Co. v. Garbus*, 66 Cal.App.2d 838, 847, 153 P.2d 184. It is not necessary that the parties say, in so many words, that they do mutually rescind the contract; rescission may be proved by other words and acts. *Cincotta v. Catania*, 95 Cal.App. 99, 100-101, 272 P. 330." It is to be noted that the intent to abandon or rescind must be mutual, Civ.Code, § 1689, subd. (5); 12 Cal.Jur.2d § 191, p. 409. *Ross v. Frank W. Dunne Co.*, 119 Cal.App.2d 690, 699, 260 P.2d 104, 109, holds that the parties terminated their dealings "but respondents did so only because appellant failed and refused to live up to the agreement. This does not appear to amount to a mutual can-

cellation, rescission or abandonment." The evidence at bar does not sustain any finding of mutual consent to an abandonment or rescission. As above shown, the parties discussed the insurance matter many times over the years; Herbert always said he would take care of it, that she had nothing to worry about; she continued to have confidence in him and believed he would make good on the insurance; she refused to accept certain brewery stock in liquidation of the obligation; also rejected his proposal to wipe it out through a suit against the Chicago Title and Trust Company. The finding of rescission cannot stand.

No other points require discussion.

The court tried the issue of liability first and for that reason excluded evidence as to the measure of plaintiff's recovery. This leaves the reviewing court without a basis for a directed judgment.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.



145 Cal.App.2d 155

In re Charles W. CROFT, on Habeas Corpus.
Cr. 3234.

District Court of Appeal, First District,
Division 2, California.

Oct. 18, 1956.

Original habeas corpus proceeding was brought in the District Court of Appeal by prisoner to have judgment of conviction and commitment to prison declared void, on ground that prisoner's plea of guilty had been induced by alleged representation of his counsel that he would receive probation and no more than a county jail sentence, and that such representation was corroborated by acts of district attorney. The Dis-

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trict Court of Appeal, Devine, J. pro tem., held that where referee, who had been appointed to hold a hearing at prison and take evidence, found that prisoner's counsel at time of prisoner's plea of guilty believed and represented to prisoner that the prisoner was eligible for probation, but that counsel made no representation that any officer of the State had made any statement on the subject, prisoner could not be relieved from alleged mistake of his counsel.

Petition denied and writ discharged.

1. Habeas Corpus ⇨90

In original habeas corpus proceeding in District Court of Appeal by prisoner to have judgment of conviction and commitment to prison declared void, finding of referee, who had been appointed by District Court of Appeal to hold a hearing at prison and take evidence, was entitled to great weight.

2. Habeas Corpus ⇨25(1)

Where referee, who was appointed by District Court of Appeal in habeas corpus proceeding by prisoner, to hold a hearing at prison and take evidence, found that prisoner's counsel at time of prisoner's plea of guilty believed and represented to prisoner that prisoner was eligible for probation, but that counsel made no representation that any officer of the State had made any statement on the subject, prisoner could not be relieved from alleged mistake of his own counsel.

Louis S. Katz, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

DEVINE, Justice pro tem.

Petitioner seeks by writ of habeas corpus to have a judgment and commitment to state prison declared void on the ground that his plea of guilty was induced by a representation by his own counsel that he

would receive probation and no more than a county jail sentence, and that this representation was corroborated by acts of the district attorney. It may be noted that petitioner was before this court in an attempt to accomplish the same results he seeks herein on an appeal from an order denying him a writ of *coram nobis*. *People v. Croft*, 134 Cal.App.2d 800, 286 P.2d 479. In that proceeding he appeared in *propria persona* and he failed to present in the trial court any affidavits to establish a factual basis for relief, but in this proceeding, his counsel has filed appropriate affidavits.

In affidavits of members of his family, as well as in his own verified petition, it is alleged that, while petitioner was ready to proceed to trial, his attorney (not the counsel who represents him in this proceeding) told him that the judge and the district attorney had promised that he would receive probation and a county jail sentence. Petitioner alleges that he believed this representation and entered his plea of guilty; that the representation of counsel was apparently corroborated by the action of the district attorney, who, just before the plea, replied to the court's interrogation that he was in accord with petitioner's counsel and moved to strike the words "with assault to commit murder" from an assault charge, and moved to dismiss charges against petitioner's brother. Petitioner contends that by tests set forth in the case of *People v. Gilbert*, 25 Cal.2d 422, 433, 154 P.2d 657, he is entitled to relief if he can establish (1) an unqualified assertion by his attorney to petitioner that a responsible officer of the state had agreed to a certain maximum punishment in return for a plea of guilty; (2) an apparent corroboration of that assertion by an officer of the state, and (3) reliance by petitioner on the assertion and the apparent corroboration.

[1] When the matter was presented to us, there was nothing to give us an account

of the matter on the part of petitioner's attorney at the time of the plea. The court appointed Honorable Murray Draper as a referee to make findings of fact. The referee held a hearing at San Quentin prison, and after taking evidence presented by petitioner and also the testimony of his former attorney, made his finding that the attorney did not make a representation that any responsible officer of the state had entered into a bargain purporting to give petitioner a lesser punishment than he would receive otherwise, in exchange for a plea of guilty. The referee's finding is entitled to great weight. In *re Allen*, 47 Cal.2d 55, 301 P.2d 577. We conclude that petitioner has not established the first and basic requisite for the relief he seeks.

[2] The referee found that petitioner's counsel at the time of the plea believed, and represented to petitioner, that the latter was eligible for probation, but he made no representation that any officer of the state had made any statement upon this subject. Petitioner cannot be relieved from such a mistake made by his own counsel. *People v. Miller*, 114 Cal. 10, 16, 45 P. 986; *In re Hough*, 24 Cal.2d 522, 531, 150 P.2d 448; *People v. Gottlieb*, 25 Cal.App.2d 411, 415, 77 P.2d 489; *People v. Morton*, 100 Cal.App.2d 269, 223 P.2d 259. He cites several cases in which it has been held that there is denial of due process of law when the representation by counsel is a sham, as in *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, but this is a very different matter from a mistake of law by counsel who was selected by defendant and who was not acting in collusion with any officer of the state.

The petition to have the plea of guilty, the judgment, and the commitment set aside is denied, and the writ is discharged.

NOURSE, P. J., concurs.

145 Cal.App.2d 149

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frank SMITH, Defendant and Appellant.
Cr. 2625.

District Court of Appeal, Third District,
California.

Oct. 17, 1956.

Prosecution on three counts of burglary of the second degree and for a prior conviction of a felony in respect to each count. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment of conviction and denied defendant's motion for new trial, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence that victim of alleged robbery had given no one permission to take his photographs and address book which were found in defendant's possession, and lack of evidence that such articles were removed by defendant's brother or any other member of victim's family was sufficient to establish corpus delicti and to establish that defendant entered victim's room with felonious intent and stole the property found in his possession.

Judgment and order affirmed.

1. Burglary ☞41(2, 3)

In second degree burglary prosecution, evidence that victim of alleged robbery had given no one permission to take his photographs and address book which were found in defendant's possession and lack of evidence that such articles were removed by defendant's brother or any other member of victim's family was sufficient to establish corpus delicti and to establish that defendant entered victim's room with felonious intent and stole the property found in his possession.

2. Criminal Law ☞824(4)

In second degree burglary prosecution, mere fact that evidence was circumstantial and that defendant's only defense was alibi did not require trial court to instruct jury

on such special defense where no request therefor was made.

Ralph D. Drayton, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and J. M. Sanderson, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was tried and convicted upon an information charging him with three counts of burglary of the second degree and with a prior conviction of a felony in respect to each count. This is an appeal from the judgment entered upon the jury's verdicts and from the order denying a motion for a new trial.

Appellant contends that, as to count three of the information, the McCurdy incident, the judgment and order must be reversed as the evidence is insufficient to establish the corpus delicti. He contends further that all three convictions should be set aside because the trial court erred in failing, upon its own motion, to instruct upon the defense of alibi. These contentions cannot be sustained.

The record shows that when appellant was arrested on the evening of January 6, 1955, he had upon his person certain photographs and an address book which proved to be the property of one Jack McCurdy, whose premises appellant, by count three of the information, was charged with having unlawfully entered with intent to commit theft therein. Mr. McCurdy identified the photographs and address book as his and testified that after he retired on January 1, 1955, they had been taken from his bedroom without his knowledge or consent. Mr. McCurdy's testimony was that when he went to bed that evening he placed his trousers on a nightstand in the room in which he slept. At that time his wallet, containing the photographs and address book, was in the back pocket of his trousers. The next morning when he arose he found his trousers outside the house and the wallet and its contents miss-

ing. Appellant was shown to have made conflicting statements as to how he came by the articles found in his possession.

[1] Appellant argues that the missing articles could have been removed by some one who made a lawful, rather than an unlawful, entry into the bedroom which Mr. McCurdy and his brother shared and that there is no proof that there was an entry made with a felonious intent. It is true that during the night in question other occupants of the house could have legally entered the room through the unlocked door which opened on the back porch. In fact, Mr. McCurdy's brother did so when he returned home and went to bed in the room which the two shared in their parents' home. However, it was for the jury to determine the nature of the entry made when the articles were taken and the intent with which it was made. Mr. McCurdy testified that he had given no one permission to take his photographs and address book which were found in appellant's possession. There was no evidence that they were removed by Mr. McCurdy's brother or any other member of his family. Therefore, the jury could, and impliedly did, find that the corpus delicti was sufficiently proved, *People v. Kross*, 112 Cal.App.2d 602, 609, 247 P.2d 44; *People v. Dodson*, 77 Cal.App.2d 389, 175 P.2d 59; and that the appellant entered Mr. McCurdy's room with felonious intent. *People v. Dillon*, 1 Cal.App.2d 224, 227-228, 36 P.2d 416. Likewise, it could be found that appellant stole the property found in his possession and concerning the acquisition of which he made conflicting statements. *People v. Buratti*, 96 Cal.App. 2d 417, 419, 215 P.2d 500; *People v. Morris*, 124 Cal.App. 402, 403-405, 12 P.2d 679; *People v. Russell*, 120 Cal.App. 622, 625-626, 8 P.2d 209.

[2] The fact that the evidence was circumstantial and that appellant's only defense was alibi did not require the trial court to instruct the jury on such special defense, as no request therefor was made. *People v. Whitson*, 25 Cal.2d 593, 604, 154 P.2d 867; *People v. Freeman*, 135 Cal.

App.2d 11, 286 P.2d 565; *People v. Williams*, 128 Cal.App.2d 458, 275 P.2d 513.

The judgment and the order are affirmed.

PEEK and SCHOTTKY, JJ., concur.



145 Cal.App.2d 169

Hilda L. M. Kimball DUFFEY, Plaintiff,
Cross-Defendant and Respondent,

v.

Frederick H. DUFFEY, Defendant, Cross-Complainant and Appellant.

Civ. 21460.

District Court of Appeal, Second District,
Division 3, California.

Oct. 18, 1956.

Rehearing Denied Nov. 14, 1956.

Hearing Denied Dec. 12, 1956.

Divorce action wherein plaintiff sought to recover sum allegedly disbursed by her for household expenses at defendant's instance and pursuant to his promise to repay her. Defendant cross-complained, seeking a declaration that the marriage was invalid, and filed a counterclaim to recover sum allegedly loaned to plaintiff. The Superior Court of Santa Barbara County, Walter J. Fourt, J., decreed that the purported marriage of the parties was void ab initio, denied defendant relief on his counterclaim, and entered judgment for plaintiff in the amount prayed for, and defendant appealed from the last mentioned portions of the judgment. The District Court of Appeal, Shinn, P. J., held that evidence sustained implied finding that defendant had agreed to meet all household expenses in excess of specified monthly contribution which plaintiff was to make, but would not sustain finding that he had not done so.

Affirmed in part and in part reversed.

1. Appeal and Error ⇨994(3), 1012(1)

Trial court is sole judge of credibility of witnesses and weight to be accorded to testimony.

2. Husband and Wife ⇨232(3)

In action to recover for household expenses allegedly incurred by plaintiff, during purported marriage of parties, pursuant to defendant's promise to repay, evidence sustained implied finding that defendant had agreed to meet all household expenses in excess of specified monthly contribution which plaintiff was to make, but would not sustain finding that he had not done so.

3. Husband and Wife ⇨232(3)

In divorce action, wherein defendant cross-complained to have marriage declared invalid and to recover sum allegedly loaned to plaintiff, evidence sustained finding adverse to defendant with regard to alleged loan.

Cavalletto, Webster, Mullen & McCaughey, by Thomas M. Mullen, Santa Barbara, Johnson & Stanton, by Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, for appellant.

J. F. Goux and Carleton B. Wood, by J. F. Goux, Santa Barbara, for respondent.

SHINN, Presiding Justice.

This is an action for divorce in which plaintiff sought, *inter alia*, to recover the sum of \$12,000 (later reduced to \$10,000) allegedly disbursed by her for household expenses at defendant's instance and request and pursuant to his promise to repay her. Defendant cross-complained, seeking a declaration that the marriage was invalid, and filed a counterclaim by which he sought to recover the sum of \$5,748 (later reduced to \$5,641) allegedly loaned to plaintiff. The court decreed that the purported marriage of the parties was void *ab initio*, denied defendant relief on his counterclaim, and entered judgment for plaintiff in the amount prayed for. Defendant appeals from the last mentioned portions of the judgment.

Plaintiff and defendant, both residents of Santa Barbara, went to Tijuana, Mexico, on January 24, 1950, where they entered into what purported to be a proxy marriage before a person who was not authorized by Mexican law to perform a marriage ceremony or to execute valid proxies therefor. They returned to Santa Barbara where they cohabited for the next three years, believing in good faith that they were husband and wife. During this time defendant and his two minor daughters resided with plaintiff, her mother and her daughter in an elegant home which was her separate property. Defendant's minor son also lived there intermittently for about a year.

Defendant was employed as manager of Bekins Van & Storage in Santa Barbara at a salary of \$7,200 per year. He owned 50 per cent of the stock of the local Bekins corporation on which he received dividends averaging \$8,300 per year. Plaintiff's assets included \$80,000 in a bank account which came from her deceased husband, building and loan deposits totaling \$10,000, a vacant lot in Brentwood which she sold for \$12,000 in 1950, her home which she valued at \$54,000, and 12 acres of surrounding land which she valued at \$12,000. Plaintiff also received an allowance of \$1,000 per month from the guardianship account of her daughter's estate.

During the purported marriage the parties maintained four bank accounts. Plaintiff had a personal account in which she deposited the monthly allowance from her daughter's guardianship account. Defendant also had a personal account in which he deposited his dividend checks. The parties maintained a joint household account in which defendant deposited his salary and to which plaintiff transferred money from her personal account. They also kept a joint capital or building and investment account. The funds deposited in this account came from plaintiff's personal account, from the estate of plaintiff's deceased husband, from her monthly allowance, and from loans. Money in the capital account was used to improve plaintiff's home, to build three houses on the sur-

rounding acreage for eventual sale, and to plant another part of the acreage with avocado trees.

The basis of plaintiff's claim is an alleged oral agreement made by her and defendant prior to or at the time of the purported marriage, whereby plaintiff agreed to contribute \$500 per month (later voluntarily increased to \$550 per month) toward the payment of household expenses in return for defendant's promise to shoulder the remainder of the expense of maintaining the household. It is plaintiff's theory, and the court below found, that "* * * plaintiff, upon the representation * * * of said defendant that he would at plaintiff's request reimburse her for the moneys and expenses incurred by her in providing defendant and his family with a dwelling * * * and in providing other necessities of life for the maintenance and support of plaintiff and defendant and his family * * *, did provide said defendant and his family with said dwelling * * * and said other necessities. * * * That * * * between January 24, 1950, and March 15, 1953, at the special instance and request of defendant * * * and upon defendant's promise to repay the same to plaintiff after request, the plaintiff * * * advanced, paid out and disbursed the sum of \$10,000 for and on account of the household expenditures incurred by defendant * * * *in connection with the maintenance and support of defendant and his said family at the dwelling and home place of plaintiff.*" (Emphasis ours.) The \$10,000, we must assume, was over and beyond the sums of \$500 or \$550 per month which plaintiff agreed to contribute. Our interpretation of the finding is that plaintiff's contributions in these amounts were deemed sufficient to defray the expenses of plaintiff's part of the household and that the remaining expense was chargeable to defendant.

Defendant contends, on the other hand, that there was no evidence of any agreement to reimburse plaintiff and that plaintiff's expenditures in excess of her monthly contributions went toward the improvement and maintenance of her separate property

and not toward the support of defendant and his children.

[1, 2] Viewing the testimony in the light most favorable to plaintiff, *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 210 P.2d 757, we are of the opinion that there was sufficient evidence of an oral agreement to share the household expenses of the combined families. Plaintiff testified as follows:

"Q. Now did you have any agreement with Mr. Duffey prior to your marriage or about the time of your marriage as to how they,—the living expenses were to be shared? A. We didn't discuss it particularly. I took it for granted that he would carry the burden of a family. However, I have a minor child who has independent means, and I had an allowance by the court, and felt that if I contributed \$500.00 to the household per month, it would be more than a fair share for her maintenance and support in my home.

"Q. You told that to Mr. Duffey? A. I told that to Mr. Duffey, and he even then said, It was far too much, and much too generous and handsome, and splendid, and he could carry the whole load otherwise."

Plaintiff further testified that shortly after the purported marriage, her invalid mother came to reside with plaintiff and defendant and that plaintiff voluntarily increased her monthly contribution to \$550 to cover the added expense of maintaining her mother there. Defendant testified that it was his understanding that plaintiff would contribute \$500 per month and that he would contribute his salary as manager of Bekins Van & Storage and that "* * * we had discussed my salary thoroughly, as well as what contributions she would make to it, and that we felt we could live within that, along with my traveling expenses and entertainment expenses and what work I could do on the place." Defendant denied that he had agreed to pay household expenses in excess of the combined amount of his salary and plaintiff's contribution. His

denial created only a conflict in the evidence as to what he had agreed to do. The conduct of the parties and their countless discussions of finances lent support to plaintiff's testimony as to the understanding. As the trial court is the sole judge of the credibility of witnesses and the weight to be accorded to testimony, we are bound by its implied determination that defendant had agreed to meet all the household expenses which exceeded plaintiff's monthly contribution. The finding is strengthened by the fact that the law imposes a duty on a husband to support his wife and his own children. Moreover, as we say, it was not disputed that defendant without objection did contribute more than his salary.

The trial court having decided that defendant obligated himself to pay the household expenses in excess of plaintiff's agreed contributions, the next problem was to determine the total amount of the household expenses and the total amount contributed by each of the parties thereto. The burden of proving these facts was upon plaintiff. Defendant contends that she did not sustain this burden of proof and we are obliged to agree.

We may say first that plaintiff's testimony was vague, rambling, manifestly incomplete and in material respects unsupported by any reliable corroborative evidence. The trial court did the best it could to unravel the numerous complicated money transactions of the parties, but the task was one which we think would have been successful, if at all, only by means of a reference or a trial in which each shred of evidence would be examined in great detail in order to discover additional facts which might have a bearing upon the validity of the claims of each party against the other. Our problem is to determine whether there was substantial evidence to support a finding that defendant was indebted to plaintiff for expenses which she claimed to have paid on his account in the sum of \$10,000 or any other definite sum and whether there was substantial evidence to support a finding that plaintiff was not indebted to defendant for money borrowed from him. This has necessitated a careful

examination of the record for evidence shedding some light upon these questions. Plaintiff kept no book of account of the household expenses for the years 1950 and 1951. She presented no data and gave only unsupported figures as to what the expenses were during those years. For the year 1952 and for about 3 months of 1953 prior to the separation she kept a detailed account, which was in evidence. Beyond that we must look to her own testimony and must give to it the interpretation and effect which tends most strongly toward support of the court's findings. Plaintiff's testimony and her book account were definite as to the 1952 and 1953 expenses. For the year 1952 the total household account as entered in the book amounted to \$19,333.86 and for 3 months of 1953 it totaled \$4,490.21. Beyond that we must look to her testimony as to the total household expenses over the period from the marriage to the separation. She was questioned by her counsel as to the average monthly expenses of the household and she testified: "Oh, it ran a thousand and more a month. There may have been some lighter months, but by and large it was a large household, a lot of entertaining of Mr. Duffey's business acquaintances and friends, mostly, and of the children entertaining and so on, and there was a big, big running expense every month." Next we look to plaintiff's testimony that from January 24, 1950, to April 15, 1953, defendant deposited in the household account \$25,873 and she deposited therein \$23,202. Her deposits would amount to about \$1,500 more than the amount she agreed to contribute of \$500 per month for a time before her mother came to live with them some time in 1950 and \$550 per month thereafter. Plaintiff testified that during the same period defendant contributed \$25,873 to the household account. This, incidentally, was some \$3,000 more than the amount of defendant's salary over that period. We have examined plaintiff's account book for the 1952-1953 period. It shows that during that period plaintiff contributed \$8,909.17 and defendant contributed \$13,747.69. However, during this year

of excessive expenditures there were numerous extraordinary expenses such as sanitarium and medical expenses for plaintiff's mother and other items for schooling which presumably should have been charged to the guardianship account of plaintiff's daughter. Obviously, the account book for that period sheds no light upon the total amount of the household expenses for three years and two months. It furnishes no basis for a computation of the expenses during 1950 and 1951. If 1952 was a typical year, the total household expenses would not only have exceeded by some \$15,000 the amount to which plaintiff testified but would have exceeded by approximately the same amount the sums which, according to plaintiff's testimony, were contributed by the parties. If we are to take plaintiff's estimate of the expenses at \$1,000 per month, they would total only \$38,000. But plaintiff testified that there was actually contributed by herself and the defendant some \$49,000. When we give effect to plaintiff's testimony as to the total household expenses for the period and the amounts which she and defendant separately contributed thereto, we find that there was no evidence whatever that the household expenses exceeded the total amount of the contributions of the parties.

We have a final word as to our problem of unearthing evidence which would support the finding that defendant is indebted to plaintiff in the sum of \$10,000, namely, that plaintiff's brief has been of no assistance to us whatever. The most we find in it is what purports to be a statement of plaintiff's assets at the time of the commencement of the cohabitation amounting to \$168,000, or with contributions from the guardianship account, to \$206,000 and a like statement of assets at the end of the period amounting to \$157,851.39. Plaintiff improved her several properties, built houses, planted avocados, and in other ways spent money lavishly. The fact, if it be a fact, that plaintiff's assets were diminished is wholly irrelevant to the issues in the case. Plaintiff's counsel are not subject to criticism for the state of the record. They did the best they could to elicit from their

client testimony as to definite facts pertinent to the issues. What they got was a torrent of words and no useful facts other than those we have stated. In reaching the foregoing conclusion we have naturally disregarded the denials of the defendant and have given to plaintiff's evidence the greatest effect that could reasonably be claimed for it. It does not by any means measure up to substantial evidence that defendant is indebted to plaintiff in any ascertainable amount. And we do not doubt that if the able trial judge had anticipated the difficulty that would be encountered in an effort to ascertain the pertinent facts of the case he would have ordered a reference for an audit and a detailed investigation of the transactions of the parties.

Plaintiff testified volubly as to an infinite number of conversations with defendant concerning finances; upon an occasion immediately before the separation she told defendant that he owed her money and he offered to give her a check or a note for some amount "I don't know, twelve thousand or something like that" etc. She asked for a check, defendant offered her a note which she refused, whereupon she ordered him to leave. It is evident that there was no agreement on the part of defendant to pay plaintiff any definite sum and no evidence of the statement of an account. If there was an attempt of the parties to reconcile their differences in money matters it came to naught. Obviously, any effort of defendant toward an agreement was made with a view to a continuance of the marital relationship and the advantages which he and his children had been enjoying for several years. But there was to be no peace, only a final parting of the ways. The court made no finding as to any promise by defendant of a settlement or of an admission of liability. We attach no importance to this alleged conversation. The evidence was not such as to require the court to find that the parties ever reached an agreement as to any amount owing by defendant.

[3] With respect to defendant's counterclaim he testified there was a balance of

\$5,641 due him on loans which he had made to plaintiff from his personal account for the improvement of her separate property. He introduced into evidence a recapitulation sheet showing loans made to plaintiff and the sums she repaid. The bulk of the remaining balance claimed by defendant is represented by two advances totaling \$5,000 made in 1952. Plaintiff testified that the \$5,000 was deposited in the household account and used to pay for painting and roofing plaintiff's home. She further testified that the \$5,000 was not a loan and was never considered by either of the parties as a loan. The court found that all sums plaintiff had borrowed from defendant had been repaid and that it was not true that plaintiff had borrowed the \$5,641 from defendant. The conflict in the evidence on this issue was resolved against defendant by the trial court, the findings are supported by substantial evidence and we are bound by them.

The part of the judgment which denies defendant recovery on his counterclaim is affirmed; the part of the judgment which awards plaintiff \$10,000 is reversed.

PARKER WOOD and VALLÉE, JJ., concur.



A. L. WIRIN, Plaintiff and Appellant,
v.

William H. PARKER, as Chief of Police of
the City of Los Angeles, Defendant
and Respondent.*

Civ. 21599.

District Court of Appeal, Second District,
Division 2, California.

Oct. 8, 1956.

Rehearing Denied Nov. 2, 1956.

Hearing Granted Dec. 5, 1956.

Action by municipal taxpayer to enjoin chief of police from expending public funds for installation, maintenance or use of dictographs or dictographic equip-

* Opinion vacated 313 P.2d 844.

ment in any place of occupancy except with the knowledge and consent of the person concerned. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Fox, J., held that in view of fact that all searches and seizures are not unconstitutional but only unreasonable searches, and whether a search is unreasonable or not depends on the facts and circumstances of each particular case, trial court properly refused to grant a declaratory judgment undertaking to determine reasonableness or legality of future acts of chief of police in connection with installation and use of sound transmission equipment for purposes of surveillance.

Judgment affirmed.

1. Searches and Seizures ☞7(1)

While surveillance invades one's privacy, it is not, as such, a violation of constitutional guarantees against unreasonable search. U.S.C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19.

2. Searches and Seizures ☞7(1)

Although the use of a listening device and the surreptitious recording of what is heard does not constitute an unconstitutional invasion of a defendant's right of privacy per se, if, however, dictographic surveillance of the person is effected through trespass or unlawful entry upon his premises, then his constitutionally protected right of privacy has been violated. U.S.C.A.Const. Amend. 4; West's Ann. Const. art. 1, § 19; West's Ann.Pen.Code, § 640; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

3. Declaratory Judgment ☞209

In view of fact that all searches and seizures are not unconstitutional but only unreasonable searches, and whether a search is unreasonable or not depends on the facts and circumstances of each particular case, trial court properly refused to grant a declaratory judgment undertaking to determine reasonableness or legality of future acts of chief of police in

connection with installation and use of sound transmission equipment for purposes of surveillance. U.S.C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19.

4. Municipal Corporations Ⓒ589

Effective law enforcement to the end that an ordered society may be maintained is one of the purposes of local government and that purpose should not be frustrated on the contingency that the rights of some unknown person may at some future time be violated by the police and some public funds erroneously spent in connection therewith.

5. Appeal and Error Ⓒ1071(4)

Trial Ⓒ393(1)

The fact that a finding is argumentative may be a proper basis for criticizing its form, but it cannot justify a reversal of a judgment.

6. Trial Ⓒ391

Conclusions of fact are not improperly included in findings of fact.

7. Municipal Corporations Ⓒ1000(5)

In action by municipal taxpayer to enjoin chief of police from expending public funds for installation for use of dictograph or dictographic equipment in any place of occupancy except with the knowledge and consent of the person concerned, evidence sustained findings that expenditures in connection with dictographic surveillance were neither large nor substantial and were less expensive than other means of surveillance, and that there was no threatened or actual irreparable injury to plaintiff or any other taxpayer or to the general public by substantial waste of public funds in connection with dictographic surveillance.

8. Appeal and Error Ⓒ731(5)

An assignment of error merely stating that trial court's findings were against the evidence failed to indicate what particular facts established that such findings were improper or in what particular such findings were against the evidence and was not sufficient to warrant an inquiry into the merits of the assignment of error.

Nathan L. Schoichet, Beverly Hills, A. L. Wirin and Fred Okrand, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Alan G. Campbell, James A. Doherty, Asst. City Attys., Ralph J. Eubank, Deputy City Atty., Los Angeles, for respondent.

FOX, Justice.

By his amended complaint plaintiff, as a citizen and taxpayer of the city of Los Angeles, sought to permanently enjoin the Chief of Police from making any expenditure of public funds of the city for the purpose of or in connection with the installation, maintenance or use in the city of Los Angeles of any dictograph or dictographic equipment upon the property or in the home or office of any person, or in any other place of occupancy of any person, in the city except with the knowledge, consent, permission or authority of each person thus concerned. The court rendered judgment denying plaintiff any relief. Plaintiff thereupon appealed.

The case was submitted to the trial court upon a stipulated record which included various documents, the pleadings, numerous affidavits, and the depositions of the parties. No oral testimony was taken.

In seeking a reversal plaintiff contends that certain findings are improper, conflicting, conclusory and unsupported by the evidence; and that the conclusions of law and judgment are against the evidence and the law.

Plaintiff's thesis is that the police practice of surveillance by dictograph is illegal in that it violates both the federal and the state constitutional guarantees against unreasonable search and seizure. United States Constitution, Amendment IV; California Constitution, Article 1, sec. 19. As a predicate for his position plaintiff argues that finding VIII, to the effect that in one or more instances "but not in all of them," dictographs have been installed and used by police officers of the city under the defendant's direction in various places without the consent of the owner or occupant,

is against the evidence. The record, however, does not sustain plaintiff's attack upon this finding. In defendant's answer, which was received in evidence pursuant to the stipulation re submission, he stated "In some instances installations such as are described in this answer are made with the knowledge and consent of the owner, occupant, or lessee of the premises upon which they are made." Captain Hamilton stated in his affidavit that "It can be said in general that the consent of some person with access to the suspected premises is frequently obtained where the officers in charge are reasonably satisfied that the security and secrecy of the installation can be maintained." This evidence is sufficient to support the challenged finding.

In discussing finding VIII plaintiff, in effect, contends that installation and use of dictographic equipment in places of private occupancy without the knowledge, consent or authority of the occupant or person subject to surveillance is a violation of such person's constitutional rights against unreasonable search. This states the principle against unreasonable search too broadly. There are a number of situations in which our courts have held an individual's constitutional rights were not infringed where his premises were searched by the police without his personal knowledge or consent and where the officers had no search warrant. In *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469, defendant occupied a room with bath in the home of Don Stevens in exchange for doing the gardening. Mr. Stevens gave the officers permission to enter and search the entire house. They searched defendant's room where they found marijuana. The court held defendant's consent was not necessary under the facts. The court pointed out, 45 Cal.2d at page 783, 291 P.2d at page 473, that "Defendant was living in the Stevens home, and it is clear that whether he was in fact a tenant, servant, or guest, Stevens believed that he had at least joint control over his quarters and the right to enter them * * * and authorize a search

thereof. Under these circumstances the officers were justified in concluding that Stevens had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly." To the same effect is *People v. Caritativo*, 46 Cal.2d 68, 292 P.2d 513, where permission to search defendant's room was given by the owner of the estate and her caretaker. In *People v. Silva*, 140 Cal.App.2d 791, 295 P.2d 942, this court held that consent given to the police to search the home by one of the joint occupants was "adequate authority for its pursuit without the necessity of any affirmative consent of defendant * * * [140 Cal.App.2d at page 795, 295 P.2d at page 944.]" In *People v. Dominguez*, 144 Cal. App.2d 63, 300 P.2d 194, the wife of defendant gave the officers permission to enter and look around. The search, therefore, was not illegal. It was held in the *Gorg* case, 45 Cal.2d at page 781, 291 P.2d 469, that the question of consent to search was one of fact.

[1,2] While surveillance invades one's privacy, it is not, as such, a violation of his constitutional guarantees against unreasonable search. In *On Lee v. United States*, 343 U.S. 747, at page 754, 72 S. Ct. 967, at page 972, 96 L.Ed. 1270; the court stated: "The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions." See to the same effect *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855 (where the officer looked through a window); *United States v. Lee*, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (searchlight beam focused on ship's deck); and *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L. Ed. 153 (peeking through a transom). Nor does the use of a listening device and the surreptitious recording of what is heard constitute an unconstitutional invasion of defendant's right of privacy per se. *Olmstead v. United States*, 277 U.S. 438, 48

S.Ct. 564, 72 L.Ed. 944—wire tapping¹; *People v. Malotte*, 46 Cal.2d 59, 292 P.2d 517—use of an induction coil which did not require physical connection with the telephone; *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322,—use of a dictaphone placed against the partition wall which enabled federal agents to hear the conversation between the defendants in their office and what one of them said over the telephone; *People v. Graff*, 144 Cal.App.2d 199, 300 P.2d 837, (hear. den.) where the same technique as in the *Goldman* case was used; *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270, where the federal agent who talked with defendant in his shop had a small microphone in his pocket with an antenna running along his arm and an agent outside the shop with a receiving set picked up incriminating statements made by defendant; *People v. Avas*, 144 Cal.App.2d 91, 300 P.2d 695 (hear. den.), and *People v. MacKenzie*, 144 Cal.App.2d 100, 300 P.2d 700 (hear. den.) where the modus operandi of recording a conversation participated in by all defendants in MacKenzie's home was substantially the same as that employed in the *On Lee* case.

If, however, dictographic surveillance of a person is effected through trespass or unlawful entry upon his premises, then his constitutionally protected right of privacy has been violated. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, and *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505.

[3] The foregoing demonstrates that there are a variety of situations in which dictographic surveillance by the police is not a violation of constitutional rights. It is apparent that whether future acts of the police amount to an invasion of such rights cannot be determined by rule of thumb or by a fixed formula. This is necessarily so because, as this court pointed out in *People v. Coleman*, 134 Cal.App.2d 594, 286 P.2d 582, it is only *unreasonable*

search and seizure that is prohibited by our federal and state constitutional provisions. In *Go Bart Importing Co. v. United States*, 282 U.S. 344, at page 357, 51 S.Ct. 153, at page 158, 75 L.Ed. 374,—a search and seizure case—the court remarked: "There is no formula for the determination of reasonableness." In *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, the court stated: "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." 339 U.S. at page 63, 70 S.Ct. at page 434. The *Cahan* decision, and what has transpired since it was rendered, is in harmony with these principles. The author of the opinion concluded with the observation that "it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interests of society in the suppression of crime." 44 Cal.2d at page 451, 282 P.2d at page 915. Since that time our courts have been busily engaged in developing these "workable rules" by an examination of "the facts and circumstances of each case" that has come before them. These principles and practices justified the trial court's refusal to grant plaintiff "a declaratory judgment of a mandatory and directory character regardless of the particular circumstances under which the defendant may be called upon to act in the future, and regardless of what some court might hold in some future case with respect to the legality of such acts when considered in the light of the evidence which may be adduced in any such case."² We note in passing that many aspects of the

1. Section 605 of the Federal Communications Act 47 U.S.C.A. § 605 makes wiretapping illegal. It is also made

illegal in California by section 640, Penal Code.

2. This quotation is from the trial judge's memorandum.

subject matter here under discussion are appropriate for legislative consideration.

[4] If it be conceded that some dictographic installation in the future will involve an infringement of the constitutional rights of some as yet unknown person the court was, nevertheless, not required to grant the relief sought for it would be detrimental to the public interest in that it would have a suffocating effect upon law enforcement, the prevention of crime, the apprehension of criminals, and the protection of property from their depredations. Such an injunction would readily lend itself to misuse and abuse by the criminal element. A bookmaking syndicate or a narcotics ring might well frustrate an effective investigation of their operations by specious contempt citations on the theory that the police had violated their constitutional guarantees against unreasonable search and seizure. While police misbehavior such as that disclosed in the Cahan and Tarantino cases cannot be condoned, it is nevertheless sound public policy that the police not be unduly hampered in tracking down crime. Effective law enforcement to the end that an ordered society may be maintained is one of the purposes of local government. That purpose should not be frustrated on the contingency that the rights of some unknown person may at some future time be violated by the police and some public funds erroneously spent in connection therewith.

[5,6] Plaintiff challenges finding XI on the grounds that it is "an argument more than * * * a finding," that "it conflicts with other findings," and that it is "replete with conclusions." The fact that a finding is argumentative may be a proper basis for criticizing its form, but it cannot justify a reversal of the judgment. The only suggestion of a conflict between this and other findings is a parenthetical reference to finding VIII. We have examined the two findings. Without detailing their provisions, suffice it to say, we fail to find any necessary conflict between them. The conclusions about which plaintiff complains appear to be conclusions

of fact. Such conclusions are not improperly included in findings of fact. *Hayward Lbr. Co. v. Construction, etc., Corp.*, 110 Cal.App.2d 1, 3, 241 P.2d 1054.

[7] Plaintiff contends that findings XII and XV are "against the evidence" and "conclusory." In finding XII the court declares that expenditures in connection with dictographic surveillance is "neither large nor substantial" and that it is less expensive than other means. Examination of the record reveals ample evidence in defendant's verified answer, in an affidavit filed by him, and in his deposition (all of which were received in evidence under the stipulation re submission) to support the finding.

In finding XV the court declared that there is no threatened or actual irreparable injury to plaintiff or to any other taxpayer or to the general public by any substantial waste of public funds in connection with dictographic surveillance. The evidence amply supports this finding.

In his attack upon these findings plaintiff makes the point that the pertinent question is not the degree of expense but the legality of the practice. This argument begs the question. Whether any expenditure of public funds by defendant is illegal turns upon the basic question of whether under the particular facts and circumstances the act giving rise to the expenditure is illegal. This, of course, cannot be determined until the facts and circumstances are known. Since plaintiff is dealing with anticipated situations these, of course, cannot now be known. Hence the legality of the expenditure cannot be determined at this time. In this connection the final sentence of finding XV is particularly significant. The court found there is no impending or threatened injury to plaintiff or to any taxpayer or to the general public by reason of any future or threatened installation or use of such equipment pursuant to any authorization therefor by defendant. This finding provides additional justification for the judgment.

Plaintiff's contention that these two findings are "conclusory" is adequately met by our observations *supra* relative to the same criticism of finding XI.

[8] Plaintiff's final challenge to the findings is that findings "XVI and XVII are against the evidence." Finding XVI is that except as they are found to be true, each of the allegations of plaintiff's amended complaint is untrue. Finding XVII is that except as they are found to be untrue, each of the allegations of defendant's answer is true. Plaintiff has failed to indicate what particular facts he has in mind or wherein either of these findings is against the evidence. It has been held repeatedly that the mere assignment of error is not sufficient to warrant an inquiry into its merits. *People v. Buena-flore*, 40 Cal.App.2d 713, 719, 105 P.2d 621; *Martter v. Byers*, 75 Cal.App.2d 375, 379, 171 P.2d 101.

Plaintiff relies on *Wirin v. Horrall*, 85 Cal.App.2d 497, 193 P.2d 470. That case is not here applicable. It was an appeal from a judgment of dismissal after a demurrer sustained without leave to amend. Plaintiff sought to restrain defendants from spending funds of the city in conducting "police blockades," that is, blocking off designated areas of the city of Los Angeles and stopping all persons and automobiles entering or leaving such areas and searching them without first obtaining search warrants." This court held he alleged a cause of action. The allegations were such as to make the roadblock and the indiscriminate searches illegal in their entirety. No question of the legality of the search in any specific instance arose. The practice sought to be enjoined in the Horrall case was similar to the roadblock at the Mexican border, considered in *People v. Gale*, 46 Cal.2d 253, 294 P.2d 13. Having held it to be illegal, the court then considered the facts and circumstances of the search of the particular defendant. While the Horrall case arose on demurrer the instant matter was decided on the merits. Contrary to the allegations in Horrall, the court here, in effect, found as a

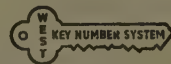
fact, and the cases cited demonstrate, that dictographic surveillance is not always a violation of an individual's rights against unreasonable search; whether such rights are invaded depends on the facts and circumstances of the particular case, *United States v. Rabinowitz*, *supra*. Hence the inapplicability of Horrall.

The conclusions of law that "the plaintiff is not entitled to a declaration or judgment undertaking to determine the reasonableness or legality of future acts" of the defendant Chief of Police in connection with the installation and use of sound transmission equipment for purposes of surveillance, and that plaintiff is not entitled to any relief, and the judgment are in harmony with the evidence, the findings of fact and the applicable law.

It is unnecessary to pass upon other points argued by counsel.

Judgment affirmed.

MOORE, P. J., and ASHBURN, J., concur.



145 Cal.App.2d 177

WALTER G. BRIX, Inc., a corporation,
Plaintiff and Appellant,
v.

Kenneth S. BROWN, Chrls E. Muller, A. G. Brown, Individually and doing business as Brown, Muller and Brown, a co-partnership, Defendants and Respondents.

Civ. 8785.

District Court of Appeal, Third District,
California.

Oct. 18, 1956.

Suit, for injunctive relief and damages, brought by plaintiff claiming to have exclusive right of way over roadway used by defendants' logging trucks. The Superior Court, Humboldt County, Delos A.

Mace, J., denied the relief sought, and plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence sustained defendants' claim that road had been in general use for over 40 years as a public highway.

Affirmed.

1. Dedication ⇨20(3)

A long acquiescence by landowner in public use will operate as a dedication of a road to such use.

2. Easements ⇨36(1)

There is a general presumption that use by other than owner is adverse and not permissive, and while such presumption is not as strong when land is open and uncultivated and remote as it is when it is enclosed, cultivated and developed, presumption exists in either case.

3. Highways ⇨17

In suit for injunctive relief and damages, brought by plaintiff claiming to have exclusive right of way over roadway used by defendants' logging trucks, evidence sustained defendants' claim that road had been in general use for over 40 years as a public highway.

4. Appeal and Error ⇨172(1)

Plaintiff whose entire cause of action in trial court had been based upon proposition that it held an exclusive right of way over road could not successfully contend on appeal that defendants' use of road exceeded that of public generally.

Hill & Hill, Eureka, for appellant.

Blaine McGowan, Eureka, for respondents.

McMURRAY, Justice pro tem.

This is an appeal from a decision denying plaintiff injunctive relief or damages.

Plaintiff claimed to have acquired by grant exclusive rights of way for lumbering purposes over a route through two separately owned, but contiguous, parcels of real property. Plaintiff learned that the

existing roadway traversing these separate pieces of property was being used by defendants' logging trucks and equipment as a means of access to a logging operation defendants were conducting. Defendants had constructed a branch road from their operation to the road over which plaintiff claimed he had the exclusive right of way. Defendants, as an affirmative defense, alleged that the road which plaintiff claimed exclusively had been in general use for over forty years as a public highway. The trial court found in accordance with this affirmative defense and denied plaintiff any relief.

On this appeal appellant urges that the evidence is insufficient as a matter of law to sustain the finding that the roadway was dedicated to a public use; that the judgment is contrary to law in that the trial court did not limit the nature and use of the road to those acquired by public use.

[1,2] A long acquiescence by a landowner in public use will operate as a dedication of a road to such use. *Taft v. Tarpey*, 125 Cal. 376, 381, 58 P. 24; *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 P. 448. Furthermore, there is a general presumption that a use by other than the owner is adverse and not permissive, and that, while this presumption is not as strong when the land is open and uncultivated and remote as it is when it is enclosed, cultivated and developed, the presumption exists in either case. *People v. Sayig*, 101 Cal.App.2d 890, at page 897, 226 P.2d 702, at page 707. In the case of *City of Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 181 P. 658, a summary of the various principles applicable to the law of implied dedication is presented. At page 450 of 180 Cal., at page 660 of 181 P., it is stated:

"In order to constitute such dedication, or such abandonment, by the owner, his intention to that effect must appear. Such intent need not be manifested by any contract, writing, or express declaration of the owner. It may be implied from his conduct. If the donor's acts are such as to indi-

cate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete.' *People v. Marin County*, 103 Cal. [223 at page] 228, 37 P. 203, 26 L.R.A. 659. In that case it is said that, in the case of an express dedication by words or acts, 'the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose,' but that an implied dedication may be proved 'by acts or conduct not directly manifesting the intention, but from which the law will imply the intent.' As stated in *Helm v. McClure*, 107 Cal. [199] 204, 40 P. 437, the question 'whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; that such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that somewhat vague entity called "the public."'

The case of *Union Transportation Company v. Sacramento County*, 42 Cal.2d 235, 267 P.2d 10, contains a full and able discussion of the law applicable to implied dedication and adverse user. What is there said is determinative of the question here presented.

[3] The record before us in this case is adequate to show a continued use of the road for over forty years along substantially the identical route which it now follows; that this use was not denied to anyone; and that improvements on the road were made by others than the owners of the abutting property; furthermore, that one portion of the road had been used by county road equipment in reaching a gravel pit. We feel that this is certainly sufficient basis for the trial court to find, as it did, in favor of the road here being a public road.

[4] Admittedly, there is evidence to controvert the idea of dedication by public use. There was evidence that gates had been maintained along the road for many years, that "No Trespassing" signs were posted and that the road was a cul-de-sac. All of these evidentiary matters merely raised conflicts in the evidence which were resolved by the trial court against appellant. In many of the cases cited by appellant for the proposition that these showings should upset the judgment in the court below, the language quoted is from cases wherein the reviewing courts upheld findings of trial courts that by reason of the existence of gates, signs, and cul-de-sacs no dedication had resulted from user. It is also contended that even if a dedication can be found, the evidence shows that the use that the defendants had made of this road had exceeded the public use, since defendants used logging trucks on the road and widened the road to make it possible for the larger vehicles to operate. Inasmuch as this point was not in issue in the trial below, and inasmuch as the court has found that there was a dedication to be implied from the evidence here set forth, it would seem that the appellant is not in a position to object to the widening of the road by defendants since appellant's entire cause of action below was based upon the proposition that it held an exclusive right of way to that road. Furthermore, the evidence as to widening shows a somewhat insubstantial change of route and cannot be said to be a substantial change of the easement owned by the public. See *Ward v. City of Monrovia*, 16 Cal.2d 815, at page 821, 108 P.2d 425, at page 429. And as to the right to make repairs where there is an easement, see the same case, 16 Cal.2d at pages 821 and 822, 108 P.2d at page 429.

Appellant's contention that an injunction should have been granted even though the court found that no damages were proven, is not well taken, since if appellant did not have an exclusive easement it would not be entitled to an injunction, and the court's

finding that this road was a public road precluded any such relief.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



145 Cal.App.2d 210

Ella Edith TOWERS, Plaintiff and
Appellant,
v.

The MASSEY-HARRIS COMPANY, a Corporation, Louis E. Amborn, Mrs. Louis E. Amborn, Herbert E. Cunningham and Mrs. Herbert E. Cunningham, Individually and doing business under the fictitious firm name and style of Superior Equipment Company, Defendants and Respondents.

Liberty Mutual Insurance Company, a Corporation, Plaintiff in Intervention.
Civ. 8884.

District Court of Appeal, Third District,
California.

Oct. 19, 1956.

Rehearing Denied Nov. 13, 1956.

Hearing Denied Dec. 12, 1956.

Action by surviving widow for death of husband who was killed when self-propelled combine rolled backwards off of ramp, allegedly as result of negligent operation and crushed the husband. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that under the facts of the case doctrine of *res ipsa loquitur* applied to the situation and raised inference of negligent conduct on part of operator of combine as proximate cause of death of husband, and that evidence as to whether husband was contributorily negligent was sufficient to present question of fact for jury.

Judgment reversed.

1. Appeal and Error ⇨927(3), 989

Where all testimony given by defendants in action was elicited from them under Civil Procedure section allowing defendants to be examined as if under cross-examination subject to the rules applicable to examination of other witnesses, plaintiff on appeal from judgment of nonsuit entered for defendants could rely upon portion of such testimony favorable to her and disregard unfavorable testimony in her attack on the nonsuit. West's Ann.Code Civ.Proc., § 2055.

2. Negligence ⇨121(3)

In action by surviving widow for death of husband who was killed when self-propelled combine rolled backwards off of ramp and crushed husband allegedly as result of negligent operation of the combine, doctrine of *res ipsa loquitur* applied to situation and raised inference of negligent conduct on part of operator of combine as proximate cause of death of the husband.

3. Negligence ⇨121(2)

Under the *res ipsa loquitur* doctrine, where plaintiff introduces only some circumstantial evidence suggesting a definite cause for accident, it cannot be said that normal inferences are defeated.

4. Negligence ⇨136(26)

In action by surviving widow for death of husband, who was killed when self-propelled combine rolled backwards off of loading ramp allegedly as result of negligent operation of the machine by its operator, thereby crushing plaintiff's husband, evidence as to whether husband was contributorily negligent in standing in back of machine was sufficient to present question of fact for jury.

Ralph E. Kingston, Stockton, for appellant.

John A. MacDonald, Leonard Hanna & Brophy, San Francisco, for plaintiff in intervention.

Neumiller, Ditz, Beardslee & Diehl, Irving L. Neumiller and Joseph W. Diehl, Stockton, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff-appellant is the surviving widow and sole heir of Guy A. Towers, who was killed while taking part in the loading of a combine harvesting machine upon a flatbed truck. The combine was self-propelled. Defendant-respondent Louis E. Amborn drove it up a loading ramp consisting of planks, with one end resting on the ground and the other on the rear of the flatbed. As Amborn drove up the ramp, Towers descended from the bed of the truck, from which point he had been directing Amborn and passed around to the back of the combine with the apparent purpose of seeing that all the wheels were properly on the planks. At this point he was out of sight of Amborn, but Amborn knew where he was. When Amborn had driven the combine onto the planks, it suddenly ran back down, crushing and killing Towers. Appellant brought action against the partnership of which Amborn was a member and against its partners individually, alleging that they, through Amborn, so negligently operated the machine as to cause it to back down the ramp. She pleaded this negligence generally in the sense that she made no attempt to describe exactly the negligent conduct of Amborn. At the trial appellant proved the foregoing facts. She went further and introduced evidence tending to prove a theory of negligent conduct, consisting in Amborn's having failed to detect mechanical defects in the harvester which permitted it, during the operation, to run back down the ramp. The evidence suggested that the immediate cause of the harvester's failure to proceed up the planks and onto the flatbed truck was that the low forward gear which Amborn was using was defective and jumped out, thus releasing the machine. At the close of appellant's evidence, the trial court granted a nonsuit, and from the judgment following this appeal is taken.

Respondents' counsel assert that the trial court was justified in nonsuiting appellant upon each of two grounds: (1) That there was no proof of negligence on the part of Amborn, and, (2) That, as a matter of

law, Towers was guilty of contributory negligence. In our view, neither ground is tenable, and the judgment appealed from must be reversed.

[1,2] All of the testimony was elicited from defendants under Section 2055 of the Code of Civil Procedure. On appeal, therefore, appellant may rely upon the portion of such testimony that is favorable to her and disregard the unfavorable in her attack on the nonsuit. *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826. Respondents Louis E. Amborn and his wife were eyewitnesses, and the description of the accident is found in their testimony. It may be summarized as follows: In addition to what has been stated, it appeared that Amborn had arranged with the trucking company, which employed Towers, to send a flatbed truck and trailer with driver to a ranch where the harvester was standing, at which point Amborn engaged to meet the driver. At the appointed time Mr. and Mrs. Amborn arrived at the ranch where the harvester was and found Towers there with his truck and trailer. Towers had placed the loading planks in position, and Amborn thereupon got onto the operating platform of the harvester, started the motor, placed the machine in low forward gear and started to drive it toward the ramp, being guided by Towers. When the front tracks of the harvester engaged the two outer planks Towers got off the rear end of the trailer and passed around behind the harvester where he checked the two inside planks to see if they were in proper position to receive the rear wheels. He stooped over, attempting to adjust one of the planks, at which moment the harvester moved rapidly backwards and crushed him. *Res ipsa loquitur* applies to the situation presented by the foregoing facts and raises the inference of negligent conduct on the part of Amborn as the proximate cause of the death of Towers. *Zentz v. Coca-Cola Bottling Company*, 39 Cal.2d 436, 247 P.2d 344.

[3] Appellant did not lose the benefit of the rule *res ipsa* by introducing testimony purporting to show that Amborn was

negligent in not having carefully inspected the mechanism of the harvester and thus discovering the claimed defect in the gears. "Where the plaintiff introduces only some circumstantial evidence suggesting a definite cause for the accident, it cannot be said that the normal inferences are defeated." "Res Ipsa Loquitur in California", by William L. Prosser, 37 Cal.Law Rev., p. 214; *Leet v. Union Pacific R. Co.*, 25 Cal.2d 605, 620, 155 P.2d 42, 158 A.L.R. 1008.

[4] The facts do not convict Towers of contributory negligence as a matter of law, and it was for the jury to decide whether such negligence existed. Presumably, he was using due care for his own safety, and that presumption is not dispelled by anything appearing in the record here. The jury could consider that automotive equipment with which we are all generally familiar has reached such a point of excellence in design and manufacture that a machine such as this, intended to propel itself on various gradients, would not ordinarily, if properly operated, suddenly back down a ramp up which it was propelling itself. Towers was not bound to anticipate any negligence of Amborn who was shown to have had considerable experience with these machines and with the driving of them, including driving them up loading ramps, and the jury could conclude that there was no necessary inconsistency with ordinary care involved in Towers' conduct.

Respondents contend that facts before the court, independently of any testimony, conclusively demonstrate the contributory negligence of Towers as a matter of law. Our attention is directed to the opening statement of appellant's counsel in connection with the various exhibits consisting of photographs of the harvester, of the truck and trailer and of the loading ramp. We have examined these and have concluded that, singly or all together, they do not have the effect for which respondents contend. In the opening statement it is true that counsel advanced a theory of negligence heretofore noted and having to

do with a mechanical defect as being the cause of the accident, which defect Amborn ought to have detected. But there was nothing in the opening statement which can be taken as waiving the benefit of the rule *res ipsa*, or as disposing of appellant's right to rely on the rule. Neither the opening statement nor the evidence introduced in support of that theory destroyed the inference that Amborn was negligent; much less did the opening statement and the facts introduced in evidence which we have already heretofore discussed, taken all together, prove Mr. Towers to have been guilty of contributory negligence as a matter of law.

For the reasons given, the judgment appealed from is reversed.

PEEK, J., and McMURRAY, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



145 Cal.App.2d 60

TITLE INSURANCE AND TRUST COMPANY, Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD, State of California, Defendant and Respondent.

Civ. 21726.

District Court of Appeal, Second District,
Division 2, California.

Oct. 11, 1956.

Action by taxpayer to recover a franchise tax paid on its trust business for 1953 and to recover interest on a refunded franchise tax paid for 1942. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment for defendant and taxpayer appealed. The District Court of Appeal, Moore, P. J., held, *inter alia*, that under statute providing interest shall be allowed upon any overpayment of tax

if the overpayment was not made because of an error or mistake on part of taxpayer, taxpayer who made an overpayment of taxes after the taxing authority announced that it was planning to require payment of such sum, and then applied for a refund rather than originally protesting payment of the tax, did not make such a voluntary erroneous payment as to deprive him of interest on fund subsequently refunded.

Judgment affirmed in part, and reversed in part with directions.

1. Taxation ☞387

After December 31, 1942, all insurance sold by a title insurance company was subject to an annual tax based upon the company's income, but income from a trust department of such a title company was required to be excluded from the basis of such tax. West's Ann.Const. art. 13, § 14½; West's Ann.Rev. & Tax.Code, §§ 23101 et seq., 26080-26080.3.

2. Taxation ☞117

A franchise tax for the privilege of doing business within the state is no less a tax upon a current year's privilege because measured by a prior year's income.

3. Taxation ☞386(1)

Where a statute provided for the levy of a franchise tax on trust business for 1943, measured by income of the business in 1942, the tax levied was for the privilege of doing business in 1943 regardless of the fact that a prior year's earnings constituted the measuring rod of the amount of the tax, and therefore the tax was not imposed in 1942 on trust businesses in violation of effective date of statute imposing franchise tax on trust businesses commencing in 1943. West's Ann.Const. art. 13, § 14½; West's Ann.Rev. & Tax. Code, §§ 23101 et seq., 26080-26080.3.

4. Taxation ☞387

Under article of Constitution providing for a revision in the taxation of insurance companies, an insurance company was obligated to pay a tax for business done prior to January 1, 1943 based upon the

amount of gross premiums received by it during the preceding 12 months, and was not exempted from payment of a tax for the privilege of doing business for the year of 1943. West's Ann.Const. art. 13, § 14½; West's Ann.Rev. & Tax.Code, §§ 23101 et seq., 26080-26080.3.

5. Taxation ☞117

Where a constitutional amendment substituted one form of taxation upon corporate franchises for another, the court would not hold that the amendment intended to postpone all collections of such taxes for an entire year in the absence of a clear and unmistakable expression of an intention to provide such a tax hiatus. West's Ann.Rev. & Tax.Code, §§ 12003, 12253, 12255; St.1943, p. 2838, § 21; West's Ann.Const. art. 13, § 14½.

6. Constitutional Law ☞34

Where a constitutional provision imposing a tax on insurance companies was self-executing without legislative implementation, in determining the effective date of such tax it was unnecessary to inquire into the intent of the Legislature in enacting various provisions of the revenue and taxation code codifying such constitutional provisions. West's Ann.Rev. & Tax.Code, §§ 12003, 12253, 12255; St.1943, p. 2838, § 21; West's Ann.Const. art. 13, § 14½.

7. Taxation ☞126

Mere fact that Legislature set in motion a new method of taxing the trust business of title insurance companies as of December 31, 1943, did not serve as an indication of legislative intent to exempt the trust business of such companies from taxation during the year 1943 in disregard of effective date of constitutional section providing for such tax, namely, December 31, 1942. West's Ann.Rev. & Tax.Code, §§ 12003, 12253, 12255; St.1943, p. 2838, § 21; West's Ann.Const. art. 13, § 14½.

8. Taxation ☞126

Where an amendment to an act providing for a franchise tax on insurance companies was made applicable only to

income years ending after the effective date of the act which was 1943, the first income year to which the amendment would be applied was 1943, rather than 1942, and even though such act changed the accrual date from the first day of the tax year to the last day of the income year, nevertheless, taxpayer's duty to pay tax upon its 1943 trust business became fixed upon December 31, 1942. West's Ann.Rev. & Tax.Code, § 23101 et seq.

9. Taxation ⇐535

Statutory provision denying interest on overpayments by a taxpayer due to error or mistake on the part of the taxpayer was designed to prevent abuse of interest allowance provided in certain cases on refunds of overpayments by taxpayers. West's Ann.Rev. & Tax.Code, §§ 25901-25901c, 26080-26080.3.

10. Taxation ⇐535

Under statute providing that interest shall be allowed upon any overpayment of tax if the overpayment was not made because of an error or mistake on part of taxpayer, taxpayer who made an overpayment of taxes after the taxing authority announced that it was planning to require payment of such sum, and then applied for a refund rather than originally protesting payment of the tax, did not make such a voluntary erroneous payment as to deprive him of interest on fund subsequently refunded. West's Ann.Rev. & Tax.Code, §§ 25901-25901c, 26080-26080.3.

Thompson, Royston, Wiener & Moss, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant filed its action in two counts: One was to recover the franchise tax as to its trust business paid for the year 1943; Two was to recover interest on the franchise tax paid for 1942 but refunded by order of the Franchise Tax Board May 31, 1950. Both demands were rejected. Appellant brought the matter here, contending (1) that it was not, in 1943, subject to the tax imposed by the former Bank and Corporation Franchise Tax Act for the calendar year 1943 by reason of the contents of section 14½ of Article XIII of the California Constitution; (2) that it is entitled to interest on the franchise tax paid for the taxable calendar year 1942 under section 27(c) of the former Bank and Corporation Franchise Tax Act¹ as that section read in 1942 because the overpayment of the tax did not result from an error or mistake on the part of appellant. The Franchise Tax Act will hereafter be referred to as the Act.

The answer to the question as to whether appellant was obliged to pay a tax under the Act for the privilege of operating its trust business in the calendar year 1943 depends upon the interpretation of section 14½² which was adopted November 3,

1. Such Act has been supplanted by the Bank and Corporation Tax Law, Division 2, Part II of the Revenue and Taxation Code.

2. California Constitution, Article XIII

"Sec. 14½. (a) Those provisions of Section 14¾ of this article relating to taxation of insurance companies and associations shall remain effective as to business done in this State prior to January 1, 1943, and as to the assessment, levy, collection and adjustment of taxes with respect to such business done prior to that date; but as to such business done subsequent to December 31, 1942, those provisions of Section 14¾ relat-

ing to taxation of insurance companies and associations shall not apply, and this section shall apply thereto.

"(b) 'Insurer,' as used in this section, includes insurance companies or associations and reciprocal or interinsurance exchanges. As used in this paragraph, 'companies' includes persons, partnerships, joint stock associations, companies and corporations.

"(c) An annual tax is hereby imposed on each insurer doing business in this State after December 31, 1942, on the bases, at the rates, and subject to the deductions from the tax hereinafter specified.

1942 and is in part copied on the margin hereof.

Section 14 $\frac{1}{2}$ is by its own contents self-executing. Without legislative aid, it emphatically subjects the trust business of appellant to taxation for 1943. Its title insurance business had long been subjected to an annual tax under subdivision (b) of section 14 $\frac{3}{4}$ of Article XIII "upon the * * * gross premiums, less return premiums, received upon its business done in this State, other than premiums received for reinsurance". But that method of computing the tax imposed upon the insurance business of title companies in 1942 underwent a change by the adoption of section 14 $\frac{1}{2}$, and trust business was separately taxed. By subdivision (a) of that section, those provisions of section 14 $\frac{3}{4}$ relating to the taxation of insurance companies "shall remain effective as to business done in this State prior to January 1, 1943, and as to the assessment, levy, collection and adjustment of taxes with respect to such business done prior to that date; *but as to such business done subsequent to December 31, 1942, those provisions of Section 14 $\frac{3}{4}$ relating to taxation of insurance companies * * * shall not apply, and this section shall apply thereto.*"

"(d) In the case of an insurer not transacting title insurance in this State, the 'basis of the annual tax' is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this State, other than premiums received for reinsurance and for ocean marine insurance.

"In the case of an insurer transacting title insurance in this State, the 'basis of the annual tax' is, in respect to each year, all income upon business done in this State, except:

"(1) Interest and dividends.

"(2) Rents from real property.

"(3) Profits from the sale or other disposition of investments.

"(4) Income from investments.

"In the case of an insurer transacting title insurance in this State which has a trust department and does a trust business under the banking laws of this

From the language just quoted, so far as appellant's insurance business is concerned, it was obliged to pay a tax for business done prior to January 1, 1943, based upon the amount of gross premiums received by it during the preceding twelve months. However, the adoption of section 14 $\frac{1}{2}$ brought on a definite change in the method of computing the annual tax on its title insurance business. While subdivision (d) retained the same basis of the annual tax as to all insurance companies except title companies, that is to say an annual tax based upon the amount of gross premiums, yet that subdivision changed the annual tax with respect to the insurance business of title companies to a tax based upon their income derived from business done in California. But if an insurance company in this state transacts title insurance and also "does a trust business under the banking laws of this State, there shall be excluded from the basis of the annual tax imposed by this section, the income of, and from the assets of, such trust department and such trust business, if such income is taxed by this State or included in the measure of any tax imposed by this State."

It was clearly the purpose of the new section that the trust portion of the business

State, there shall be excluded from the basis of the annual tax imposed by this section, the income of, and from the assets of, such trust department and such trust business, if such income is taxed by this State or included in the measure of any tax imposed by this State.

"(i) The tax imposed on insurers by this section is in lieu of all other taxes and licenses, State, county, and municipal, upon such insurers and their property, except:

"(2) That an insurer transacting title insurance in this State which has a trust department or does a trust business under the banking laws of this State is subject to taxation with respect to such trust department or trust business to the same extent and in the same manner as trust companies and the trust departments of banks doing business in this State."

done by such companies as appellant was not to be considered as insurance business and therefore should not be taxed as insurance business. Therefore, while section 14½ exempted the insurance companies and title companies from the great majority of taxes, it emphasized by subdivision (i) that the trust business done by title companies shall be taxed to the same extent and in the same manner as is that of any trust company or trust department of any bank operating in this state. From such reading of the new section, it is apparent that title companies are not engaged in the same type of insurance as that of other insurers and should be taxed on a different basis, to wit, on their incomes rather than on their gross premiums. Inasmuch as the trust business of title companies was not exactly a part of their insurance activities, the new section was so phrased that the trust business of title companies shall be required to pay the same type tax as trust companies and banks doing a trust business are required to pay.

[1] From the foregoing, the conclusion is unavoidable that after December 31, 1942, all insurance sold by a title company must pay an annual tax based upon the company's income, but its income from its trust department must be excluded from the basis of such tax. As to the trust business done by a title company after December 31, 1942, it was subject to a franchise tax under the Bank and Corporation Franchise Tax Act, the same as that paid by other trust companies and trust departments of banks.

Appellant contends (1) that under section 14¾ by reason of the fact that its insurance tax is levied in lieu of all other state taxes, it was exempt from the payment of California bank and franchise tax; but (2) that under section 14½ it is subject to such tax measured by its trust department's net income; (3) that the levy of a franchise tax for 1943 measured by its income for 1942 was the assessment and levy of a tax with respect to business done prior to January 1, 1943; (4) thus the judgment of

the superior court approving the levy of a tax measured by appellant's trust department income for 1942 applies section 14½ prematurely and contrary to the terms of the express, effective date provided by the section; namely, December 31, 1942.

[2, 3] Appellant's contention that the levy of a franchise tax on trust business for 1943 measured by the income of its trust business in 1942 is, in effect, a tax upon its 1942 trust business in violation of the effective date of section 14½ is not justified by an analysis of that section. Section 14½ expressly provided for taxation of 1943 trust business. The franchise tax here levied was for the privilege of doing business in 1943 regardless of the fact that a prior year's earnings constituted the measuring rod of the amount of the tax. A tax for the privilege of doing business within the state is no less a tax upon this year's privilege because measured by last year's income. Is not success in the recent past the best criterion for measuring the value of doing business now? Since the formula prescribed by the legislature for deriving the taxes due by a trust company furnishes an approximation of the amount accrued and since there appears no abuse of power by the legislation, it will not be disturbed. See *Fullerton Oil Co. v. Johnson*, 2 Cal.2d 162, 175, 39 P.2d 796.

[4, 5] We cannot agree that section 14½ should be so construed as regards its effective date as to leave appellant not subject to tax for the privilege of conducting trust business in 1943. Should such construction prevail, the trust portion of appellant's business would be exempt for 1943 while its insurance business would be taxed for that year. Thus, would result a hiatus in the law as to the taxation of the trust business of title companies which could not reasonably have been intended by the authors of section 14½ which contemplates that trust business would be taxed. Under appellant's construction of the amending section, the insurance business would be taxed for the year 1943 while its trust business would escape the

drag of the tax gatherer. "In substituting one form of taxation upon corporate franchises for another, we should not hold that the people intended to postpone all collections of such taxes for an entire year unless, the intention to provide such a tax hiatus was clearly and unmistakably expressed." *Spring Valley Co. v. Johnson*, 7 Cal.App.2d 258, 261, 46 P.2d 294, 296; *Carpenter v. Peoples Mutual Life Ins. Co.*, 10 Cal.2d 299, 303, 74 P.2d 508.

[6, 7] However, appellant argues that the task of this court of attempting to construe the effective date of section 14½ has been pre-empted by the Legislature. The gist of the contention is that when the Legislature added sections 12253 and 12255 to the Revenue and Taxation Code by the Statutes of 1943, chapter 956, page 2832, and thereby codified the provisions of the constitutional section 14½, section 21 of chapter 956 provided that the effective date of these statutory sections was to be December 31, 1943. Thereby the inference is sought to be drawn that the Legislature construed section 14½ as not providing for franchise taxation of trust business carried on during 1943 as measured by 1942 receipts. This contention cannot prevail. In view of the fact that the provisions of section 14½ are clearly self-executing without legislative implementation, it is unnecessary to inquire into the intent of the Legislature in enacting the various provisions of the Revenue and Taxation Code. In the second place, the effective date contained in section 21 of chapter 956 applied to numerous amendments to the code besides sections 12253 and 12255. It is therefore impossible to infer any legislative intent that these specific sections were to have the December 31, 1943, effective date because of a construction by that body of the constitutional provision. Furthermore, neither of these code sections provided for taxation of the trust business of title insurers. Rather they merely excluded receipts from such business from the income used to measure insurance taxation under the new method for computing such tax. The fact that the Legislature set in

motion the new method of taxing the insurance business of title companies as of December 31, 1943, does not serve as an indication of legislative intent to exempt trust business of such companies from taxation during the year 1943 in disregard of the clear effective date of the constitutional section; namely, December 31, 1942.

[8] A final point put forward by appellant is that in June of 1943, the Legislature amended the Bank and Corporation Franchise Tax Act to provide that from thenceforth the franchise tax would be collected at the *close* of the business year rather than the beginning, thereby measuring the amount of the tax by the business of the current rather than the prior year. Stats. 1943, ch. 984, § 4(7), p. 2899. Thus, the argument runs that the first year whose income should be measured for taxation would be that of 1943 rather than 1942. In other words, that the first franchise tax applicable to appellant would be by the terms of the amendment to the Act be due on the 31st of December, 1943, and be measured by the income earned from the trust business during that year. However, the fact that the Legislature changed the accrual date from the first day of the tax year to the last day of the income year does not affect appellant's liability. Nevertheless, appellant's duty to pay tax upon its 1943 trust business became fixed upon December 31, 1942. At that time, a franchise tax was imposed due the first day of the year 1943 for the privilege of doing business in 1943. The amendment to the Act could not have been effective as to the income year 1942 upon which the 1943 franchise tax was based because under the provisions of section 2 of chapter 984 of the statutes of 1943 the amendment was only to be applicable to "income years ending after the effective date of this act." Therefore, the first income year to which the amendment would apply would be 1943 and not 1942. This provision was undoubtedly inserted so that taxation of income years would proceed in an unbroken chain regardless of the change in accrual dates.

The Overpaid Franchise Tax for 1942.

On March 15, 1942, appellant filed its franchise tax return for that year based upon 1941 income. The return disclosed a net income of \$79,625.61 and assessed appellant's franchise tax at \$3,197.02 which was paid with the return. Appellant and Franchise Tax Commissioner having waived the statute of limitations for the assessment of the franchise tax, the time for assessment was extended to December 1947. Thereupon, appellant filed its claim for a refund of the reported tax upon the ground that "The Bank and Corporation Franchise Tax is not applicable in any way to claimant for the period here involved for the reason that claimant was at all times mentioned herein an insurance company, subject to the California tax on insurance companies in lieu of all other taxes." The taxpayer then pursued its remedies through the appropriate tribunals and secured an order for the refund of the tax *but without interest*. The Title Company now demands interest at the rate of six per cent on the refunded amount as accrued from the date of its payment, March 15, 1942, to the date of refund, June 5, 1950.

The statute under which the claim is made is section 27(c) of the Bank and Corporation Franchise Act as constituted in 1942, which read, "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment was not made because of an error or mistake on the part of the taxpayer". The admitted facts surrounding the payment of the tax are that in 1940 the Attorney General of the State of California issued his opinion which advised the taxing authorities to collect a franchise tax from title insurers in the trust business regardless of the provisions of the section of the California Constitution which provided for a single tax upon insurance companies; the opinion was published in tax journals; and the taxing authorities indicated their intent to adopt the advice offered. Appellant relied upon these representations of intent and voluntarily self-assessed the tax. However, appellant must have had the intent at that time of seeking a refund of the tax be-

cause, regardless of the Attorney General's opinion, the Board of Equalization had recently rendered a decision favorable to appellant's position. Considering these circumstances, the question is whether the payment was due to the "error or mistake" of the taxpayer.

A reading of the Bank and Corporation Franchise Tax Act as it was constituted in 1942 convinces us that appellant is entitled to interest on the overpayment. That act provided a choice of two avenues to a taxpayer in the position of the appellant who felt it did not owe a tax *which the taxing authorities were avowedly intending to collect*. Section 25, Stats.1939, ch. 1050, p. 2962, authorized the taxpayer to protest the payment of the tax, obtain a hearing before the Franchise Tax Commissioner, and subsequently to appeal to the Board of Equalization. However, if the taxpayer there lost, section 24(c) would impose upon it interest on the deficiency at the rate of six per cent from the date when the tax was originally payable to the date when the deficiency was finally paid. Stats.1939, ch. 1050, p. 2962. On the other hand, the taxpayer could proceed in the manner followed here; i. e., pay the tax and then claim a refund. In such event, the taxpayer would be entitled to the interest on the overpayment at the identical rate of six per cent. Stats.1939, ch. 1050, § 27(c), p. 2966. Quite obviously the taxpayer is not under a compulsion to choose either of the avenues provided. If it chooses to protest a tax the government attempts to collect, naturally the taxpayer should re-imburse the government for its loss of use of the funds during the period of protest. On the other hand, if the government demands payment of funds which the taxpayer does not feel are due, the government should recompense the taxpayer for use of his funds for a period of time.

[9,10] The provision in section 27(c) denying interest on overpayments due to error or mistake on the part of the taxpayer was designed to prevent abuse of the interest allowance. If six per cent happens to be a very good rate of return on an invest-

ment, naturally taxpayers may not be allowed to overpay at will and then collect profitable refunds. Thus, if appellant's attorneys had read court or board decisions, construed the statutes, and mistakenly determined themselves liable for franchise tax, they could expect no compensation for their error. But where, as here, the taxing authority announces it is planning to require payment of certain sums, a taxpayer choosing to pay and seek refund has not made such a voluntary, erroneous payment as to deprive him of interest on the funds subsequently refunded.

The judgment is affirmed (Count I) insofar as it denied recovery of the franchise tax appellant paid on its trust business for 1943; it is reversed insofar as appellant is denied interest upon the refund of the 1942 franchise tax, and the trial court is directed to enter judgment in favor of plaintiff on Count II in accordance with the views herein. Each party is to bear its own costs of appeal.

FOX, J., concurs.

ASHBURN, J., does not participate in this decision.



145 Cal.App.2d 158

Albert LANDSBERG et ux., Plaintiffs and Appellants,
v.

Dr. Sydney M. KOLODNY et al., Defendants and Respondents.

Civ. 21680.

District Court of Appeal, Second District,
Division 1, California.

Oct. 18, 1956.

Rehearing Denied Nov. 8, 1956.

Hearing Denied Dec. 12, 1956.

Action by husband and his wife for damages caused by alleged negligence of obstetrician and hospital in causing a mesh of cotton gauze, used and applied in the body of wife during a child delivery, to be-

come lodged and embedded in wife's abdomen. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Doran, J., held that evidence, including testimony as to a severe hemorrhage causing the loss of three or four pints of blood endangering wife's life, presented a question for the jury as to whether defendants used due care in treating wife.

Judgment affirmed.

1. Appeal and Error ⇨930(1)

Where an appellant relies upon insufficiency of evidence to support a judgment for respondent, all the evidence, and its inferences, must be viewed in a light most favorable to respondents.

2. Hospitals ⇨8

Physicians and Surgeons ⇨18(9)

In action by husband and his wife for damages allegedly caused by the negligence of obstetrician and hospital in causing a mesh of cotton gauze, used and applied in the body of wife during a child delivery, to become lodged and embedded in wife's abdomen, evidence, including testimony as to a severe hemorrhage causing the loss of three or four pints of blood endangering wife's life, presented a question for the jury as to whether obstetrician and hospital used due care in treating wife.

3. Appeal and Error ⇨1064(1)

Physicians and Surgeons ⇨18(10)

In action by husband and his wife for damages resulting from alleged negligence of obstetrician and hospital in causing a mesh of cotton gauze, used and applied in body of wife during a child delivery, to become lodged and embedded in wife's abdomen, in view of evidence that an emergency arose requiring a quick exercise of obstetrician's best judgment, as to how to stop a severe hemorrhage, instruction that obstetrician would not be liable although jury might believe from the evidence that the procedure followed by him was not the best procedure, was pertinent, and was not prejudicial.

4. Hospitals ⇐8**Physicians and Surgeons ⇐18(10)**

In action by husband and his wife for damages resulting from alleged negligence of obstetrician and hospital in causing a mesh of cotton gauze, used and applied in body of wife during a child delivery, to become lodged and embedded in wife's abdomen, instruction that if the accident in question could have been avoided by the exercise of exceptional foresight, skill or caution, still no one might be held liable for injuries resulting from it, was proper, in view of obstetrician's theory of the case as being an unavoidable or inevitable accident.

5. Trial ⇐203(1)

Each party to an action is entitled to have the jury instructed on each and every theory of a case.

Jerome L. Ehrlich, Samuel A. Rosenthal, Los Angeles, Max Bergman, Los Angeles, of counsel, for appellants.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent, Dr. Sydney M. Kolodny.

Reed, Kirtland & Packard, Henry E. Kappler, Los Angeles, for respondent, Queen of Angels Hospital.

DORAN, Justice.

The gist of the action is that the defendants negligently caused a mesh of cotton gauze, used and applied in the body of the plaintiff Bernice Landsberg during a child delivery, to become lodged and embedded in said plaintiff's abdomen. The gauze remained in the plaintiff's abdomen until removed by surgery some two years later. The term plaintiff, as hereinafter used, refers to the plaintiff Bernice Landsberg. Dr. Kolodny was the obstetrician employed by the plaintiff; the delivery took place at Queen of Angels Hospital where Dr. Kolodny was assisted by a resident physician, intern and nurses who were employees of the defendant hospital.

The plaintiff relied upon the doctrine of *res ipsa loquitur*, and after several days of

trial before a jury, a 9 to 3 verdict was returned for the defendants. It is appellants' contention that the evidence is insufficient to support the verdict; that defendants' failure to explain the cause of the accident, "or to produce evidence of any measures to prevent such * * * occurrence", and particularly "defendants' gross negligence in not counting the sponges used during the delivery" leads to the conclusion that "plaintiffs prima facie case * * * has in no way been met or overcome by the defendants". Appellants make the further claim that "The verdict for the defendants is explainable only by the fact that the erroneous instructions by the trial court misled the jury".

On the morning of June 9, 1950, plaintiff entered Queen of Angels Hospital, and about 11:50 a. m. the baby's heart beats suddenly dropped from 120-160 to a low of 80 beats per minute, a condition requiring immediate delivery. Plaintiff was given a spinal anesthesia; the baby's head was found to be in an abnormal position requiring the use of forceps to rotate the head, resulting in certain lacerations. In order to facilitate delivery, Dr. Kolodny performed an episiotomy or incision to widen the vaginal canal, and to stop bleeding inserted a number of cotton gauze sponges, about four by four inches square. There was testimony that a custom or usage existed in Class A hospitals not to count sponges used in child delivery, and that if not removed, such sponges would ordinarily be expelled through the natural opening. Such usage differs from that existing in surgery of other parts of the body where sponges would not be naturally expelled.

When the baby was born two loops of cord wrapped around its neck impeded breathing which was restored by artificial respiration. Shortly after delivery, plaintiff suddenly had a severe hemorrhage losing three or four pints of blood, indicating a failure of the uterus to contract normally; plaintiff's pulse rose, blood pressure dropped, and it was feared that the plaintiff would die on the table. After

medicinal and other procedures failed to stop the bleeding, Dr. Kolodny packed the uterus with a five-yard roll of gauze and then packed the vagina with a three-yard length of gauze tied to the first roll, and the hemorrhage was then arrested.

More than two years later, an exploratory operation by another surgeon disclosed a large abscess in the abdominal cavity. Within the abscess was lodged "an irregular mass of disintegrating gauze mesh", measuring approximately 7 by 6 by about 3½ inches. A pathologist testified that it could not be determined whether the gauze found came from sponges or from a piece of packing. Plaintiff remained in the hospital from September 3, 1952 when the gauze was removed, until November 26, 1952.

On October 22, 1952 a second operation was performed during which plaintiff's spleen and three-quarters of the stomach were removed. Many blood transfusions were required, and a third remedial operation was performed on November 10, 1952. As stated in appellants' brief, "There was considerable difference of opinion * * * as to whether the second operation * * * and the third remedial operation were necessitated by the *abscess* and infection, resulting from the lodging of the gauze mesh in plaintiff's abdomen."

[1] In the appellants' brief it is said: "we are mindful of the appellate principle that (1) an appellant who relies upon insufficiency of the evidence must point out the relevant evidence and the manner in which it is insufficient to support the judgment and (2) that all the evidence and its inferences must be viewed most favorably for the respondents". Viewing the record in the light of this principle it cannot be said that the verdict and judgment are without the support of substantial evidence.

[2] Appellants' argument that under the *res ipsa loquitur* rule the jury was obliged to find for the plaintiffs in this case, is untenable. As stated in respondents' brief, "while the doctrine of *res ipsa loquitur*

may have applied against the defendant in the first place, there was sufficient evidence of due care, both explaining the occurrence and rebutting the inference of negligence". In the final analysis, the matter was one for the jury to determine, and since the verdict is supported by substantial evidence, there should be no appellate interference therewith.

In this connection it is to be noted that there were several theories as to how the gauze reached plaintiff's abdominal cavity. The plaintiff's experts suggested that in the packing process the fundus of the uterus was accidentally punctured and a portion of gauze was shoved through the opening. Another possible explanation was that one or more gauze sponges, used to wipe away bleeding caused by lacerations or incisions, passed through cervical or vaginal lacerations into the cul-de-sac close by and wandered into the abdomen. And, under either theory, or disregarding both explanations, the jury may have reached the conclusion that the occurrence was in the category of an unavoidable accident.

The emergency presented by plaintiff's condition, the excessive hemorrhage following delivery, engendering the fear that plaintiff was entering irreversible shock and would die on the table, has been previously noted, and was doubtless considered by the jury. As Dr. Holcombe, plaintiff's expert, testified, when a patient's life is in danger, "your No. 1 problem is to save that life * * * regardless of any other question". In such an emergency situation, the occurrence in question could be found entirely accidental. Another witness, Dr. Tolefson, who testified that it was not good practice to leave packing in the uterine cavity, distinguished between "something that may be intentionally done and something that may be unintentionally done under the stress of circumstances".

The record discloses evidence from which the jury could find that the defendants had satisfactorily explained the situation and had been sufficiently exculpated in respect to the charge of negligence.

As said in the Kolodny brief, "A short reflection will show * * * that at times the only way in which a defendant can refute the inference of negligence is to show precisely what steps he used and then leave it to the jury to decide whether ordinary care was exercised". This was the procedure followed in the instant case.

The appellants complaint that certain instructions were erroneous and prejudicial is without substantial merit. The jury was told that in respect to the defendants' conduct, "you are not permitted to set up arbitrarily a standard of your own", and that "the only way you may properly learn that standard is through * * * expert witnesses". It appears that the plaintiffs, as well as the defendant Kolodny, had requested instructions that the doctor was obliged to use "the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality", etc. As stated by the respondent, "How could this standard of care and skill * * * be known to the jury unless it was testified to by other doctors who were the only ones in a position to know?"

[3] The jury was likewise instructed that if "a condition arose calling for the exercise of defendant's best judgment in weighing the probable consequences of different methods which might be pursued", and if Dr. Kolodny "exercised his best judgment and used the skill and care ordinarily possessed and used by doctors in the same specialty practicing in the same locality, then you are instructed that defendant Kolodny would not be liable although you should believe from the evidence that the procedure followed by him was not the best procedure". In view of the evidence that an emergency arose requiring a quick "exercise of defendant's best judgment", the instruction was pertinent, and no prejudice resulted from the giving thereof.

[4, 5] The same may be said in reference to the court's instruction on the theory of unavoidable or inevitable accident, concluding with the statement that "Even if

such accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it". Each party was entitled to have the jury instructed on each and every theory of the case which in this case included that of unavoidable accident.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.



145 Cal.App.2d 94

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William Charles BALLARD, Defendant and
Appellant.

Cr. 3227.

District Court of Appeal, First District,
Division 1, California.

Oct. 15, 1956.

Defendant was convicted for sale of narcotics in violation of Health and Safety Code. The Superior Court, Santa Clara County, William F. James, J., entered judgment and order denying defendant's motion for new trial and defendant appealed. The District Court of Appeal, Peters, P. J., held that information which charged sale of a "narcotic, to wit, Amidone, also known as Methadone Hydrochloride," clearly charged defendant with selling a narcotic in violation of the statute, and that there was no error in admission of evidence during trial or in giving or refusing to give instructions.

Judgment and order appealed from affirmed.

1. Indictment and Information ☞71

An information must be sufficiently definite to enable accused to know with what he is charged.

2. Poisons ☞9

Information which charged defendant with sale of a "narcotic, to wit, Amidone, also known as Methadone Hydrochloride," charged defendant with selling a narcotic in violation of Health and Safety Code. West's Ann.Health and Safety Code, §§ 11001, 11500.

3. Poisons ☞9

In prosecution for sale of narcotics in violation of Health and Safety Code, evidence was sufficient to show that tablets sold by defendant were "amidone" as defined in statute prohibiting sale thereof. West's Ann.Health and Safety Code, §§ 11001, 11500.

4. Criminal Law ☞369(1)

Generally, evidence of other crimes or of a general propensity towards crime is not admissible in a criminal prosecution.

5. Criminal Law ☞370, 372(1)

In prosecution for sale of narcotics in violation of Health and Safety Code, evidence of two prior sale transactions by defendant was admissible to show defendant's knowledge of the narcotic nature of the substance sold and to show a common plan, scheme or design. West's Ann.Health & Safety Code, §§ 11001, 11500.

6. Criminal Law ☞783(1), 1172(2)

In prosecution for sale of narcotics in violation of Health and Safety Code, instruction to jury that evidence of prior narcotics sale transactions by defendant was introduced solely for purpose of showing general customary habit was poorly worded but was not prejudicial error, where prosecutrix told jury that evidence of prior crimes was offered to show knowledge on part of defendant and to show a general plan or scheme and trial court ruled that evidence was admissible for those purposes. West's Ann.Health and Safety Code, §§ 11001, 11500.

7. Criminal Law ☞37

Entrapment is an affirmative defense.

8. Criminal Law ☞814(8)

In prosecution for sale of narcotics in violation of Health and Safety Code, failure

of trial court to give instructions on entrapment was not error, where defendant failed to offer testimony on the issue, and prosecution's evidence merely showed that police furnished a willing customer for defendant. West's Ann.Health & Safety Code, §§ 11001, 11500.

9. Criminal Law ☞37

Merely furnishing an opportunity to commit the crime is not evidence of entrapment.

10. Criminal Law ☞863(2), 1174(1)

In prosecution for sale of narcotics in violation of Health and Safety Code, comments by trial judge to jury, which sought further instruction, that \$400 of marked money given by police officer to defendant in purchase of narcotics had nothing to do with case and that it did not make any difference what became of the money, were not accurate and in some respects were misleading but were not prejudicial error, where defendant made no objection to comments and failed to ask for further clarification and court fully instructed jury on basic issues involved. West's Ann.Health & Safety Code, §§ 11001, 11500.

Benjamin M. Davis, San Francisco, Lionel Browne, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerney, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged by information with two violations of section 11500 of the Health and Safety Code in that on two separate dates he unlawfully sold a named narcotic. He was found guilty by a jury of both counts of the information. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The information, in separate counts, charges that on August 3, 1955, and again on August 9, 1955, the defendant did "willfully, unlawfully and feloniously sell a narcotic, to wit, Amidone, also known as Meth-

adone Hydrochloride." Amidone is defined in section 11001 of the Health and Safety Code as follows:

"'Narcotics,' as used in this division, means any of the following: * * *

"(j) Amidone. Amidone shall mean any substance identified chemically as 4,4-diphenyl-6-dimethylamino-heptanone-3, or and salt thereof by whatever trade name designated."

In the opening statement of the prosecuting attorney reference was made to the fact that the main prosecution witness, Mantler by name, a narcotic enforcement officer, first met defendant through a police informant; that this informer on two occasions in July of 1955, took Mantler to a certain parking lot, went over to defendant's car, returned to Mantler's car and got some money, and returned to Mantler's car with some white tablets, later analyzed as amidone. The prosecuting attorney referred to these two prior occurrences at some length, and then concluded the statement by declaring that the narcotic involved in all four transactions was amidone. Counsel for defendant moved for a mistrial, which was denied.

At the trial the prosecution produced three witnesses, while the defense produced none. A chemist in the Bureau of Narcotics stated that he had analyzed the tablets secured in all four transactions, and that all of them were amidone, a narcotic. The tablets from all four sales were introduced into evidence, the tablets which had been secured by the informant being admitted over defendant's objections.

Narcotics Officer Mantler testified that on July 26 and 30, 1955, he and the informant drove to the parking lot, that the informant left his car with marked money, went to defendant's car, and returned in a few moments with amidone tablets. Defendant objected to this testimony. Mantler also testified that on August 3rd the informant introduced Mantler and the defendant and Mantler purchased directly from defendant 25 white tablets, afterwards determined to be amidone, for \$50. Thereafter,

Mantler had several telephone conversations with defendant in an attempt to arrange another sale. On August 9th this second sale was consummated. Mantler, by prearrangement, met defendant in the parking lot, gave defendant \$400 in marked money, and received from defendant 200 white tablets, afterwards ascertained to be amidone.

Defendant was arrested later that night, and thereafter Mantler had three conversations with him. In the first two the defendant either denied ever having met Mantler before, refused to talk, or requested that he be permitted to see an attorney. In the third conversation defendant told Mantler that after the \$400 transaction he thought he was being followed and when he was unable to elude his followers, he burned the \$400. He also told Mantler that he sold him the tablets because he thought Mantler was sick and an addict and needed help.

The third witness produced by the prosecution was another narcotic official. He testified to observing Mantler talking with defendant on August 9th. He and another officer tried to follow defendant after that meeting, but they lost him. They found defendant later that night and arrested him. They searched defendant, his car and his residence, but found no narcotics and no trace of the \$400.

[1,2] The first contention of appellant is that the information does not allege a public offense. This contention requires but scant consideration. Appellant misconstrues the information by contending that he was charged with having sold, on two occasions, "Amidone, a narcotic, to wit: Methadone Hydrochloride." The information charges the sale of "a narcotic, to wit, amidone, also known as Methadone Hydrochloride." Thus, the information did not define amidone as methadone hydrochloride, but simply averred that amidone was also known as methadone hydrochloride. While an information must be sufficiently definite to enable the accused to know with what he is charged, *People v. Horiuchi*, 114 Cal.App. 415, 300 P. 457, the information here meets all of the requirements. Uncertainty is

created only by misquoting the actual charge. Appellant was clearly charged with selling a narcotic, amidone. The later part of the charge "also known as Methadone Hydrochloride" can, if necessary, be disregarded as surplusage. *People v. Beesly*, 119 Cal.App. 82, 6 P.2d 114, 970; *People v. Nordeste*, 125 Cal.App.2d 462, 270 P.2d 530.

[3] Appellant next attacks the sufficiency of the evidence. He admits that Mantler's testimony is sufficient to show that appellant sold the officer certain white tablets, and that the chemist testified that these tablets were amidone, but contends that no one testified that the tablets were amidone as defined in the statute above quoted. The point is without merit. The chemist was called as an expert. He testified that the tablets were amidone, a narcotic, and that dolophine and methadone hydrochloride were other names for the same substance. Thus, the evidence was sufficient on this point.

[4, 5] It is next urged that it was error to admit into evidence, over appellant's objections, evidence of the two prior sale transactions. The point is without merit. We are well aware of the rule that, generally, evidence of other crimes, or of general propensity towards crime, is not admissible. But it is equally true that evidence of other crimes may be admissible to show appellant's knowledge of the narcotic nature of the substance sold, or to show a common plan, scheme or design. *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924; *People v. Sykes*, 44 Cal.2d 166, 280 P.2d 769; *People v. MacArthur*, 126 Cal.App.2d 232, 271 P.2d 914. This was the theory advanced by the prosecutrix at the time of the trial, and the theory upon which the evidence was admitted. The evidence was properly admissible on either of these theories.

[6] The real question on this issue relates not to the admissibility of the evidence, but to the instruction given in reference to the evidence. The challenged instruction reads as follows: "There was some evidence introduced here regarding some prior transactions prior to the third

of Aug. and prior to the ninth of Aug. You are concerned in this case only with these two charges, that is, the charge of selling amidone on the third of Aug. and the charge of selling amidone on the ninth of Aug. and you need not go any further than that. The evidence of the other two transactions were [sic] introduced solely for the purpose of showing general customary habit of the defendant if it showed that, and just what weight it is to be given is up to you, but it is not a charge against the defendant and does not constitute one of the counts in this complaint."

This instruction contains some unfortunate language. The statement that the evidence was introduced "solely for the purpose of showing general customary habit" is ill-chosen because it could mean that such evidence was offered to show that defendant had a "general customary habit" to be a criminal—i. e., had a criminal disposition. If the instruction meant that, it clearly was erroneous. See cases collected 18 Cal.Jur.2d p. 583, sec. 136. But the language used in the instruction, while unfortunate, reasonably could not have misled the jury. That is so, because, when the evidence of the other crimes was offered and appellant had objected, the prosecutrix told the jury that the evidence was offered to show knowledge on the part of appellant and to show a general plan or scheme. The trial court correctly ruled that it was admissible for those purposes. Thus, the jury must have connected these limitations with the general language of the instruction. It must be remembered that in a case involving section 11500 of the Health and Safety Code the prosecution must show that the defendant knew the narcotic character of the substance sold by him. *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433; *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40. The evidence of other sales tended to show that the two offenses charged were not isolated transactions, and that appellant had made prior sales of the same narcotic. Thus, this was some evidence that appellant had the "general customary habit" of selling amidone, and this was some evidence that

appellant had knowledge of the character of the substance he was selling. So interpreted, the instruction was not erroneous.

Moreover, even if the instruction were erroneous it could not have been prejudicial, under the facts. The evidence as to the two sales charged was direct, positive and corroborated. Defendant did not see fit to take the stand to contradict this evidence.

[7-9] Appellant makes objections to several other instructions that need not be separately considered, because the objections are clearly without merit. He also objects to the failure of the trial court to give instructions on entrapment. Entrapment is, of course, an affirmative defense. Defendant offered no testimony on the issue at all, but claims that the prosecution's evidence shows entrapment. All that the prosecution showed was that the informer was working under the direction of the police. The evidence relied on simply showed that the police furnished a willing customer. Merely furnishing an opportunity to commit the crime in this fashion is not evidence of entrapment. *People v. Lindsey*, 91 Cal.App.2d 914, 205 P.2d 1114; *People v. Alamillo*, 113 Cal.App.2d 617, 248 P.2d 421.

[10] Error is also claimed by reason of certain comments made by the trial judge. The record shows that after the jury had commenced deliberating, it returned to the courtroom to ask some questions. The jury wanted to know what the court's instruction relating to the failure to introduce the \$400, or any part of it, into evidence had been. Actually, no instruction on this matter had been given, and none was offered by either side. The foreman of the jury told the court that the jurors wanted to know "if the money is part of the evidence. We want to know your instructions on the money part of it." And he also stated: "The money part, whether you instructed us that it would have a bearing on the case or not, and also we want to hear Mr. Davis' last arguments." Another juror asked: "Didn't you instruct us to disregard the absence of the money as evidence?" Then the following occurred:

"The Court: It hasn't anything to do with the case at all.

"The Foreman: That is what we wanted to know.

"The Court: It has nothing to do with the case. All you have to do is decide these two questions: Was this narcotic sold by the defendant on the third of Aug. or not? Was it sold on the ninth of Aug. or not? That is all you have to decide. What became of the money is not important. It does not make any difference what became of it. You are not suing for the money.

"Any other questions?"

After consultation with the other jurors the foreman stated that no one now wanted to hear defense counsel's last argument as previously requested.

These comments by the court are not accurate and in some respects are misleading. While it is certainly true that it was not necessary for the prosecution to show that the appellant had the money or any part of it in his possession when arrested, and it was not necessary for the prosecution to account for the money, nevertheless it is not strictly true that the fact appellant did not have the money when arrested "hasn't anything to do with the case at all." The presence or the absence of the money several hours after the charged sales was, of course, relevant evidence, but it was not essential evidence. The failure to produce the money was certainly relevant on the issue of the credibility of the officer, that is, as to whether any sales at all had taken place. The court's comments, above quoted, made no reference to this phase of the case, and were therefore not accurate.

But although the comments are subject to criticism, we do not think that they were prejudicial. Appellant made no objection to the comments, nor did he ask for clarification. The court had fully instructed the jury on the basic issues involved. The court gave full and complete instructions on the burden of proof and the presumption of innocence. The basic issue was whether the two charged sales had been made. This issue was definitely left to the jury. Thus,

when the challenged comments are read in the light of the instructions and evidence as a whole, we do not think that the remarks were prejudicial.

The other points raised do not require discussion.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur,



145 Cal.App.2d 180

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Kenneth E. HOPPER, Defendant and
Appellant.
Cr. 2671.

District Court of Appeal, Third District,
California.
Oct. 18, 1956.

Prosecution for first degree murder. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment of conviction and defendant appealed therefrom and from order denying new trial. The District Court of Appeal, Van Dyke, P. J., held that, because of a failure to show that there was premeditation or that killing of victim who lived with defendant as his wife was perpetrated by means of torture, the evidence was insufficient to sustain conviction for first degree murder, but was sufficient to sustain conviction for second degree murder.

Order affirmed; judgment affirmed as modified and cause remanded with directions.

1. Homicide \S 253(1), 254

Evidence, because of a failure to show either premeditation or that killing of vic-

tim, who lived with defendant as his wife, was perpetrated by means of torture, was insufficient to sustain conviction for first degree murder, but was sufficient to sustain conviction for second degree murder.

2. Homicide \S 22(1)

In determining whether homicide was perpetrated by means of torture, thereby making it first degree murder, solution rests upon whether assailant's attempt was to cause cruel suffering on part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity.

3. Homicide \S 152

Where a killing is proved to have been committed by defendant but nothing further is shown, the presumption of law is that it was a malicious act and an act of murder, but in such a case the verdict should be murder in the second degree, and not murder in the first degree.

4. Criminal Law \S 476

In prosecution for murder of victim whom the defendant claimed met death by reason of a fall from a moving automobile, it was not erroneous to permit the coroner, a licensed mortician, and the autopsy surgeon, to testify that the abrasions found on victim's body did not appear to be caused by a fall from a moving vehicle.

5. Criminal Law \S 683(1)

In prosecution for homicide, wherein question of defendant's violent temper was raised, and wherein defendant testified that he had gone to home of witness some four years before killing, and slapped such witness in face, it was not error to permit witness to testify on rebuttal that on that date she was severely beaten by an assailant whom she admitted she could not identify. West's Ann.Pen.Code, \S 1323.

6. Witnesses \S 277(4)

If a defendant takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is very wide, and he cannot by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly

denying testimony against him, but, without testifying expressly with relation to the same facts, limit cross-examination to the precise facts to which he testified. West's Ann.Pen.Code, § 1323.

7. Witnesses ⚡277(4)

A defendant may be cross-examined with respect to the facts or denials which are necessarily implied from the testimony in chief as well as with respect to facts which he expressly states. West's Ann.Pen.Code, § 1323.

8. Criminal Law ⚡783(1)

In prosecution for first degree murder of victim who apparently died as a result of a severe beating, court's instruction respecting function of evidence introduced for purpose of showing that on prior occasions defendant beat and struck such victim and on one occasion beat another, was not unfair or erroneous.

9. Homicide ⚡159

In prosecution for murder of victim who apparently died as a result of a severe beating, trial court did not commit error in admitting testimony as to bruises that had been seen on person of victim at various times throughout five year period preceding her death, where testimony of defendant's proximity or of his admissions was sufficient to justify inference that marks and bruises had been inflicted by him.

Robert C. Bienvenu, Leo J. Biegenzahn, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a jury's verdict which found the appellant guilty of first degree murder with a recommendation of life imprisonment. Defendant also appeals from an order denying his motion for a new trial.

Appellant and the victim of the homicide had been living together as husband

and wife for approximately ten years. She was the mother of his four children.

Appellant contends that the evidence is insufficient to support a verdict of first degree murder. With this contention we agree, and this conclusion requires a somewhat detailed statement of the evidence. On July 5, 1955, at about 11:45 A.M., the Sheriff's Office of Stanislaus County received a call to investigate a death at the home of the appellant. A deputy sheriff proceeded to the home where he observed the body of the decedent, Milladean Hopper, lying on a bed. The cause of death was ascertained to be hemorrhage due to laceration of the kidney. The autopsy physician described the injuries to the body of decedent as follows: There were multiple injuries, bruises and abrasions by fingernails. Although there were no external wounds on the head, there was considerable hemorrhage beneath the scalp. This injury could have been caused by a blow from a fist but was not particularly characteristic of such a blow. It was more suggestive of a wound occasioned by falling on the floor or hitting a large, flat surface. It could have been caused by a kick. It was possible that the force which caused the fracture of the three ribs in the back was a crushing force applied to the front part of the body rather than a blow to the back part, and this would be as reasonable an inference as the inference that the fractures were caused by a blow. Without the injury to the kidney, death would not have resulted, with the possible exception of the head injury. The kidney is more vulnerable to a posterior than to an anterior blow. The fractures of the three ribs and the injury to the kidney were just as consistent with the application of a crushing force as the application of a blow of any sort with any type of a blunt instrument. There was no break in the skull. Of the multiple small bruises around the knee, more than a dozen in total, a number of blows from a blunt object would have been necessary to cause them. The bruises on the back about the waistline would not necessarily have been caused by the same blunt instru-

ment that caused the bruises on the knee, and in the opinion of the autopsy surgeon the same instrument was not responsible. It was possible that all of the bruises had been caused by a fall from a car. With regard to the bruises on the lower limbs, they could have been caused by blows from a blunt object, they could have been caused by several kicks, they could have been caused by several falls to a floor, and they could have been caused by a fall from a car onto a road surface on which there was loose rock. The autopsy surgeon gave her opinion that the most likely possibility was that the bruises were caused by kicks. Taking the entire body, the overall pattern of the injuries was, in the opinion of the autopsy surgeon, not consistent with a fall on a roadway, which opinion was influenced somewhat by the absence of what the autopsy surgeon called road burns. On redirect examination the autopsy surgeon gave as her opinion that the probable cause of the breaking of the ribs was a direct blow which could have been from a boot, and that the rupture of the kidney was caused by a blow on the back of the body rather than by a crushing force applied to the front. The condition of the deceased's body, considering all the injuries thereto, was such that, in the opinion of the autopsy surgeon, the injuries were the result of a beating. The coroner testified that he had examined the body of decedent and that there were bruises all over the body which were not consistent with the type of bruises which would, in his opinion, have been received by a person falling from an automobile. Appellant and deceased had attended a Fourth of July dance, which they left about 2:30 A.M., in company with John McDonald. They entered appellant's car and drove to a restaurant, where the two men had something to eat, but decedent, stating she wanted to sleep, remained in the car. About 4:30 A.M. they drove to the Hopper residence, whereupon McDonald stated he wanted to go home; and the three then drove to Oakdale, the two men in the front seat, Mrs. Hopper in the back. McDonald testified that during this ride

the two seemed to getting along well together and that, in fact, at one point in the conversation appellant had stated that decedent was the "best woman he ever had", and decedent had responded that appellant was "not so bad" himself. It was after McDonald got home and appellant had driven away that decedent received the injuries from which she died. While appellant and decedent were at the dance appellant danced with another woman and asked her if she was still going with a certain individual. When she replied she was, he told her that if she would get rid of that man he would get rid of decedent. There was nothing to explain what might have been meant by the term "get rid of". During the same evening decedent shouted at appellant while he was on the dance floor, stating that she was tired and wanted to go home. Appellant replied, "Damn it, you're drunk". She stamped her feet and said, "I still want to go home", whereupon he took her by the arm and with a jerking motion took her to the center of the floor where the two engaged in conversation with another man. On July 2, 1955, appellant and decedent went into a cafe and they were quarreling as they entered. Decedent was overheard to say, "If you ever do that again I am going to call the cops". The appellant replied, "God-damn you, if you do it will be the last God-damned thing you ever do. I'll kick the out of you". Thereupon decedent began to cry. Several witnesses testified that on several other occasions appellant struck decedent and made threats to kill her; however, all this occurred long prior to the homicide. For instance, one witness testified to such an incident in February of 1954. On this occasion appellant referred to decedent as "a two-bit whore", grabbed her by the hair, threw her to the ground, stepped back and kicked her a severe blow, causing her to scream, whereupon two men came out of a dance hall and stopped the fight. Later on, the same night, when the Hoppers had returned home, this same witness observed appellant slap decedent and push her across the bed. The

witness thereupon left the room and went to another part of the house. She later saw decedent with red marks on her face. On this occasion the appellant tried to persuade this witness to have intercourse with him but was refused. Another incident occurred in the early part of 1952. A witness had observed appellant chasing decedent around the house. She was yelling and screaming and he had a garden tool of some kind in his hand. (He explained this by saying that it was in jest.) Three days later the same witness observed that the decedent had a black eye. Another incident occurred in October of 1953 when a witness heard a commotion and observed appellant striking somebody whom she could not identify. However, she heard appellant say, "God damn you, I'll kill you, you bitch, you God damned bitch, I'll kill you". Three or four days later this witness saw decedent and observed that her nose was swollen and her eyes were black. A week before the death of Mrs. Hopper and while the two were walking toward the Eatmor Cafe in Modesto, one witness observed Mr. Hopper as he walked beside decedent kick her "in the seat" and a few steps later strike her on her left shoulder. In January of 1954 the pair, accompanied by another, went to Stockton. During the trip the two argued continuously, and the companion heard appellant tell decedent to "Shut up or I'll get you". The party returned to Modesto, arriving about 3 P.M. where Mrs. Hopper was scheduled to play the piano. Later that evening the witness testified he saw her bleeding at the mouth, with blood over her face and with disheveled hair. He asked a few minutes later of the appellant where decedent was, and appellant replied, "If I ever catch her I will kill her". On this same occasion another witness saw her walking down the highway in a condition which the witness described as "all bloody" with blood over her face and the front of her dress. He tried to talk to her, but she would not talk. He stated her face was "pretty well beat up". About that time appellant drove up in his car, and decedent got into the car with him,

and the two of them drove away. Another witness, who had an orchestra which played for dances in the neighborhood, within a few days of the homicide went to the home of appellant for the purpose of engaging decedent in his band. She had two black eyes and during the conversation appellant stated, "she run off down the railroad tracks without her shoes on and when I found her I beat the hell out of her". While these incidents were testified to, covering, as is seen, a range of several years, it is also without dispute that the two lived together steadily and maintained a family residence. It is also without dispute that appellant, for several years at least and because he claimed to have such an injury to his back that he was unable to work, was without employment and without income, and that he, decedent and the four children were supported by the earnings of the decedent, who was a pianist and who was fairly steadily engaged in playing for various dance bands around the region. There was an utter absence of any showing of motive which would impel the appellant to kill his wife. He took an active part in assisting his wife in getting and in keeping her engagements as a pianist, generally going with her wherever she played and leaving the children in the charge of others. One witness testified that he tried to help her in her work and teach her "showmanship".

[1,2] It is apparent that if the verdict of first degree murder is to be supported, it must be because the killing was one perpetrated by means of torture, or that it was a wilful, deliberate and premeditated killing. In *People v. Tubby*, 34 Cal.2d 72, 76-77, 207 P.2d 51, 54, it was said:

"Torture has been defined as the 'Act or process of inflicting severe pain, esp. as a punishment in order to extort confession, or in revenge.' Webster's New Int. Dict. 2d Ed. The dictionary definition was appropriately enlarged upon by this court in its original opinion in *People v. Heslen*, 163 P.2d 21, 27, in the following words: 'Implicit in that definition is the requirement of an in-

tent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. That intent may be manifested by the nature of the acts and circumstances surrounding the homicide.' * * * The Colorado Supreme Court has declared in similar terms that as an essential of torture physical pain must be inflicted as a means of persuasion, punishment or in revenge. *Townsend v. People*, 107 Colo. 258, 265, 111 P.2d 236. In holding that a murder by strangulation was not necessarily murder by torture this court has stated: 'The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be presumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that the victim shall suffer.' *People v. Bender*, 27 Cal.2d 164, 177, 163 P.2d 8, 16.

"In determining whether the murder was perpetrated by means of torture the solution must rest upon whether the assailant's intent was to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death."

In *People v. Tubby*, the defendant was seen to strike an aged man who was in the front yard of his residence. This act was observed by neighbors who shouted at him to cease. The defendant thereupon seized his victim by the hair of the head and dragged him into his residence and there proceeded to pummel, strike, and drag the victim about until, when the officers arrived, they found the victim seated in a chair in

which he had at last been placed by the defendant, suffering from injuries from which he later died. As stated in the dissenting opinion in amplification of the statement of facts in the opinion by the majority, 34 Cal.2d at page 81, 207 P.2d at page 57:

"The evidence clearly indicates that defendant chased his victim about the house inflicting terrific punishment upon him. There was blood on the porch, and on the walls and floor of practically every room in the house. The stove and stovepipe had been knocked out of place and some of the furniture had been broken during the affray. When the officers arrived, they found deceased had been beaten 'practically beyond recognition.' Physical examination showed that deceased's nose 'was crushed almost flat'; that his eyes were swollen shut; that there was a fracture of the lower jaw and a complete fracture of the upper jaw; that there were several fractures of the skull; that the brain had been 'split completely open' and 'was literally pulverized over the back portion of the two frontal sinuses.' Other injuries were described by the doctors, including abdominal injuries, but the foregoing recital sufficiently shows the nature and severity of the resulting damage."

The majority declared that the record was devoid of any explanation of why the defendant might have desired his stepfather to suffer. It was noted that the only testimony concerning the relationship between the two men was that the deceased and the defendant were on amicable terms prior to the attack, and concluded:

"* * * The record dispels any hypothesis that the primary purpose of the attack was to cause the deceased to suffer. When death results under the circumstances here shown the homicide cannot be said to constitute murder by torture in the popular, dictionary, or legal sense. The evidence is therefore insufficient as a matter of law to sup-

port the verdict on the theory that the homicide was murder by torture."

In the case on appeal the evidence was without conflict that the relations between the appellant and the decedent, during the time when McDonald was in their company, were amicable even to the point of being affectionate. It is true there was testimony of physical assault several days prior thereto. There were also incidents testified to at widely separated intervals, going back as we have noted for several years, wherein physical assaults of varying severity were committed against decedent by appellant. But these things furnish no light as to what occurred when, after leaving McDonald at his home, the pair drove toward their own residence. We do not know whether there was provocation, whether there was a prolonged assault, whether or not the attack made was sudden, violent and furious, with, as we must assume, the intent to kill. We do not know, and we cannot infer, that over and above the intent to kill was the intent to torture. The record on this issue leaves us wholly to speculation and is insufficient to sustain the first degree verdict upon the theory that the killing was perpetrated by means of torture, "in the popular, dictionary, or legal sense".

[3] What we have heretofore said has a direct bearing, also, on the issue of premeditation. The following appears in *People v. Bender*, 27 Cal.2d 164, 179, 163 P.2d 8, 17, quoting from and citing *People v. Howard*, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385:

"* * * 'When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree.'"

In the *Bender* case, as in this case, there was substantially no evidence casting light on either motive or intent at the time of the killing; and there, as in this case, there was evidence of marital discord, although

the picture in the *Bender* case of the marital association was darker and portrayed a much more consistent lack of harmony than is shown by the evidence in this case. There, also, the jury was required to reject the testimony of the defendant that denied the killing. Said the Supreme Court in 27 Cal.2d on page 179, 163 P.2d on page 17:

"On the other hand, if the testimony, letters, and declarations of defendant are considered as a whole they show that the marriage of defendant and deceased began inauspiciously when defendant failed to tell deceased that his previous marriage had not been dissolved, and that some eight months later the violent disagreements which characterized the marriage culminated, after several hours of drunken quarreling, in murder. The picture of the events which led up to the murder and the events which followed it is a consistent one, interrupted only by the defendant's denial that he killed his wife. This picture suggests reasons for and the facts of quarreling between decedent and defendant but leaves only to conjecture and surmise the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation. Overwhelmingly opposed to such conjecture or surmise, and consistently evidenced by every circumstance is the rationale of a tempestuous quarrel, hot anger, and a violent killing."

In *People v. Thomas*, 25 Cal.2d 880, 898, 156 P.2d 7, 17, it was declared that an instruction that "'If * * * specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree'" was erroneous, and that to hold otherwise would be to emasculate the statutory difference between first and second degree murder; that "The word 'specific' (adjective) means 'Precisely formulated or restricted; * * * definite, * * * explicit; of an exact or particular nature' (Webster's New Int. Dict. 2d Ed.)

while 'deliberate' (as an adjective) means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a deliberate judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; * * * Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; * * * Slow in action; unhurried; * * * Characterized by reflection; dispassionate; not rash.'" Finally it has been held that the evidence must show that the intent to kill was thus arrived at if the killing is to measure up to first degree murder. *People v. Tubby*, supra. The testimony of occasional threats and acts of violence committed by appellant against decedent which were widely separated and interspersed by amicable relations throws no light whatever upon whether or not appellant is guilty of a wilful, deliberate and premeditated murder. Some time after McDonald left appellant and his wife, this amicable relation changed and he beat her as he had done before. But the record is barren of proof that this beating differed from others in that it was done in carrying out a preconceived design to kill, deliberately arrived at.

[4] The Coroner of Stanislaus County was called as a witness and was permitted to give an opinion that the character of the abrasions found upon the body of decedent were not such as would have appeared had her body fallen from a moving car. Appellant's counsel objected that he was not qualified as an expert on such a matter and here contends that the court erred in overruling that objection. The witness testified that he had been a licensed mortician for 21 years, had been a deputy coroner for 8 years; had seen at least 15 or 20 dead bodies which had been thrown from or had fallen from a moving vehicle and was familiar with the abrasion markings resulting from such a fall. On cross examination to test his qualifications he said that he was not an expert at medicine nor an expert in the nature of bruises generally; that he could not describe pathologically the various types of bruises found for lack of

expert training. Over objection to his qualifications he then testified that he had observed on the bodies he had seen and which had fallen or been thrown from moving vehicles areas of abrasion where the body struck the road. That by abrasions he meant a scraping off of the skin. He said, "The skin is more or less scraped off, especially on the high spots, the shoulders, ribs, knees, hips and things of that nature. There may be some contusions, but they nearly always are accompanied by this abraded or scraping wound that goes along with it." If the subject matter was one for expert testimony, then we think the coroner was qualified. The importance of the testimony arose because the appellant contended the decedent's death came about by her falling from his automobile as he drove along the road. If, from the coroner's experience, he could say as he did that, when a person falls from a moving vehicle and strikes a road surface, he will suffer characteristic abrasions of the skin on and about body prominences, he is qualified to express an opinion as to whether or not the abrasions he found on the body of the decedent had the appearance of such characteristic abrasions. This witness was not attempting to describe or to testify concerning bruises; his testimony was limited to surface abrasions.

Appellant contends that the court erred in receiving the opinion evidence of the coroner and of the autopsy surgeon as to the probability that the abrasions they found on decedent's body had been received by a fall from appellant's car. His argument is that the subject was not one for expert testimony, because it falls within knowledge commonly possessed to the point that the jury should not have been subjected to opinion evidence as to the cause of the abrasions. We do not agree. It is certainly not incredible that human bodies falling from a car and striking a road surface would receive abrasions peculiar to such an accident. Both witnesses had had considerable experience in determining that abrasions so received did possess an appearance which differentiated them from

abrasions received otherwise. It was proper, therefore, to give the jury the aid which could be derived from an expression of an opinion by them as to the cause of the abrasions found on the body of decedent. Both witnesses testified that, in their opinion, those abrasions were not received by reason of a fall from a moving vehicle upon a road surface. Professor Wigmore has said the criterion for receiving opinion evidence from a qualified witness is: " * * * Can a jury from this person receive appreciable help?" (7 Wigmore on Evidence, Section 1923.) In *Taylor v. Monroe*, 43 Conn. 36, 44, it is stated:

"The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the questions at issue."

We think both these witnesses were qualified to express an opinion, and that no error was committed in receiving their testimony as such. Both had had the experience of examining and noting the characteristics of road abrasions or road burns as exhibited on bodies known by them to have suffered abrasions from falling from moving vehicles and striking upon a road surface. Both said that they had observed such characteristics and that there was a similarity in the road burns or abrasions so received. Both had examined the abrasions on the body of deceased. Both stated that, in their opinion, the characteristics of road burns were not present on the body of deceased. It would have been difficult, if not impossible, for these witnesses to describe the appearances upon which they based their opinion in such a way as to place the jury in the same situation which they were in when they arrived at their opinion. Under such circumstances it was proper for the court to take the testimony of these

witnesses in order to aid the jury in the determination of whether or not the claims of appellant that his wife had fallen from his car and struck the road and thus received the injuries which caused her death were true or false.

[5] Appellant contends that the court erred in admitting the testimony of the witness Minnie Wilson. She was the sole rebuttal witness called by the prosecution. In cross examination the appellant had been subjected to numerous questions concerning his affection for decedent and his relations with her. He had testified, generally, that the marital association between the two had been amicable and affectionate. He had substantially denied all of the testimony that he had abused and beaten her on the occasions testified to by witnesses for the prosecution. At the close of his cross examination, the following occurred: He was asked if he knew a Minnie Wilson and he said that he did; that he and his wife had taken her home after a dance; that his wife and he had met Minnie Wilson at a beer joint when she was crying and said her husband and she were having a lot of trouble; that she asked the Hoppers to take her home; that they agreed to do so; that appellant had been trying to get some beer before the "beer joints closed" and that Minnie Wilson had said she had plenty of whiskey at her place and if they would take her home she would give them some; that when they got there she walked inside her door, said "just a minute" and that he waited; she did not bring any whiskey; that he shouted at her, and when she came to the door, said "where's that whiskey?"; that she replied she didn't have any; and that he then said that she had told them she had some whiskey and would give it to him if the Hoppers would bring her home; that she replied, "You're just a dirty, no-good, lying son-of-a-bitch, I never said no such of a thing", whereupon he slapped her; that he did not "put her in the hospital", but that he had paid a fine as a result of his striking her. At this point objection was made that the subject

of the cross examination was improper as having no relevancy to the crime charged. The objection was overruled. He said he did not go into her house but had opened the screen door behind which she stood and slapped her in the face. He was asked if he made any advances toward her and said he had not. In rebuttal Minnie Wilson was called to the stand. She testified that the Hoppers had taken her home and that she had got out of the car, gone into her house, hooked the screen door and laid down across her bed; that in three or four minutes there was a knock on the door to which she did not respond; that the knock was repeated several times and still she did not respond; that then the person knocking broke in by breaking the hook off the screen door; that she then said "Who's that?", and the person replied, "What do you want to know for?"; that she said, "Well, you'd better get out of here; I'm looking for my husband any minute"; the person replied, "Husband or no husband, I'm not leaving until I get what I want"; that thereupon she was attacked and did not remember anything more until the next morning when she was found wandering around her yard in a dazed condition, badly beaten up and was taken to the hospital. She described her injuries as follows: "The blood was dripping out of my hair and my clothes; you could have wrung the blood out of them. My ear was torn or cut, whatever it was happened, to here all the way back here at the side of my head (indicating). My eye was cut here. I was bashed in here. This knuckle was knocked out over here. I had had this here tooth capped, it tore the cap, knocked the cap off of the tooth, and tore the ligaments in this eyeball loose, and my eyeball had fallen down, * * * had torn the ligaments loose to my eyeball; * * * this thigh all up and down here, looked like it had been kicked; big bruises on me." She did not testify that she had been sexually assaulted. Notwithstanding the objections made and overruled as to the questions concerning Minnie Wilson which had been addressed to the appellant, the

foregoing testimony of Minnie Wilson herself came in without objection. On cross examination, however, the witness testified that during the altercation she did not know who her assailant was. She said that because it was dark she did not see or recognize and was unable to identify the man who assaulted her, and it finally appeared that of her own knowledge she still could not testify that defendant was that man. Motion was thereupon made to strike her testimony, and the motion was denied, the court stating that he did so because appellant had testified on cross examination that he had gone to Minnie Wilson's front door, opened the screen door and had slapped her because of her refusal to give him the whiskey she had promised.

Section 1323 of the Penal Code provides:

"A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. * * *"

[6,7] This does not mean that the cross examination must be confined to a mere categorical review of the matters, dates, or times mentioned in the direct examination. It may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination. If a defendant takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross examination is very wide, and he cannot by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but, without testifying expressly with relation to the same facts, limit the cross examination to the precise facts to which he testified. He can be cross examined with respect to facts or denials which are necessarily implied from the testimony in chief

as well as with respect to facts which he expressly states. *People v. Zerillo*, 36 Cal. 2d 222, 227 et seq., 223 P.2d 223. We have heretofore sufficiently reviewed the testimony of the prosecution and that of the appellant when he took the stand in his own behalf to justify the generalization that not only had he denied his guilt generally, not only had he denied specifically most of the instances of violent assault upon his wife, but he had also given a general picture of amicable relations between them and had offered an explanation of her death which directly conflicted with the theory presented by the prosecution. Under such circumstances his cross examination could properly range wide. The incident concerning which he was asked with respect to Minnie Wilson occurred almost four years before the death of appellant's wife. No objection, however, was made on the ground of remoteness, and had it been made, it could have been properly overruled as affecting the weight and not the admissibility of the evidence in view of the fact that the state was charging that his wife came to her death by a beating administered by him, his denial thereof, and of the testimony of the prosecution as to his frequent physical assaults upon her, including of course a showing by implication that his character was that of a man given to sudden storms of anger during which he readily resorted to his fists in assaults against a woman to whom he bore the relation of husband and who was his chief mainstay and support in life. His denial of these matters, his attempts to explain them away as either never having happened or as being things done in jest brought his character and his addiction to violent outbursts and of physical assault with little or no provocation sharply to the fore. It was, therefore, permissible to examine him concerning like matters even though in the incident inquired about, the beating, if it occurred, was administered by him to a woman not his wife. When he denied the assault, it was permissible also for the prosecution to call Minnie Wilson to establish that the assault had occurred, and

certainly if he was the assailant, then the ferocity of the attack with no provocation save his disappointment in not obtaining the whiskey which he thought the woman would give him for taking her home, was material to the issues presented by his own testimony. We cannot sustain the appellant's contentions that the testimony was improperly admitted. Neither can we sustain appellant's contention that the testimony of Minnie Wilson should have been stricken on motion. To be sure, she said she did not and could not identify her assailant as being appellant, because it was dark and she could not see him. Nevertheless, the other circumstances made it a fair inference that he was the assailant. He himself had testified that he was there, that he had taken her home, that he had done so on a promise that she would deliver whiskey to him, that when she failed to do so he tore open the screen door and slapped her. These circumstances warranted an inference that the vicious assault which she testified to was in fact inflicted by him, even though according to his version he stopped with a single slap.

[8] The court instructed the jury that, although evidence had been offered in the case for the purpose of showing that on occasions prior to the 5th of July, 1955 (the day Mrs. Hopper met her death), defendant had beaten and struck his wife and on one occasion had beaten another woman, that such evidence had been received for a limited purpose, not to prove distinct offenses or continuing criminality, but for such bearing, if any, as it might have on the question whether the defendant was innocent or guilty of the crime charged; that the jury were not permitted to consider the evidence for any other purpose; that the value of the evidence of beating of decedent depended on whether or not it tended to show a course of conduct of the defendant toward her on prior occasions which ultimately culminated in her death and on whether or not such prior acts indicated a motive for the crime charged in the action; that the value of the evidence of the beating of decedent

and of the beating of another woman depended on whether or not the prior acts viewed with the act of which the defendant was accused showed a common pattern, scheme or design. Appellant contends that the giving of this instruction constituted error. We cannot sustain appellant's contentions with respect to this instruction. It was not unfair to him and did not misstate the law. In general, appellant's argument in support of this point is addressed to the admissibility of the evidence, and we have already passed upon that matter. There was a pattern of behavior evidenced by the testimony of witnesses referred to in the instruction which aided the inference that appellant had killed decedent while beating her.

[9] Appellant contends that the trial court erred in admitting testimony as to bruises that had been seen on the person of decedent at various times throughout a five-year period preceding her death. Appellant says that these highly prejudicial remarks were admitted into evidence over objection but upon a general assurance from the district attorney that he would tie such testimony in with the appellant, and that such tying in was not effected. It would serve no good purpose to relate the testimony on these matters more in detail than has been done. The testimony of witnesses concerning the various times when they had seen evidences on her face and body that she had received a beating was accompanied in each instance with testimony of his proximity and of admissions sufficient to justify the inference that the marks and bruises observed had been inflicted by him.

Finally, appellant contends that he was denied a fair and impartial trial because of the attitude and comment of the trial judge, which reflected his feelings toward the appellant and which were conveyed to the jury and everyone else in the courtroom. Appellant requests us to "ponder the entire record and the cumulative effect of the rulings of the trial court in determining whether or not there was an adverse effect upon the rights of defendant by the

trial court's attitude throughout the case". This court has complied with the appellant's request that we consider the whole record. We find nothing in that record to substantiate the charge of misconduct or of bias on the part of the trial judge.

For the reasons given, the order denying the motion for a new trial is affirmed. However, acting under the authority given us by Sections 1181 and 1260 of the Penal Code, the judgment is modified by reducing the degree of the crime to murder of the second degree, and as so modified the judgment is affirmed. The cause is remanded to the trial court with directions to sentence the defendant to imprisonment for the term prescribed by law for murder of the second degree.

PEEK, J., and McMURRAY, J. pro tem., concur.



145 Cal.App.2d 133

Henry BIESCAR, Jr., et al., Plaintiffs, Cross-Defendants and Respondents,

and

Mary Henrietta Josephine Biescar Waldner, et al., Defendants, Cross-Defendants, Cross-Complainants and Respondents,

and

Barbara Biescar, a minor, et al., Defendants, Cross-Defendants and Respondents,

v.

CZECHOSLOVAK-PATRONAT, a corporation, Defendant, Cross-Complainant, Cross-Defendant and Appellant.

Civ. 21532.

District Court of Appeal, Second District,
Division 2, California.

Oct. 17, 1956.

Rehearing Denied Nov. 13, 1956.

Hearing Denied Dec. 12, 1956.

Action for declaratory relief and to quiet title wherein defendants cross-complained. From an adverse judgment in the Superior Court of Los Angeles County,

Caryl M. Sheldon, J., the cross-defendant appealed. The District Court of Appeal, Fox, J., held that where deed granted to non-profit corporation a fee simple subject to condition subsequent that property be used perpetually as a park or meeting ground and where as result of misuse of the property, an ordinance granting exception to the use thereof, was repealed, evidence supported findings that property was granted upon a condition subsequent; that finding that ordinance authorizing the use of the property was repealed because of misuse thereof was supported by the evidence, and that the grantee was not entitled to relief on the ground as it would be oppressive and inequitable to enforce restrictions by a reason of change of the character of the vicinity.

Judgment affirmed.

1. Deeds ⇨99

Writings contemporaneously executed to express the terms of a particular grant of realty are held to constitute but a single instrument and must be read as though each referred to the other and expressly incorporated its terms.

2. Deeds ⇨99

Where deed granted to non-profit corporation a fee simple subject to conditions subsequent expressed in a contemporaneously executed agreement imposing a duty upon the grantee to use the property perpetually as a park or meeting ground, the deed and contract constituted one instrument and were to be read together.

3. Deeds ⇨145

Clauses in a conveyance imposing obligations on the grantee are to be construed as personal covenants rather than conditions whenever that can be reasonably done in order to avert a forfeiture, but such an interpretation will not be given contrary to the intention of the parties and where it clearly appears that an estate was conveyed subject to conditions, it will be upheld as such.

4. Deeds ⇨93

Intention of parties to a deed is to be derived by consideration of the instrument as a whole rather than detached clauses, giving due regard to every provision, clause and word, whether of grant, description, qualification or explanation and viewing it in light of the circumstances surrounding its execution. West's Ann.Civ.Code, § 1641.

5. Deeds ⇨168

Where deed granted to non-profit corporation a fee simple subject to conditions expressed in contemporaneously executed agreement imposing a duty to use the property perpetually as a park or meeting ground, and vesting in grantors the right of re-entry for termination for breach of condition, in action to quiet title for breach of the condition, evidence authorized finding that the estate was granted upon condition that it be used perpetually as a park or meeting ground.

6. Municipal Corporations ⇨122(4)

In action to quiet title to property, on ground of breach of condition by which property was granted to a non-profit corporation to be used perpetually as a park or meeting ground, finding that the ordinance which authorized the use of the property in the manner contemplated by the agreement was repealed because of the corporation's misuse of the property, was supported by the evidence.

7. Trial ⇨90, 105(2)

Where testimony, while hearsay in character, was admitted without objection or motion to strike, it was competent to support a finding.

8. Deeds ⇨167

In action to quiet title to property conveyed to a non-profit corporation because of breach of condition subsequent that property be used perpetually as a park or meeting ground on ground that corporation's misuse of property resulted in repeal of an ordinance granting an exception as to the use of the property, corporation was not entitled to relief against conditions of conveyance on the ground that it would be oppressive and inequitable to enforce re-

strictions by reason of a change in character of the vicinity.

9. Deeds ⇨167

A grantee in a deed could not claim that the court should have relieved it from forfeiture resulting from breach of a condition subsequent in the deed when its own conduct engendered the action which ultimately rendered impossible the further use of the property on the conditions imposed.

10. Equity ⇨54

Equity does not aid one who is a sole cause of his own misfortune.

11. Trial ⇨404(2)

A finding that the grantee in a deed had no estate right, title or interest in the property, was not a conclusion of law but one of ultimate fact.

12. Appeal and Error ⇨1071(5)

Even if some of the findings attacked as conclusions were regarded as misplaced conclusions of law, it could avail appellant nothing where the specific findings supported the conclusions reached, were amply sustained by the evidence, and disposed of all material issues and fully supported the judgment.

L. J. Styskal, North Hollywood, Alvin O. Wiese, Jr., Charles F. Lowy, Los Angeles, for appellant.

Hunt & McCann, Arnerich, del Valle & Sinatra, Los Angeles, for respondents.

FOX, Justice.

This is an appeal by the Czechoslovak Patronat (hereinafter designated Patronat) from a judgment quieting title to real property in favor of plaintiffs and certain cross-complainants.

The plaintiffs who originally filed the within action for declaratory relief and to quiet title are heirs of Henry and Josephine Biescar, the grantors of the property here in dispute. Named as defendants were the Patronat and other heirs of the grantors. The defendant heirs, in turn, cross-complained against the Patronat, raising the

same issues made in the complaint. The Patronat has also filed its own cross-complaint against all the heirs praying that title be quieted in its favor. Despite the multiplicity of pleadings, the parties are in accord that the issues are essentially those framed by the complaint, the answer and cross-complaint filed by the Patronat, and the answer of the cross-complainants.

The paramount issues presented by this appeal are (1) whether the original grant created a fee simple subject to a condition subsequent or merely a covenant as to use by the grantees; (2) whether the interpretation of the instrument by the court was contrary to the rule of construction against conditions leading to forfeitures if that is reasonably possible; and (3) whether the court erred in failing to relieve against a forfeiture by virtue of the changed character of the neighborhood.

The background facts are these: The Patronat is a nonprofit corporation and functions as a coordinating organization of congress for various fraternal clubs and lodges comprising persons of Czech or Slovak origin in Los Angeles and its environs. The Patronat's membership is made up of delegates from these affiliated groups and its primary objective is apparently to promote and foster a program of social, cultural and recreational activity for local residents of Czechoslovakian descent. As a part of its program in the early thirties, the Patronat was desirous of establishing a communal meeting place where the functions it sponsored for its compatriots might be held.

Henry and Josephine Biescar, a married couple, were members of several Slovak organizations. They owned a parcel of land in the area now known as La Crescenta. They were willing to donate a part of this land to the Patronat as a meeting ground for fellow Czechoslovakians. On November 6, 1931, the Biescars conveyed to the Patronat a triangular-shaped segment of this property, located at one corner of their tract. The deed, which was recorded within a week, was a grant of a fee simple estate in absolute form. The Patronat gave no monetary consideration for the convey-

ance. However, contemporaneously with this deed, the Biescars and the Patronat executed a document entitled "Agreement" appertaining to the property so granted. This instrument was not recorded until 1949. It was drafted by L. J. Styskal, the attorney for the Patronat. So far as it is here germane, this document (in which the Biescars are designated "First Parties" and the Patronat "Second Party") reads as follows:

"Whereas, The Czechoslovak-Patronat is an organization calculated and planned for the purpose of uniting the Czecho-Slovak people of Los Angeles and vicinity into a civic, patriotic and mutually beneficial unit, and pursuant to such plan or scheme, said organization is in existence; and

"Whereas, Henry Biescar and Josephine Biescar, as members of the said Czecho-Slovak colony, are desirous to grant unto The Czechoslovak-Patronat, for its use and for the benefit of its constituting members, and to that extent to the Czecho-Slovak community of Los Angeles and vicinity, certain property hereinafter more specifically described, for purposes hereinafter more accurately denominated; and

"Whereas, The Czechoslovak-Patronat is willing to accept the said property *on the conditions hereinafter more specifically enumerated*, and for the purposes designated;

"Now, Therefore, It Is Agreed, Understood and Contracted as follows, to-wit:

"First: First parties hereby agree to grant by deed to be executed contemporaneously herewith, unto second party herein,

that certain property situated in the County of Los Angeles, State of California, and particularly described as follows, to-wit: [Property described.] * * *

"Second: The said grant and devise shall be subject to the following provisions, to-wit:

"(a)¹ The said property shall be used and dedicated by second party herein as a park or meeting ground for the Czecho-Slovak people in Los Angeles and vicinity, and their various organizations, clubs and lodges; the said property shall remain under the control and direction of the said Czechoslovak-Patronat, but its use shall, nevertheless, be administered equally and fairly to all persons and organizations mentioned and with a view of enabling as many of said persons to have the benefits and uses of said property as possible.

"(b) It is agreed and understood that the said property shall be designated and known as 'Biescar Park' and shall be so designated in all public references thereto, to the end that the Czecho-Slovak public shall become acquainted with said property and its location under said name.

"(c)² It is agreed and understood and *made a condition of this grant* that the said property shall not be encumbered by the second party herein or any of its successors or assigns for a period of twenty-five (25) years from the date of the transfer thereof unto second party herein, *it being the intent to perpetuate said property in a free and clear condition as a meeting place and recreational center, as hereinabove more particularly set forth.*

the following purposes only: That said property may be hypothecated to Great Western Building and Loan Association as security for a building loan in the sum of \$....., the full amount of which shall be used to erect a building on said premises, designated as a meeting place of Czechoslovak people.

Dated: October, 1933.

Henry Biescar
James Tyra Pretseda

Henry Biescar
Josephine Biescar

1. [Typed in margin.]

It is understood that paragraph (a) means that whenever the Czechoslovak Patronat shall rent or lease the premises to any individual, organization or club for private entertainment, they shall restrict attendance to exclude the general public; that this shall be a private park, and not a public park.

2. [Typed in margin.]

Provisions of subparagraph (c) of paragraph Second are partially waived for

"(d)³ First parties agree to sell unto second party, at such rates and upon such terms as shall be hereafter determined by these parties, five (5) shares of stock in the Water District now supplying the area and vicinity of the property agreed to be conveyed, such shares of stock to be sold at a price of Fifty Dollars (\$50) each. It is the intent of this provision that the purchase of said shares of stock shall be a condition of the transfer, for the reason that first parties herein propose and intend that the said 'Biescar Park' shall be amply supplied with necessary water for the uses to which it shall be dedicated.

* * * * *

"Third: It is specifically agreed that all of the conditions above set forth shall be borne out and performed by second party herein, in the spirit of the donation made by first parties and to perpetuate the said property at all times for the general good of the CzechoSlovak public. * * *"
(Italics added.)

At the time the property was conveyed, it was worth between \$600 and \$800, and consisted of rocky land located in a relatively undeveloped area which was zoned exclusively for residential purposes. On July 31, 1933, about 20 months after the gift deed was made, the Board of Supervisors adopted Ordinance No. 2305, the effect of which was to exempt the property donated by the Biescars from its restriction to residential uses. The ordinance specifically permitted the use of the property "For the construction and maintenance of a clubhouse for the Czechoslovak-Patronat." Members of the Patronat proceeded to clear the land of rocks and bushes by voluntary labor. Thereafter a clubhouse was erected on the land by the Patronat and dedicated by the Consul of

Czechoslovakia in a formal ceremony which the Biescars attended.

During the next seventeen years, the Patronat used the property for recreational and cultural activities for the benefit of the ethnic groups affiliated with it. With the passage of time, the surrounding area was gradually built up with residential buildings. The character of use to which the property was put in the course of meetings and activities and the incidental problems created, encountered objection on the part of residents of the neighborhood. This situation led to hearings before the Zoning Board of the Los Angeles Regional Planning Commission. John P. Commons, who sat as a member of the hearing body, testified as to the nature of the complaints by residents of the neighborhood at the hearing.⁴ The complainants testified that persons attending meetings drank alcoholic beverages on the premises and became intoxicated, that beer bottles and cans were strewn on the streets and littered their yards, that invitees used the street and parking areas for urination, that adjoining streets were congested with parked cars, that crowds in excess of the capacity of the building and grounds to contain them attended certain meetings, that the general public was solicited to use the facilities of the park by radio advertisements and that non-Czechoslovakian organizations were using the premises, that certain functions on weekday nights lasted far into the early morning hours with much attendant noise, and that the Patronat piled boxes and containers outside its building in an unsightly manner.

As a result of these hearings, the Zoning Board made certain recommendations which were adopted by the Planning Commission and, in turn, recommended to the Board of Supervisors. The Patronat was notified by the County Regional Planning

3. [Typed in margin.]

See partial waiver of this paragraph set forth on previous page.

4. Mr. Commons' testimony was received with only a single objection directed to

the matter of alleged indecencies being committed in automobiles parked on the street in front of residences adjacent to the Patronat.

Commission that it would recommend that the Board of Supervisors revoke the exception granted by Ordinance 2305 unless the Patronat's consent were obtained to an amendment of the ordinance imposing certain conditions on the use of the property by the Patronat. Mr. Commons testified that these terms were suggested in the hope "of alleviating or answering in part the objections of the people living in the vicinity." The conditions enumerated were substantially as follows: (1) that no alcoholic beverages be sold, served, or consumed on the property at any time; (2) that no ginger ale, water, ice, or other liquid be sold, served, or supplied on the premises to any person *if it is known* that such person is going to mix such ginger ale, water, ice, or other liquid with any alcoholic beverages; (3) that off street automobile parking space of not less than 25,000 square feet be provided, such parking space to be developed and maintained in accordance with the provisions of section 52 of Ordinance 1494, the Zoning Ordinance, Zone "P" Parking; (4) that not less than ten (10) water closets for women be provided and not less than nine (9) water closets for men; except that urinals may be substituted for each water closet, but at least 2 water closets must be installed for men. If a trough urinal is installed, two feet of length may be substituted for each water closet; (5) that attendance of all meetings of any nature be limited to a maximum of 300 people who shall be members of one of the member organizations of the Czechoslovak Patronat or bona fide guests of such members such guests not to exceed one-fourth of the members present; (6) that meetings shall be concluded, the clubhouse closed, and the group dispersed not later than 10:30 p. m. on every night except Friday and Saturday, when the meetings shall be closed at 12:00 midnight, and on December 24th and 31st, when the meetings shall be concluded and clubhouse closed and groups dispersed not later than 2:00 a. m. the following day; (7) that at no time

shall there be any use of the building for any meeting open to the general public; (8) that any announcements or advertisements of any function or event to be held at the clubhouse shall be so worded as to limit the invitation to members of the member organizations of the Czechoslovak Patronat; (9) that all cartons, boxes, crates, and other containers shall be stored within the buildings. The Patronat refused to accept the conditions outlined by the Planning Commission, and its negotiations to obtain a relaxation thereof or a compromise failed. In September, 1950, the Board of Supervisors adopted Ordinance 5590 repealing the 1933 ordinance which authorized the use of the property by the Patronat as an exception to the residential zoning provisions of the law. Thereafter, the Patronat undertook to sell the property demised to it by the Biescars.

In December, 1953, plaintiffs, as heirs of the grantors, brought this action and prayed that title be quieted in them on the ground that Ordinance 5590 prevented the use of the property on the conditions set forth under the conveyance by the grantors and that as a result the Patronat's interest in the property was terminated.

At the trial, the court thoroughly explored the circumstances under which the grant was made and received parol evidence as to what the parties intended by the use of the particular language employed in the instruments of conveyance. Mr. Styskal, the Patronat's attorney, who had prepared the agreement and the deed drawn to effectuate it, stated that he did not attempt to explain to the Biescars the technical difference between covenants and conditions but asserted Mr. Biescar knew that the Patronat accepted the property only as an unqualified gift and that absolutely no reversionary rights remained in him or his successors in interest. The attorney testified that Mr. Biescar wished to make it certain that the property he donated was used as a meeting ground, that it be known as Biescar Park, and that it not be encumbered to avoid possible loss of the prop-

erty. Mr. Styskal stated these qualifications were embodied in a separate instrument in order not to cloud the Patronat's free and clear title to the property conveyed by the deed. Other testimony was introduced on behalf of the Patronat supportive of the theory that the Biescars intended to make an unconditional gift to the Patronat.

The essential findings made by the court were: (a) that the Biescar deed granted to the Patronat a fee simple subject to the conditions subsequently expressed in the contemporaneously executed agreement, which together with the deed constituted the instrument of conveyance; (b) that the grant by its conditions imposed a duty to use the property "perpetually" as a park or meeting ground and that the grantors were vested with a right of entry or power of termination for breach of the condition; (c) that by reason of the Patronat's misuse of the property, its continued use as a park and meeting place impinged on the convenience of the residents of the neighborhood; (d) that as a result of such misuse of the property by the Patronat, the Board of Supervisors repealed the ordinance, No. 2305, granting the exception as to the use of the property; that the Patronat breached the conditions of the grant by its misuse of the property; and (f) that by reason of said breach, the Patronat has no interest in the property, and the heirs of the grantors are the owners of the fee.

[1,2] At the outset, the Patronat deplores the fact that the trial court apparently treated the deed and agreement, which were executed at the same time, as an integrated instrument. It urges that "nothing supports a finding that they are but one document." However, the rule is

well settled that writings contemporaneously executed to express the terms of a particular grant of real property, are held to constitute but a single instrument. *Downing v. Rademacher*, 133 Cal. 220, 224, 65 P. 385; *Patterson v. Donner*, 48 Cal. 369, 377; *Sledge v. Stolz*, 41 Cal.App. 209, 220, 182 P. 340. In *Downing v. Rademacher*, supra [133 Cal. 220, 65 P. 386], the court observed: "The deed and the agreement constitute one instrument, and must be read as though each referred to the other *and expressly incorporated its terms.*" (Italics added.) In the *Sledge* case, supra [41 Cal.App. 209, 182 P. 344], the court states: "We must look to the agreement to ascertain the consideration for the execution of the deed, for it was executed and delivered pursuant to the agreement. *The two documents are inseparable.*" (Italics added.) The trial court was entitled to treat the instruments here involved in accordance with this rule.

[3,4] The Patronat assigns as error the determination of the court below that the property was conveyed subject to conditions subsequent rather than upon a simple covenant concerning the use to which the property was to be devoted. In so doing it relies upon cases announcing the familiar rule that clauses in a conveyance imposing obligations on the grantee are to be construed as personal covenants rather than conditions whenever that can be reasonably done in order to avert a forfeiture.⁵ That, of course, is a venerable rule of construction. However, such an interpretation will not be given contrary to the intention of the parties; and where it clearly appears that an estate was conveyed subject to conditions, it will be upheld as such. *Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal.2d 602, 605, 134 P.2d 245; *Knight*

5. The principal cases relied on are *Savanna School Dist. v. McLeod*, 137 Cal. App.2d 491, 290 P.2d 593; *Fitzgerald v. County of Modoc*, 164 Cal. 493, 129 P. 794, 44 L.R.A.,N.S., 1229; *Victoria Hospital Ass'n v. All Persons*, 169 Cal. 455, 147 P. 124; *Beran v. Harris*, 91 Cal. App.2d 562, 205 P.2d 107; *Hasman v.*

Union High School, 76 Cal.App. 629, 245 P. 464; *Gramer v. City of Sacramento*, 2 Cal.2d 432, 41 P.2d 543.

Nonetheless, the decisions in each of these cases recognize the rule that the ultimate test is the joint intent of the grantor and grantee.

v. Black, 19 Cal.App. 518, 523, 126 P. 512. The intention of the parties to a deed is to be derived by a consideration of the instrument as a whole rather than of detached clauses, giving due regard to every provision, clause and word, whether of grant; description, qualification or explanation and viewing it in the light of the circumstances surrounding its execution. Paddock v. Vasquez, 122 Cal.App.2d 396, 400, 265 P.2d 121; Schroeder v. Wilson, 89 Cal.App.2d 63, 66, 200 P.2d 173; 15 Cal.Jur.2d, sec. 128, pp. 528-529. Every part of the instrument is to be given effect if reasonably practicable and consistent with the evident purpose of the grant, each clause helping to interpret the others. Civ. Code, § 1641; Brannan v. Mesick, 10 Cal. 95, 106-107; Barnett v. Barnett, 104 Cal. 298, 300, 37 P. 1049.

[5] It is manifest from a consideration of the deed as a whole and the situation of the parties at the time of the grant that the conveyance was executed with the intent to create an estate upon condition that the property be permanently maintained as a communal gathering place for local residents of Czechoslovakian derivation. The agreement itself is replete with phraseology indicative of an intention to create a conditional estate. While not of controlling significance, it is recited in the preamble that the Patronat is willing to accept the conveyance "on the conditions hereinafter more specifically enumerated." The conditions are then incorporated into the granting part of the instrument, paragraph Second, which commences: "The said grant shall be subject to the following provisions, to wit * * *" Subdivision (a), the alleged condition claimed to have been broken, declares that the property shall be used and dedicated as a park or meeting ground for local Czechoslovakians and to be so administered by the Patronat to enable as many of such persons as possible to enjoy its benefits. Subdivision (b) declares the property shall be designated as "Biescar Park." Subdivision (c) makes it a condition of the

grant that no encumbrance shall be placed on the property for 25 years, it being the intent to perpetuate such property, unencumbered, as a meeting place, "as hereinabove more particularly set forth." Subdivision (d) provides for the purchase of shares of water stock as an express condition of the transfer to insure that Biescar Park "shall be amply supplied with necessary water for the uses to which it shall be dedicated." To contend, as does the Patronat, that only Subdivisions (c) and (d) are conditions because they are so designated but that Subdivision (a), to which (c) and (d) are ancillary in purpose, is a mere covenant would not only be anomalous but would emasculate and render nugatory the paramount intent and object of the conveyance. Subdivisions (c) and (d), which are expressly termed conditions, indicate by reference to the previous subdivisions that their purpose is to subserve and implement the predominant objective of the grant as expressed in Subdivision (a). The express conditions (1) against hypothecation and (2) requiring purchase of water stock were obviously included to insure preservation of the property for the principal purpose intended. It would be a fatuous construction indeed to assert that the Patronat was bound by the requirements of Subdivisions (c) and (d) as conditions, but was not bound by a condition that it use the property as a meeting place for the benefit of the Czech public when it is manifest that this latter was the fundamental consideration of the grant. Paragraph Third negates any such unrealistic construction. It states that "all of the conditions above set forth shall be borne out and performed by second party * * * to perpetuate said property at all times for the general good of the Czechoslovak public."

[6] Clearly, "the conditions above set forth" must necessarily include Subdivision (a), for this is the crucial element of the grant, and unless this condition were performed the cardinal purpose of the donation—to perpetuate the property for the

ends intended—would be destroyed and the performance of the other conditions specified would be stripped of any significance. The circumstance that the Patronat paid nothing for the property, coupled with the frequent use of language connoting condition, together with the donors manifest intent that the property constitute a permanent memorial of his benefaction to the Czechoslovak public, fully justified the court's finding, as a proper statement of ultimate fact, that the estate was devised upon condition that it be used perpetually as a park or meeting ground. The word "perpetuate" is used twice in the instrument and it may properly be assumed in the overall context present to have had some import in terms of a possible divestment of the grant. As stated in *Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal.2d 602, 607, 134 P.2d 245, 247, "Some significance may be given to the use of the word 'forever' * * *. If the conditions are to be binding, 'forever' it indicates that compliance must be had with the condition in question 'forever' or perpetually." Webster's International Dictionary gives the following phrases in its definition of "perpetuate": "to make perpetual, to come to endure, or to be continued, indefinitely." The internal evidence adduced from the language used and the spirit and purpose disclosed by the terms of the instrument as well as the external evidence of the circumstances surrounding the agreement abundantly support the construction arrived at by the court, a re-entry clause being unnecessary. *Taylor v. Continental Southern Corp.*, 131 Cal.App.2d 267, 273, 280 P.2d 514; *Papst v. Hamilton*, 133 Cal. 631, 66 P. 10; *Martin v. City of Stockton*, 39 Cal.App. 552, 556, 179 P. 894.

It would be a work of supererogation to analyze and differentiate the various cases cited by the Patronat, previously alluded to in the footnote, in support of its contention that the use to which the property shall be put is merely a covenant rather than a condition of the grant. Obviously, the language used in the instruments is different and does not have the same com-

elling force as is made patent by the terms employed, the intent manifested therein, and the surrounding circumstances. Furthermore, Subdivision (a) here appears in the granting part of the integrated instrument, elaborately qualified and restricted by words of condition, rather than in a habendum clause containing a mere statement as to use without more, which distinguishes this conveyance from those referred to in virtually all cases cited by the Patronat. As stated in *Marshall v. Standard Oil Co.*, 17 Cal.App.2d 19, 23-24, 61 P.2d 520, 522: "Where the purpose for which the deed is executed appears in the habendum clause, the authorities universally hold that such declaration does not debase the fee, or whatever interest is conveyed in the granting clause. This principle, however, does not apply where the qualifying words appear in the granting clause of the deed. This distinction is made clearly to appear from the following excerpts which we quote from 9 California Jurisprudence, page 274: 'An expression of the purposes of the conveyance as to the use of the property conveyed, "as for the purpose of a public road", or "for a county high-school ground and premises", or for certain religious and educational purposes, are generally held to be directory only, and not to qualify or limit a grant which is in absolute form. But this principle is not applicable where the qualifying words are in the granting part of the deed, and so clearly connected with the word "grant" as naturally to suggest that the intention was merely to convey the right to use the property for a certain purpose.'"

[7,8] The Patronat attacks also the court's finding the ordinance which authorized the use of the property in the manner contemplated by the agreement was repealed because of the Patronat's misuse of the property. There is no merit to this contention. The testimony of Mr. Commons which has previously been quoted fully sustains such a finding. While hearsay in character, it was admitted without objection or motion to strike and is competent

to support a finding. In re Estate of Doran, 138 Cal.App.2d 541, 553, 292 P.2d 655; Lail v. Lail, 133 Cal.App.2d 610, 621, 284 P.2d 907; Smith v. Smith, 135 Cal. App.2d 100, 105, 286 P.2d 1009. This testimony indicates, in part, that the Patronat permitted various non-Czechoslovakian organizations to use the property and permitted conditions to exist which constituted a nuisance. In an attempt to alleviate these conditions and correlate the use of the property by the Patronat with the convenience of neighboring residents, the Planning Commission suggested certain conditions of use to which the Patronat refused to accede. The Patronat contends it could not do so because certain of these conditions were contrary to the purpose for which the property was granted. It argues that the Commission prescribed "that attendance of all meetings of any nature be limited to a maximum of 300 people who shall be members of Czechoslovak Patronat," a restriction which could not be lived up to in the spirit of the grant. This is not borne out by the language of the agreement. Subdivision (a) only requires that the Patronat so administer the property as would enable as many persons "to have the benefits and uses of said property as possible." This clearly suggests that the Patronat was only required to make available the facilities granted only to the extent possible, whether limited by physical capacity or any reasonable restrictions by a governmental body which would have to grant an exception before the donation could be effective at all for the intended purpose. It was patently never contemplated that all eligible persons would have to be invited or received at any one time. It would have been no violation of the agreement to accept the Commission's proposal, which would have enabled the Patronat to perpetuate the use of the property. The Patronat urges that it could not accept the Commission's requirement that advertisements of any event shall be so worded as "to limit invitations to members of the member organizations of the Patronat." It contends that to accept this

condition would have done violence to the requirement that the meeting ground be used "for the Czechoslovak people in the City of Los Angeles and vicinity." However, it is clear that the grantors were primarily interested in the use of the property by the Patronat and its affiliates. The preamble expressly recites the desire of the Biescars to grant the property to the Patronat, "for its use and for the benefit of its constituting members, *and to that extent* to the Czechoslovak community of Los Angeles and vicinity." (Italics added.) The Commission's recommendation was thus in harmony with the terms of the grant. Such recommendation, if followed, would also have prevented further violation by the Patronat of the terms of the grant under its practice of renting the property to non-Czechoslovakian organizations, which was expressly prohibited by said grant.

[9, 10] From what has been said, it is clear that the Patronat was not entitled to relief against the conditions of the conveyance under the doctrine of the cases holding that such relief may be granted when it would be oppressive and inequitable to enforce such restrictions by reason of a change in the character of the vicinity. The changes in the character of the neighborhood, which at all times was residentially zoned, did not precipitate the repeal of the excepting ordinance nor did it militate against the Patronat's continued use of the property within the spirit of the grant. An effective use of the property on the conditions granted with reasonable regard for the rights of adjacent residents was possible. Indeed, the Planning Commission offered to work out a *modus vivendi* on terms that would have eliminated certain abuses which had developed as a consequence of a rather undisciplined administration of the property and would have permitted continuity of the uses envisaged by the grant. The Patronat declined to accept these terms. It cannot now be heard to say that the court should have relieved it from the forfeiture resulting from breach of a condition subse-

quent when its own conduct engendered the action which ultimately rendered impossible the further use of the property on the conditions imposed. The situation presented was not of a nature calculated to invite the court's invocation of the general rule that equity will not ordinarily enforce a forfeiture. As stated in *Thein v. Silver Investment Co.*, 87 Cal.App.2d 308, 318-319, 196 P.2d 956, 962: "Equity does not aid one who is the sole cause of his own misfortune. Any forfeiture that here resulted was caused by appellant's own acts. * * * Under such circumstances, no principle of equity suggests, far less compels, the granting of relief to appellant. He has brought his misfortunes upon his own head."

[11, 12] Appellant has made a comprehensive attack on the findings, assigning some 16 specifications in which it asserts the findings are either unsupported by the evidence or conclusions of law. This, in part, is mere quibbling. For example, the finding that Ordinance No. 2305 permitted the use of the property here in dispute as a "park or meeting ground" is not con-

trary to the evidence, such use being implicit in the language of the ordinance granting an exception for the maintenance of a clubhouse by the Patronat. The Patronat's contention that the finding that it has no estate, right, title or interest in the property is a conclusion of law is refuted by *Dam v. Zink*, 112 Cal. 91, 93, 44 P. 331, upholding a similar finding as one of ultimate fact, as well as by *McArthur v. Goodwin*, 173 Cal. 499, 160 P. 679, and *Hitchcock v. Rooney*, 171 Cal. 285, 152 P. 913, which characterize such statements as findings of ultimate fact. In any event, even if some findings attacked as conclusions are regarded as misplaced conclusions of law, it can avail Patronat nothing since the specific findings support the conclusions reached, are amply sustained by the evidence, dispose of all the material issues and fully support the judgment.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

47 Cal.2d 241

Sayde GENIS, Mrs. Mae Swig, and Mrs. Doris Weller, Plaintiffs and Appellants,

v.

Clyde A. KRASNE, Clyde A. Krasne Company, a co-partnership, Harry Maron, David Erenberg, Victor Erenberg, and Clyde A. Krasne Company, a California corporation, Defendants.

Harry Maron and Clyde A. Krasne Company, a co-partnership, Respondents.

L. A. 24188.

Supreme Court of California.

In Bank.

Oct. 23, 1956.

Action by landlords against tenants to recover attorneys' fees incurred by landlords in successful defense of a previous action against them by tenants. The Superior Court, Los Angeles County, Bayard Rhone, J., sustained tenants' demurrer to complaint without leave to amend and entered judgment of dismissal and landlords appealed. The Supreme Court, Schauer, J., held that where lease provided that if tenants shall bring any action for relief against landlords, arising out of the lease, and landlords shall prevail, tenants shall pay landlords a reasonable attorneys' fee which shall be taxed as a part of the costs of such action, if landlords were entitled to recover attorneys' fees under such provision as the result of their prevailing in an action commenced against them by tenants, such fees had to be recovered as costs in the action in which they were incurred, and could not be recovered in a separate action brought for that purpose.

Judgment affirmed.

Opinion, 295 P.2d 37, vacated.

I. Damages ⇐71

Attorneys' fees recoverable only by virtue of contract are characterized as "damages" and such fees cannot be allowed a successful litigant without pleading and proof or an admission that there is a contract provision for them, and this is so

whether the successful party is plaintiff or defendant.

See publication Words and Phrases, for other judicial constructions and definitions of "Damages".

2. Damages ⇐163(1), 222

Attorneys' fees are not like the usual item of damages, in that a court may allow a reasonable attorneys' fee in a judgment without hearing evidence or making any finding as to the amount of such fee.

3. Costs ⇐172

Where attorneys' fees are allowable solely by virtue of contract, they cannot be recovered by merely including them in a memorandum of costs.

4. Costs ⇐264

When costs are awarded on appeal, the memorandum of costs on appeal is filed and taxed in the trial court, and if a party is entitled to attorneys' fees on appeal, they can be determined by the trial court when it determines the costs on appeal. West's Ann.Code Civ.Proc. § 1034.

5. Landlord and Tenant ⇐44(1)

Where lease provided that if tenants shall bring any action for relief against landlords, arising out of the lease, and landlords shall prevail, tenants shall pay landlords a reasonable attorneys' fee which shall be taxed as a part of the cost of such action, if landlords were entitled to recover attorneys' fees under such provision as the result of their prevailing in an action commenced against them by tenants, such fees had to be recovered as costs in the action in which they were incurred, and could not be recovered in a separate action brought for that purpose.

6. Landlord and Tenant ⇐37

Where a lease is prepared by landlords, its provisions should be construed against them.

7. Pleading ⇐34(4)

In determining whether a complaint to which a demurrer has been interposed states a cause of action, it will be presumed that plaintiffs stated their case as favorably to themselves as the facts permit.

8. Appeal and Error ⇐103

Order denying motion for leave to file an amended complaint after demurrer to original complaint had been sustained without leave to amend, and order denying motion for reconsideration of order denying leave to amend were not appealable orders, and attempted appeals therefrom would be dismissed.

Dryden, Harrington, Horgan & Swartz, Jacob Swartz and Vernon G. Foster, Los Angeles, for appellants.

Fred Horowitz, Alvin F. Howard and Amos Friedman, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiffs appeal from a judgment of dismissal entered after a demurrer to their complaint was sustained without leave to amend and after plaintiffs' motions for permission to file an amendment to the complaint and for reconsideration of the sustaining of the demurrer without leave to amend were denied.

Plaintiffs, assignees of lessors, seek to recover from the assignees of lessee the amount of attorneys' fees expended by plaintiffs in successful defense of a prior action brought by the assignees of lessee. For convenience, we will refer to plaintiffs-appellants as if they were the original lessors and to defendants-respondents as if they were the original lessee.

The provision of the lease under which lessors seek recovery reads as follows: "if Lessee shall bring any action for any relief against Lessors, declaratory or otherwise, arising out of this lease, and Lessors shall prevail in such action, Lessee agrees to pay Lessors a reasonable attorney's fee which shall be taxed as part of the costs of such action."

Lessors prevailed in the earlier action but they did not in that action secure an

award of attorneys' fees. In such prior action lessors (defendants there) set up a claim for attorneys' fees as a so-called affirmative defense; at the close of the first trial of the prior action lessors were allowed attorneys' fees as if they were costs, but on lessee's motion to tax costs the item for attorneys' fees was stricken; on the second trial of the prior action lessors, so far as their complaint discloses, over the objection of opposing counsel and without the consent of the court, announced their intention of "requesting this court to proceed in a separate proceeding to, if necessary, hear evidence as to the amount of any attorneys' fees which should be allowed, or to seek the recovery of that by way of an independent action."

We have concluded that the contract (lease) upon any reasonable construction requires that attorneys' fees be recovered, if at all, as if they were costs in the prior action. In this connection it is to be observed that plaintiffs' complaint in this action does not allege, and plaintiffs do not claim, that there is available to them extrinsic evidence which would permit construction of the contract other than according to the normal meaning of its language.

The complaint, with the proposed amendment, alleges:

The Lease: A photostatic copy of the lease is attached to and made a part of the complaint.¹ The following provisions of the lease relate to this controversy:

Lessors agree to furnish janitor service. "No additional locks shall be placed upon any doors of the premises * * *."

"Lessors shall be in no wise responsible for any loss of or damage to property from the leased premises, however occurring."

"In case Lessors shall bring suit to recover any rent due hereunder or for breach of any covenant of this lease, or to recover possession of the premises, and shall re-

1. Upon its face this photostat shows that the lease was made on a printed form prepared by lessors. The lease provisions

quoted herein are printed provisions of the form.

cover in the suit, or if Lessee shall bring any action for any relief against Lessors, declaratory or otherwise, arising out of this lease, and Lessors shall prevail in such action, Lessee agrees to pay Lessors a reasonable attorney's fee which shall be taxed as part of the costs of such action."

The Facts Concerning the Prior Action by Lessee: The complaint in the prior action alleged: The premises were leased with the provision that lessee place no additional locks upon the doors. Lessee "entrusted" the leased premises and their contents to lessors except when the premises were open for business. Lessors permitted their agents to have keys to the premises. Using these keys the agents wrongfully entered the premises and converted goods of lessee.

Issues were joined by answer of lessors. As a "ninth affirmative defense" the answer alleged that the lease contained the above quoted paragraph as to attorneys' fees and that \$7,500 was a reasonable fee for the defense of the action. The answer prayed for recovery of that amount.

In the prior action lessee claimed that lessors' liability arose out of the landlord-tenant relationship and "relied upon the following facts:

"1. The fact that the lease prohibited the tenants from providing additional locks to their doors.

"2. That under the terms of the lease, the landlord retained keys to the tenant's premises and such keys were used in the theft of the tenant's property.

"3. The duty of a landlord, upon a lease being made, to secure the tenant in the quiet enjoyment of the premises.

"4. An implied term of the lease that the landlord did not permit the use of keys retained by her to be used in the theft of the tenant's property."

The first trial of the prior action resulted in a judgment of nonsuit. Lessors included in their memorandum of costs and disbursements an item of \$7,500 for attorneys' fees. On lessee's motion to tax costs that

item was stricken. Lessee appealed from the judgment of nonsuit and lessors appealed from the order striking the item for attorneys' fees. The District Court of Appeal (Maron v. Swig (1952), 115 Cal. App.2d 87, 92, 251 P.2d 770) reversed the judgment of nonsuit; it determined that, because of such reversal, the order granting the motion to tax costs was moot; therefore, it dismissed lessors' appeal from such order.

A second trial of the prior action was had before a jury. Before the matter was submitted to the jury the following occurred in chambers: Lessors' counsel said, "we are mindful of this affirmative defense. We are not to be considered as waiving it but have chosen to await the action of the jury in this case either for the purpose of then requesting this court to proceed in a separate proceeding to, if necessary, hear evidence as to the amount of any attorneys' fees which should be allowed, or to seek the recovery of that by way of an independent action." Lessee's counsel replied, "We don't consent to this procedure. I just want to make it clear that we are not consenting to such a procedure."

No evidence on the issue of attorneys' fees was offered at the second trial in the prior action, and the question of recovery of attorneys' fees by lessors was not referred to before the jury. It is alleged that the "affirmative defense" was "in fact withdrawn by * * * [lessors] at the trial of said case." But there is no allegation whether the trial court made any ruling as to the above quoted (and pleaded) colloquy of counsel, and no allegation as to whether attorneys' fees were included in lessors' memorandum of costs at the conclusion of the second trial of the prior action.

The second judgment in the prior action makes no mention of the subject of attorneys' fees. It is in the usual form of a judgment on a verdict for defendant. Such verdict and judgment in the prior action were for lessors (defendants there). Judgment became final without appeal.

The complaint in the present action further alleges: Lessors paid \$24,250 attorneys' fees for defense of the prior action. That is a reasonable sum for the professional services rendered. Under date of "January —, 1955," lessors made written demand upon lessee for such sum. The complaint shows that January, 1955, was after the judgment in the prior action became final. Lessee has not paid or offered to pay the sum or any part thereof.

[1,2] *The Nature of Attorneys' Fees Recoverable Only by Virtue of Contract:* The texts accept the view of those cases which characterize attorneys' fees recoverable only by virtue of contract (and not as costs either by statute or by case law) as "damages." (13 Cal.Jur.2d, Costs, § 36; 14 Cal.Jur.2d, Damages, § 104; 3 Witkin, California Procedure (1954), pp. 1914-1915.) Such fees cannot be allowed a successful litigant without pleading and proof (or admission) that there is a contract provision for them. This is so whether the successful party is plaintiff (Brooks v. Forington (1897), 117 Cal. 219, 221, 48 P. 1073; Prescott v. Grady (1891), 91 Cal. 518, 522, 27 P. 755; Stubblefield v. Fickle (1954), 123 Cal.App.2d 325, 327, 266 P.2d 808) or defendant (Techow v. Pollack (1952), 111 Cal.App.2d 556, 558, 244 P.2d 915; City Investment Co. v. Pringle (1920), 49 Cal.App. 353, 355, 193 P. 504). But attorneys' fees are not like the usual item of damages, for the court may allow a reasonable attorneys' fee in the judgment without hearing evidence or making a finding as to the amount of such fee. (See Huber v. Shedoudy (1919), 180 Cal. 311, 313-314, 181 P. 63; Wagner v. Shapona (1954), 123 Cal.App.2d 451, 463-464, 267 P.2d 378; Pehau v. Stewart (1952), 112 Cal.App.2d 90, 97, 245 P.2d 692.)

2. In Wagner v. Shapona (1954), supra, 123 Cal.App.2d 451, 454, 463, 267 P.2d 378, the contract provided for "a reasonable attorney's fee which shall be fixed by the court as a part of the costs." Apparently the contractual provision was pleaded and proved. The trial court first allowed the fee in the main part of the judgment, then amended the judgment to direct that the

[3] It is particularly to be observed that where attorneys' fees are allowable solely by virtue of contract they *cannot* be recovered by merely including them in the memorandum of costs (City Investment Co. v. Pringle (1920), supra, 49 Cal.App. 353, 355, 193 P. 504.)² Therefore, lessors, in the prior action, properly set up their claim for attorneys' fees before it could be known whether there would occur an essential fact (lessors' prevailing in the prior action) which would give rise to a duty of lessee to pay attorneys' fees.

The Meaning of the Lease Provision as to Attorneys' Fees: Lessors argue that despite the provision of the lease that the fees "shall be taxed as costs in such [prior] action," they can recover such fees in this independent action. In support of this argument lessors cite Stockton Theatres, Inc., v. Palermo (1954), 124 Cal.App.2d 353, 268 P.2d 799 (hearing denied). That case allows recovery of attorneys' fees, in a separate action, under the following provision of a lease: "If either party shall commence any legal proceedings against the other for relief because of any default by the other because of failure to perform any term, covenant or condition of this lease and shall prevail in said action, the party who has commenced and prevailed in said legal proceeding shall recover, in addition to all court costs a reasonable attorney's fee to be fixed by the Court" (at pages 354-355 of 124 Cal.App.2d, at page 800 of 268 P.2d). Lessor recovered judgment in unlawful detainer and under a writ of restitution took possession of the leased premises. Lessee appealed and the judgment was reversed. In a subsequent action brought by lessee, lessee recovered attorneys' fees incurred in prosecution of the appeal. The District Court of Appeal

fee be a part of the costs. The appellate court held that this procedure was proper, but reversed on other grounds. The Wagner case need not be taken as authority as to what is proper procedure where attorneys' fees are allowable by contract, since the cases on which it relies are cases where such fees were allowable by statute.

upheld the trial court's determination that the lessor's taking possession under the writ of restitution was a default within the meaning of the above quoted provision concerning attorneys' fees, and the lessee's taking of an appeal was the commencement of legal proceedings for relief because of such default. Adopting the opinion of the trial court, the District Court of Appeal said (at pages 364-365 of 124 Cal.App.2d, at pages 806-807 of 268 P.2d), "It has * * * been argued on behalf of Defendant Palermo [lessor] that the attorney's fee clause in the lease by its very terms requires that the attorney's fees must be recovered in the same proceeding in which relief is sought for a default. * * * [This argument] seem[s] to be a severe application of the theory of strict construction. In fairness the most that can be drawn from the language of this clause is that the parties contemplated such a procedure would be followed. It should be apparent that the attorney's fee clause creates a right to recover attorney's fees under certain circumstances and also describes a remedial procedure. The words of the clause do not designate this to be the solitary and exclusive remedy for the enforcement of this contractual right. If the attorney's fee clause were to be so construed then the result would be that under some circumstances a party would have a right without a remedy. The practical result of such a construction would be a partial invalidity of the attorney's fee clause. For these reasons this does not seem to be a proper case for the application of the rule 'expressio unius est exclusio alterius.'"

[4] Lessors urge that here, as in *Stockton Theatres, Inc., v. Palermo* (1954), supra, 124 Cal.App.2d 353, 268 P.2d 799, there would be no way for them to recover their attorneys' fees in the prior action. It is lessors' position that when the litigation concluded in their favor in the trial court they could only present evidence of services which had been rendered up to that time; they could not anticipate whether there would be an appeal and what attorneys' services would be required if there were.

There is no such practical difficulty, for when costs are awarded on appeal, the memorandum of costs on appeal is filed and taxed in the trial court (Code Civ.Proc., § 1034); and if a party is entitled to attorneys' fees on appeal, they can be determined by the trial court when it determines the costs on appeal. (See *Cirimele v. Shinazy* (1954), 124 Cal.App.2d 46, 53, 268 P.2d 210; *Oakland California Towel Co. v. Roland* (1949), 93 Cal.App.2d 713, 718-719, 209 P.2d 854.)

[5-7] The only "reasonable attorney's fee" which lessee agreed to pay was one "which shall be taxed as part of the costs of such [prior] action"; the extent of lessors' right and lessee's duty is measured by the terms of their agreement; the agreement manifestly contemplates that the fees should have been recovered in the litigation as to which they were incurred. This conclusion is strengthened by the consideration that the photostatic copy of the lease attached to the complaint shows that it was prepared by lessors and, therefore, should be construed against them. (See *Basin Oil Co. v. Baash-Ross Tool Co.* (1954), 125 Cal.App.2d 578, 595, 271 P.2d 122.) It is, of course, to be presumed that plaintiffs have stated their case as favorably to themselves as the facts permit. (*Faulkner v. California Toll Bridge Authority* (1953), 40 Cal.2d 317, 328 [6], 253 P.2d 659.)

Other Contentions: Lessee argues that it appears on the face of the complaint that the question of attorneys' fees was res judicata in the prior action and that this action is therefore barred. Lessee further argues that lessors have no right to attorneys' fees under the lease because the prior action was in tort for conversion and therefore, on lessee's view, was not an "action for any relief against Lessors * * * arising out of this lease." In view of our conclusion that the lease requires that attorneys' fees be recovered, if at all, by proceeding as if they were costs in the action in which they were incurred, it is unnecessary to discuss lessee's other arguments above stated.

[8] Plaintiffs purport to appeal from orders denying them leave to file the amendment to the complaint and denying their motion for reconsideration of the sustaining of the demurrer without leave to amend. These orders were made before judgment and are not appealable. The attempted appeals therefrom are dismissed.

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 189

Petition of Herbert ALLER, Business Representative of Local 659, I.A.T.S.E., for an Order Directing Arbitration and Appointment of an Arbitrator.

LOCAL 659, I.A.T.S.E., a California corporation, substituted for Herbert Aller, Business Representative of Local 659, I.A.T.S.E., Petitioner and Appellant,

v.

COLOR CORPORATION OF AMERICA,
Defendant and Respondent.

L. A. 24270.

Supreme Court of California.
In Bank.

Oct. 19, 1956.

Proceedings brought by union to compel arbitration under collective bargaining agreement. The Superior Court, Los Angeles County, Arnold Praeger, J., dismissed the petition, and the union appealed. The Supreme Court, Carter, J., held that there can be a mutual rescission or a waiver of arbitration provisions of collective bargaining agreement, and held that, on record presented, the trial court

could properly find that union had in fact repudiated its right to arbitration.

Affirmed.

Opinion, 298 P.2d 128, vacated.

1. Labor Relations Ⓒ418

There may be a mutual rescission or a waiver of arbitration provisions of collective bargaining agreement; and, on record presented in proceedings brought by union to compel arbitration, trial court could properly find that union had in fact repudiated its right to arbitration.

2. Contracts Ⓒ253

A contract repudiation, accepted by promisor excuses performance by promisee.

3. Labor Relations Ⓒ418

Pursuing remedy provided by Labor Code section making it a misdemeanor to unlawfully withhold wages is some evidence of intent not to arbitrate. West's Ann. Labor Code, §§ 222, 225.

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellant.

Pauline Nightingale and Leon H. Berger, Los Angeles, amici curiae on behalf of appellant.

Irving A. Bernstein, Beverly Hills, for respondent.

CARTER, Justice.

Pursuant to the statutory provisions concerning arbitration, Code Civ.Proc. §§ 1280-1293, Aller, petitioner, the business representative of a union, Local 659, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators (by stipulation the union was substituted as petitioner in place of Aller), filed against defendant, Color Corporation of America, a corporation (hereinafter referred to as Color), asking that Color be required to arbitrate a dispute under a collective bargaining agreement. Defendant answered, its main claim being that petitioner had lost its right to have the arbi-

tration provision in the collective bargaining agreement enforced because it had repudiated and waived it. After hearing on the petition, the court gave judgment dismissing the proceeding and awarding costs to defendant. Petitioner appeals.

It is not disputed, and the court found, that Color, engaged in the film processing business, had collective bargaining agreements with five other unions in addition to petitioner and all contracts contained the same arbitration clause. The clause provided three steps in grievance procedure for settling disputes with regard to wages, hours or other conditions of employment, and the interpretation of the agreement, the first two being an attempt by representatives of Color, the employer, and the unions to settle the dispute. Failing settlement, the third provides for the appointment of an arbitrator by the parties within 10 days thereafter to settle it. Either party may proceed under the arbitration clause. Any grievance for the payment of dismissal pay not presented under the first step shall be deemed waived unless presented 365 days after the employee becomes entitled to such pay. Under the collective bargaining agreements employees are entitled to "dismissal pay" but the employer is not liable therefor if the employee was dismissed "for any other cause or causes beyond the control of the" employer, Color. In 1954, Color closed its plant and dismissed all of its employees, including Krog, Ragin and Moore who were members of petitioner, Local 659. In August, 1954, a dispute arose between Color and the unions as to whether the dismissed union employees should receive dismissal pay inasmuch as Color claimed that under the bargaining agreement the dismissals were for causes beyond their control and the union contended otherwise. All of the unions except petitioner, Local 659, and defendant proceeded with the grievance and arbitration procedure and those proceedings are still

pending. Defendant has expended over \$300 as expenses of the proceedings.

The trial court also found in addition to the foregoing that defendant is not in "default" in proceeding with arbitration but petitioner is and hence the instant proceedings should be dismissed; that petitioner has been guilty of unreasonable delay in bringing the proceeding and is estopped to seek enforcement of the arbitration provision; that defendant's demands on petitioner to arbitrate during the grievance procedure by the other unions were refused by petitioner and it wilfully failed and refused to comply with the arbitration provision and instead elected to and did bring proceedings against petitioner before the state labor commissioner to collect dismissal pay.

[1] Petitioner argues that under the law it could not lose its right to have the arbitration provision enforced and under the facts, as a matter of law, it did not. Defendant urges that petitioner lost his right to arbitration and the evidence supports the trial court's finding in this respect. No question is raised as to whether the dispute here involved was subject to arbitration under the arbitration statute and the collective bargaining contract.

The evidence on the subject is by affidavit and letters. In an affidavit by Bernstein, counsel for Color, offered by Color, it is stated: That on August 5 and 12, 1954, he explained defendant's position on the dispute to petitioner's representatives, that is, that it was not liable for dismissal pay. On the 18th, it agreed with counsel for the unions other than petitioner, that grievance and arbitration procedure was necessary; on August 25th, he was advised that the labor commissioner had issued an order (dated August 19th) to appear before him on a charge by petitioner that defendant was invoking section 222 of the Labor Code;¹ that he explained the arbitration

1. "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other

person, to withhold from said employee any part of the wage agreed upon." Lab.Code, § 222. A violation of the section is a misdemeanor. Id., § 225.

provision to the commissioner; that on September 2nd he met with the commissioner and petitioner's representative Nave and asked Nave to dismiss the complaint before the commissioner and arbitrate under the bargaining agreement but Nave refused; that after some correspondence with the commissioner, Stone, defendant's vice president, on September 22nd, wrote a letter (sending a copy to petitioner) reviewing the matter of arbitration and stating: "By this action and by the action of IATSE Local 659 [petitioner], you are requiring us to defend our position in court in the face of the fact that our bargaining agreement provides otherwise. We intend to hold both you and Local 659 fully responsible for all consequences resulting from this ill-advised action"; that on September 29th petitioner wrote to Stone stating: "Our dispute with you is not a matter of interpretation but one of non-payment and we are prepared to show that you have wilfully refused to make such payment and that you were not compelled to go out of business, as you claimed you were in the defense raised in the arbitration proceeding. Even that is not a good defense in the current hearing with the other unions, but since they have elected to take the other course, that is their problem. The best way to settle this matter is to let everyone testify under oath and I would certainly expect you to be very willing to accept this judicial process of settling disputes. After all, when one is under oath, the truth and only the truth will prevail"; that on September 27th the commission advised defendant that petitioner insisted on criminal proceedings and the matter will be referred to the "city attorney." Stone's affidavit, offered by defendant, stated that he had a "great many telephone conversations" with Aller before and after January 11, 1955, and prior to Aller's letter of September 29, 1954, he made "repeated demands" upon Aller that Local 659 abide by the terms of the bargaining and arbitrate the dispute; that after the receipt of that letter "and in every subsequent conversation, I informed Mr. Aller that the Compa-

ny considered his tactics in this whole matter to be reprehensible, that the Company [defendant] chose to consider those tactics and his unequivocal refusal to arbitrate as a repudiation and breach of the contract, and that the Company would no longer consent to an arbitration"; he acknowledged receiving the letters Aller mentions in his affidavit but denies the agreement mentioned by Aller.

Aller in his affidavit on behalf of petitioner stated he denied Local 659 had ever refused to arbitrate the dispute but defendant refused to cooperate and he and Stone agreed to "hold in abeyance" all disputes until one of the other union's (Local 683) arbitration had been completed; he refers to letters he says he sent to Stone during January, March and April, 1955, demanding arbitration inasmuch as the arbitration with Local 683 had been favorable to that union.

The question thus presented is whether or not there has been a waiver, mutual rescission, repudiation, laches, or estoppel by or on behalf of petitioner in the enforcement of the arbitration clause. We are not concerned here with any question involving the repudiation or violation of the terms of the bargaining agreement other than the arbitration provision. See conflict of authorities on that subject: 3 A.L.R.2d 383. Section 1280 of the Code of Civil Procedure provides that a provision in a written contract to settle by arbitration a controversy arising out of the contract or the refusal to perform the whole or any part thereof "shall be valid, enforceable and irrevocable, *save upon such grounds as exist at law or in equity for the revocation of any contract*". (Emphasis added.) It is thus indicated that there may be instances in which the right to enforce an arbitration provision is lost. This is further shown by other provisions. A party aggrieved by the failure or refusal of another to perform under a contract providing for arbitration may have the provision enforced by the court; the court shall hear the matter and on being satisfied the failure to comply with the arbitration "is not in issue" shall

order the arbitration to proceed; if "default" be in issue, that shall be tried. *Id.*, § 1282. If any action be brought on the issue arising out of the contract for arbitration the court shall stay the action upon being satisfied that the issue is referable to arbitration provided the "applicant for the stay is not in default in proceeding with" the arbitration. *Id.*, § 1284. It is also evident that defendant could have proceeded to enforce the provision for arbitration under the code when petitioner refused to arbitrate.

In harmony with the arbitration statute, *supra*, it has been held that the arbitration provision of a contract may be waived by either or both of the parties by litigating the dispute which would be arbitrable under the provision and not raising the question of the arbitration provision, *Case v. Kadota Fig Ass'n*, 35 Cal.2d 596, 220 P.2d 912; *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182; *Jones v. Pollock*, 34 Cal.2d 863, 215 P.2d 733; *Landreth v. South Coast Rock Co.*, 136 Cal.App. 457, 29 P.2d 225; *Pierce v. Wright*, 117 Cal. App.2d 718, 256 P.2d 1049; *Fejer v. Paonessa*, 104 Cal.App.2d 190, 231 P.2d 507; *Wilson v. Mattei*, 84 Cal.App. 567, 258 P. 453; *Almacenes Fernandez, S. A., v. Golodetz*, 2 Cir., 148 F.2d 625, 161 A.L.R. 1426, 117 A.L.R. 302; see, *Squire's Dept. Store, Inc., v. Dudum*, 115 Cal.App.2d 320, 252 P.2d 418, and that a failure by a party to proceed to arbitrate in the manner and at the time provided in the arbitration provision is a waiver of the right to insist on arbitration as a defense to an action on the contract. See *Pneucrete Corp. v. United States Fid. & G. Co.*, 7 Cal.App.2d 733, 46 P.2d 1000; *Jordan v. Friedman*, 73 Cal.App. 2d 726; see 117 A.L.R. 302; 161 A.L.R. 1426. There may be a mutual rescission. See *Drake v. Stein*, 116 Cal.App.2d 779, 254 P.2d 613. It has been said: "In the light of present-day arbitration statutes, most agreements to arbitrate future disputes are likely to be held to be lawful and valid; and under such statutes the courts may stay proceedings at law and order the arbitration to go forward. When one of the parties is

resisting such an order, the court must make two principal determinations before issuing it. First was a valid agreement to arbitrate ever made by the parties and is it still operative? Secondly, does the dispute that now exists fall within the terms of that agreement, reasonably interpreted? In the present action we are dealing only with the former of these questions.

"* * * the arbitration agreement * * * if lawful, may have been rescinded, repudiated, or avoided. The parties to such an agreement have power to rescind it by mutual agreement to that effect. The ordinary arbitration statutes do not deprive them of this power. The parties may, however, rescind other agreements that they have made, without intending to affect their agreement to arbitrate disputes. The agreement to arbitrate may be wholly separate from other transactions; or, although contained in a single written instrument with other provisions, it may be wholly independent of them—a separate and collateral agreement.

"Although one party can not by himself 'rescind' a contract, he can wrongfully 'repudiate' it. What is the effect of his repudiation? To answer this, we must first interpret his expressions and determine the coverage of the repudiation. Suppose first that he repudiates the agreement to arbitrate itself. By such a repudiation he does not deprive the other party of his right to arbitration; and if the repudiator brings an action in breach of his valid arbitration agreement the defendant can defend on the ground that arbitration is a condition precedent, or under a statute can obtain a stay or an order to arbitrate, or can counterclaim for damages. But such a repudiator has himself no right to arbitration. The other party can now bring his action in reliance on the repudiation, or otherwise change his position in reliance. Thereafter, the repudiator has no power of retraction and can not insist on the remedy by arbitration. * * *

"In determining whether a repudiation or other vital breach of a contract should

deprive a party of his right to an arbitration of the existing dispute, the court should consider the form and extent of the repudiation or breach and the reasons for which it occurred. A repudiation that clearly includes the arbitration provision itself should prevent the repudiator from using it in defense when sued in the courts. If the provision is not itself repudiated and the issue that is raised by the alleged breach is one that is within the coverage of the provision, the defendant should be supported in insisting on arbitration of the issue unless his bad faith and wilful misconduct are sufficiently obvious to justify a discretionary refusal of such support." Corbin on Contracts, § 1443. In *Tas-T-Nut Co. v. Continental Nut Co.*, 125 Cal.App.2d 351, 354, 270 P.2d 43, 46, the court, while holding the evidence insufficient to show a waiver or repudiation of an arbitration provision, proceeded to discuss applicable principles. It said: "* * * it has often been held the right to arbitrate can be waived [citations], and that whether or not waiver has taken place is ordinarily a question of fact, yet we are compelled to hold upon the record here that there is no support for the trial court's finding that the appellant had ever waived the provision of the contract binding the parties to proceed in arbitration if controversies arose between them. The right to arbitrate is of course possessed by each party to the agreement and notwithstanding one party may impede the normal course of arbitration such conduct cannot dispense with the right of the other party to compel it. Our statute affords complete remedies to implement and to specifically enforce this right. If, therefore, one party to an arbitration agreement has by dilatory tactics or an express refusal to proceed with arbitration placed himself in such a position that the other party could accede to the abandonment of the arbitration clause, yet such party need not do so. * * * But this is an election which it must make for it cannot keep alive in itself the right to arbitrate and at the same time deny it to its adversary. *Krauss Bros. Lbr. Co. v. Louis Bossert & Sons*, 2

Cir., 62 F.2d 1004, 1006. Said the court as to one party to an arbitration agreement who had ignored that agreement and brought action in a state court:

"* * * The state action was indeed a repudiation of the plaintiff's own promise to arbitrate; it gave the defendant an election, taking the plaintiff at its word, to put an end to the arbitration clause, or to insist upon performance. By its plea in the answer it chose the second course. * * * It is true that it did not follow this up by selecting an arbitrator as it had promised to do. Until it did, it was therefore not in position to enjoin prosecution of the action under section 5 of the New York Arbitration Act * * * and delay to do so might indeed forfeit its recourse to that remedy. * * * But, so far as concerned the plaintiff's repudiation, it had chosen not to call off the clause, not to "rescind" it; and it could not prevent the plaintiff's resumption of the remedy, while its own position remained unchanged."

"The above holding by the federal court is no more than an application of the familiar rule that if an agreement be breached the party against whom the breach is committed may refuse to accept the breach or terminate the contract, thus keeping the contract alive, but that if he does so he keeps it alive both for the benefit of himself and for that of the other contracting party." Williston on Contracts, Rev. Ed., § 684; *Alder v. Drudis*, 30 Cal.2d 372, 381, 182 P.2d 195."

In the instant case it appears that the dispute under the collective bargaining agreement arose in August, 1954 between petitioner and all the other unions and the other unions commenced the grievance and arbitration procedure. Petitioner however, refused to participate. The dispute with all the unions was exactly the same, whether dismissal pay was to be paid under the contract. In the same month petitioner complained to the state labor commissioner that pay (dismissal pay) was being withheld contrary to section 222 of the Labor Code, supra, and the commissioner issued

his order for a hearing on that subject. On September 29th petitioner, by Aller, wrote the letter to defendant heretofore quoted and it was in response to a demand that petitioner arbitrate. While not too clear, that letter is readily susceptible of the construction that petitioner did not wish to arbitrate but preferred to proceed before the labor commissioner. In any case, Stone's affidavit shows that defendant's repeated demands on petitioner, both before and after the letter, that it arbitrate, had been refused and after the letter he informed Aller that petitioner's repudiation of the arbitration provision and refusal to arbitrate was a breach of the contract and defendant would "no longer consent" to arbitration. There is some conflict on the matter by reason of Aller's affidavit but the resolution of that conflict was for the trial court. Even if the letter did not constitute an unequivocal refusal to arbitrate, Stone's affidavit shows other unequivocal refusals and defendant's acceptance thereof. For the same reason it is not necessary to consider the proceeding before the labor commissioner; there is sufficient without it. Aller in his letters to Stone of January 11, 1955, and thereafter indicated a desire to arbitrate, but we take it from Bernstein's and Stone's affidavits that there had before then been a repudiation of the arbitration provision and acceptance thereof by defendant. Indeed, it may well be concluded from those affidavits that there was a mutual rescission of the provision for arbitration.

[2] A repudiation of a contract accepted by the promisor excuses performance by the promisee. *Bomberger v. McKelvey*, 35 Cal.2d 607, 220 P.2d 729; *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 P. 356; Civ.Code, § 1511. And it is said in *Dessert Seed Co. v. Garbus*, 66 Cal.App.2d 838, 847, 153 P.2d 184, 189: "It is well settled that an abandonment of a contract may be implied from the acts of the parties and this may be accomplished by the repudiation of the contract by one of the parties

and by the acquiescence of the other party in such repudiation. This doctrine is supported by many cases. [Citations.]

"In support of the court's findings and judgment, the evidence would warrant a conclusion that there had been a mutual abandonment or rescission of the oral contract."

[3] *Amicus curiae*² contends on behalf of petitioner on petition for hearing in this court that the proceeding by petitioner before the labor commissioner and the steps for enforcement by the commissioner of section 222 of the Labor Code, *supra*, cannot be considered as an election of remedies by petitioner as it would mean that the arbitration provisions would control over that section and the policy thereby established by the Legislature relying upon *Pneucrete Corp. v. U. S. Fid. & G. Co.*, 7 Cal.App.2d 733, 46 P.2d 1000, and *Wallace v. Carpenters Local Union, etc.*, 137 Cal. App.2d 468, 290 P.2d 583. In the *Pneucrete* case the court declared that an action would lie on a materialman's bond given by the contractor as required by statute when there was a construction contract between the contractor and a flood control district, even though there was an arbitration provision in the construction contract because the bond was required by statute and to allow arbitration to prevent an action thereon would frustrate the public policy requiring the bond. In the *Wallace* case it was held that the employer could obtain an injunction authorized by the law against jurisdictional strikes, Lab. Code, §§ 1115-1120, even though there was an arbitration clause in the collective bargaining agreement. It is unnecessary to pass upon that point, however, because the judgment is otherwise supportable as seen from the foregoing discussion. Moreover, we see no frustration in the policy declared in section 222 in treating a proceeding thereunder as some indication that petitioner was abandoning or repudiating the arbitration provision.

Assuming the right to enforce the provisions of section 222 cannot be and is not

2. The state labor commissioner.

waived by an arbitration provision, a person's conduct in pursuing the remedy provided for under this section is some evidence that he does not intend to arbitrate. What the labor commissioner or a prosecuting attorney may or may not do in enforcing the section has no bearing on the arbitration provision, but what the party to the contract containing the arbitration clause does, may throw some light on his intention.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 239

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Oscar HAMPTON, Defendant and Appellant.
Cr. 5907.

Supreme Court of California.
Oct. 19, 1956.

Prosecution for unlawful sale of narcotics, to wit, marijuana. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment and made order denying motion for new trial and defendant appealed. The Supreme Court, McComb, J., held that evidence sustained conviction.

Judgment and order affirmed.

Opinion, 295 P.2d 945, vacated.

1. Criminal Law Ⓒ573

Where information was filed on June 17, 1955, and trial was completed on July 7, 1955, for unlawful sale of narcotics, de-

fendant was not denied a speedy trial. West's Ann.Pen.Code, § 1382, subd. 2; West's Ann.Const. art. 1, § 13.

2. Poisons Ⓒ9

Evidence was sufficient to sustain conviction for unlawful sale of narcotics, to wit, marijuana. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law Ⓒ1037(1, 2)

Where defendant, in prosecution for unlawful sale of narcotics, neither objected to alleged error of district attorney in closing remarks nor requested trial court to instruct jury to disregard it, defendant, on appeal, was not entitled to urge alleged error as prejudicial. West's Ann.Health & Safety Code, § 11500.

Oscar Hampton, in pro. per., and Robert L. Bostick, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerney, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., and Edward L. Merrill, Deputy Dist. Atty., Oakland, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment of guilty after a trial before a jury of violating section 11500 of the Health and Safety Code (the unlawful sale of narcotics, to wit, marijuana). He also appeals from the order denying his motion for a new trial.

Questions

[1] *First: Was defendant denied a speedy trial as guaranteed him under article I, section 13, of the California Constitution?*

No. The record discloses that an information was filed against defendant on June 17, 1955, and that the trial was completed July 7, 1955. It is thus apparent that defendant was tried well within the 60-day period specified in section 1382 of the Penal Code.*

* Section 1382 of the Penal Code reads in part: "The court, unless good cause to the contrary is shown, must order

the action to be dismissed in the following cases: * * *

"2. If a defendant, whose trial has

[2] *Second: Was there substantial evidence to sustain the verdict of guilty?*

Yes. A federal narcotics agent testified in detail to the purchase from defendant of a quantity of marijuana, the transaction taking place in the agent's presence. This testimony, which was believed by the jury, constituted substantial evidence to sustain the verdict.

[3] *Third: Did the deputy district attorney commit prejudicial error in his argument to the jury?*

No. During the course of the prosecutor's argument to the jury he said: "May it please the Court; Ladies and Gentlemen of the Jury. It now becomes my privilege to make you the final argument. Right off I want to say I am not throwing in the sponge, as Mr. Casalina led you to believe. I think this man is guilty; I don't think that he is just a little pusher; I think he is a supplier; and I think he is guilty of this offense.

"Now Mr. Casalina said the guilty man has pleaded guilty, so it is all washed up and we ought to know it. That is not true, Ladies and Gentlemen of the Jury. I wouldn't be standing here telling you that if I didn't believe it. It is my duty as a Deputy District Attorney to only prosecute the people that I believe are guilty. In this case I sincerely believe Mr. Hampton is guilty."

The rule is established that unless the harmful results of misconduct of the district attorney cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error; and (b) a request to the trial court to instruct the jury to disregard it. (*People v. Sampsell*, 34 Cal.2d 757, at page 764, 214 P.2d 813; *People v. Byrd*, 42 Cal.2d 200, at page 208 [3], 266 P.2d 505; *People v. Tolson*, 109 Cal.App.2d 579, at page 582 [3], 241 P.2d 32.)

not been postponed upon his application, is not brought to trial in a superior court within 60 days after the finding of

In the present case the foregoing rule is applicable. An examination of the entire record shows that the acts complained of are of such a character that an objection thereto and an instruction from the trial court to the jury to disregard the alleged misconduct would have obviated any prejudicial effect that the alleged improper remarks might have had.

Therefore, since the record fails to show that defendant either objected to the alleged misconduct or requested the trial court to instruct the jury to disregard it, defendant may not urge the alleged error as prejudicial in this court.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



47 Cal.2d 200

ESTATE of Fred Mason CARTER, also known as Fred M. Carter, Deceased.

AMERICAN CANCER SOCIETY et al.,
Appellants,
v.

CHURCH DIVINITY SCHOOL OF THE
PACIFIC, Respondent.

ESTATE of Mabel C. CARTER, also known as Mabel Carter, Deceased.

AMERICAN CANCER SOCIETY et al.,
Appellants,
v.

CHURCH DIVINITY SCHOOL OF THE
PACIFIC, Respondent.

S. F. 19359, 19360.

Supreme Court of California
In Bank.

Oct. 19, 1956.

Rehearing Denied Nov. 14, 1956.

Proceedings in the matter of the estates of a deceased husband and deceased

the indictment, or filing of the information * * *."

wife. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered orders determining deceased wife had not exercised her power of appointment over corpus of trust established by deceased husband, and contestants appealed. The Supreme Court, McComb, J., held that testatrix, by residuary clause distributing "all the rest, residue, and remainder of my estate whether the same be real, personal or mixed and wheresoever the same may be situated," exercised her power of appointment over corpus of trust established by her predeceased husband.

Reversed with directions.

Opinion, 297 P.2d 783, vacated.

1. Wills ⇨440, 456

If the language of a will is clear and unambiguous it must be interpreted according to its ordinary meaning and legal import and the intention of the testator ascertained therefrom.

2. Wills ⇨589

A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting intent to dispose of all real or personal property, passes all real or personal property which he was entitled to dispose of by will at time of his death including property embraced in a power to devise. West's Ann.Prob.Code, § 125.

3. Wills ⇨457

Where a will is drawn by an experienced and competent lawyer it is presumed that the legal terms embodied in the will are used in their legal sense.

4. Wills ⇨589

Where testatrix by her will distributed "all the rest, residue and remainder of my estate, whether the same be real, personal or mixed, and wheresoever the same may be situated, including any and all lapsed bequests under this will," testatrix effectively exercised her power of appointment over corpus of trust established by her predeceased husband.

5. Wills ⇨487(6)

In proceeding involving question whether deceased wife had by residuary

clause of will devising residue of estate of every kind and nature exercised her power of appointment over corpus of trust established by her predeceased husband, admitting drafting attorney's testimony concerning testatrix' declarations to him was error since residuary clause was clear and unambiguous. West's Ann.Prob.Code, § 105.

Peart, Baraty & Hassard, Joseph S. Rogers, San Francisco, Gerald S. Chargin, San Jose, J. Clark Benson, San Francisco, Richard G. Lean, Douglas, Zingheim & Allen, San Jose, and Bruce F. Allen, Sacramento, for appellants.

Ridley Stone, for respondent.

McCOMB, Justice.

These are two appeals, consolidated by stipulation, from orders of the superior court instructing (1) the executor of the last will and testament of Mabel C. Carter, deceased, and (2) the trustee under the last will and testament of Fred M. Carter, deceased, to the effect that Mabel C. Carter did not by her will exercise the power of appointment given to her by the will of her predeceased husband, Fred M. Carter.

Appellants are five charities which are residuary legatees under the will of Mabel C. Carter but which are not mentioned in the will of Fred M. Carter.

Fred M. Carter and his wife, Mabel C. Carter, each executed wills on September 30, 1949, in the office of their attorney, W. W. Jacka, who had been practicing law since 1933 and prior to that time had been a trust officer for a bank. Mr. Carter later executed one codicil to his will. He died September 7, 1951. Mrs. Carter executed nine codicils to her will, and died April 21, 1954.

Mr. Carter's will was limited to his separate property and his share of the community property. It left his personal effects to his wife and the residue in two trusts, Trust A and Trust B. The entire income from each trust was to be paid to his wife during her lifetime. Trust A authorized his wife to add to it from her sep-

arate or community estate if she so wished, to make withdrawals from the corpus of Trust A, and

"(e) With respect to the said Trust A, my said wife is hereby granted a power to appoint the entire corpus thereof free of the Trust, in favor of her own estate or of any other beneficiary or beneficiaries whom my said wife may designate, which power shall be exercisable by my said wife alone, and in all events but shall be effective only if exercised by a valid will of my said wife."

In the event of non-exercise of the power of appointment by Mrs. Carter, Mr. Carter's will provided that the residue of Trust A went into Trust B, which was bequeathed to 28 specific legatees with the residue to respondent, Church Divinity School of the Pacific.

Mrs. Carter did not transfer her estate into Trust A as was authorized in Mr. Carter's will. The will of Mrs. Carter does not refer in express terms to the power of appointment given her by her husband's will. In her original will paragraph fifth (n) read as follows: "All the rest, residue and remainder of my estate, whether the same be real, personal or mixed and where-soever the same may be situated, including any and all lapsed bequests under this Will, I give, devise and bequeath unto said Church Divinity School of the Pacific, Berkeley, California, without any restrictions as to the use thereof."

By a codicil dated March 1, 1953, the foregoing paragraph was changed to read: "All the rest, residue and remainder of my estate, whether the same be real, personal or mixed, and wheresoever the same may be situated, including any and all lapsed bequests under this will, I give, devise and bequeath equally to the following organizations and institutions:

"Shriners Hospitals for Crippled Children, San Francisco, California.

"Church Divinity School of the Pacific, Berkeley, California.

"Santa Clara County Heart Association.

"American Cancer Society, Santa Clara County Chapter.

"Crippled Children's Society of Santa Clara County, Inc.

"National Foundation for Infantile Paralysis, Inc., Santa Clara County Chapter."

Over objection of appellants, the attorney who prepared the wills and several codicils was permitted to testify to conversations with the testator and testatrix relative to the terms of their wills and the codicil of March 1, 1953, and in particular to statements of Mrs. Carter to the effect that she did not intend by her will or the codicil of March 1, 1953, to exercise her power of appointment under Trust A; also that he had advised Mr. and Mrs. Carter that the power of appointment could only be exercised by a will or codicil, (a) executed after the death of Mr. Carter, which (b) contained language expressly exercising the power of appointment.

Such testimony was admitted subject to a motion to strike. The trial judge did not expressly rule on the objection but in rendering his decision filed a memorandum opinion in which he stated: "It is my opinion also that the clause in the will under consideration is not ambiguous and therefore Judge Jacka's testimony was not necessary."

These questions are presented for our determination:

First: Did Mrs. Carter by her will exercise the power of appointment given to her by the will of her predeceased husband?

This question must be answered in the affirmative and is governed by these pertinent rules:

[1] (1) Where the language of a will is clear and unambiguous it must be interpreted according to its ordinary meaning and legal import and the intention of the testator ascertained therefrom. (In re Estate of Willson, 171 Cal. 449, at page

456, 153 P. 927; In re Estate of Blake, 157 Cal. 448, at page 459, 108 P. 287; In re Estate of Avila, 85 Cal.App.2d 38, at page 40, 192 P.2d 64; In re Estate of Schaetzel, 44 Cal.App.2d 320, at page 324 [1], 112 P. 2d 324; Gore v. Bingaman, 29 Cal.App.2d 460, at page 470, 85 P.2d 172; In re Estate of Bourn, 25 Cal.App.2d 590, at page 602 [9], 78 P.2d 193.)

[2] (2) A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, including property embraced in a power to devise. (Prob.Code, § 125; California Trust Co. v. Ott, 59 Cal.App.2d 715, at page 717 [1], 140 P.2d 79; Childs v. Gross, 41 Cal.App.2d 680, at page 687, 107 P.2d 424; Harvard Trust Co. v. Frost [Mass.], 154 N.E. 863, at page 864 [5]; cf. Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, at page 590 et seq., 40 P. 810.)

In California Trust Co. v. Ott, supra, 59 Cal.App.2d at page 716, 140 P.2d at page 80, the following provision in a will was held to be the exercise by the donee of a power of appointment: "I give, devise and bequesth to my beloved wife, Phebe Ott, of Los Angeles, California, all the rest and residue of my estate, both real, personal and mixed, of every kind and nature, wherever the same may be situate, absolute, forever."

The court said 59 Cal.App.2d at page 717, 140 P.2d at page 80: "The trial court found 'that said Francis S. Ott, Deceased, intended to and did exercise in his Last Will above set forth, his power of appointment.' We have reached the conclusion that the finding is supported. The will of Francis S. Ott purports, certainly, to devise all his real and personal property; the fifth subdivision clearly gives it that effect, following as it does the two specific bequests. Section 1330 of the Civil Code, as it read from the adoption of that code in 1872 until the section was repealed to emerge as a part of section 125, Probate

Code, in 1931, provides: 'Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator.' We entertain no doubt that the effect of section 1330 has not been affected by its reenactment in a new context and in new words (Prob.Code, sec. 2; Childs v. Gross, (1940) 41 Cal.App.2d 680, 687, 688 [107 P.2d 424]), but we do not need to so hold, for the section, being one of interpretation, continues to control in this case, where the will and trust agreement were both drawn before the section was rewritten into the Probate Code. (See Medical Finance Ass'n v. Wood, (1936) 20 Cal.App. 2d Supp. 749, 750 [63 P.2d 1219], and cases cited.) By virtue of section 1330, therefore, the will was properly interpreted as an exercise of the power, to devise the trust property, which the trustor-husband had retained."

The provisions of the will of Mr. Ott in the cited case, which were held to constitute an exercise of his power of appointment, are almost identical with the provisions of Mrs. Carter's will in the instant case.

[3] (3) Where a will is drawn by an experienced and competent lawyer it is presumed that legal terms embodied in the will are used in their legal sense. (In re Estate of Rutan, 119 Cal.App.2d 592, at page 598 [2], 260 P.2d 111; In re Estate of Hollingsworth, 37 Cal.App.2d 432, at page 436 [3], 99 P.2d 599; In re Estate of Bourn, supra, 25 Cal.App.2d at page 595 [1], 78 P.2d 193; In re Estate of Northcutt, 16 Cal.2d 683, at page 689, 107 P.2d 607.)

Respondent claims that two paragraphs of Mrs. Carter's will indicate her intention not to exercise her power of appointment by the general bequest in paragraph fifth (n). First, respondent urges that in the fourth paragraph of her will relating to her bequest to her husband of all her estate if she predeceased him, after using other descriptive words, she said: "and of which I have the right of testamentary disposition." Respondent claims the quoted words

do not appear in the general bequest in paragraph fifth (n) and therefore she did not intend to exercise her power of appointment by paragraph fifth (n).

This argument fails for the reason that paragraph fourth covers the situation of her death prior to that of her husband, at which time there would be no power of appointment. There would be a community estate and property held in her husband's name in which she, as a result of community property laws, had a right of testamentary disposition. This community property right would not exist after the death of her husband as their community property rights would have terminated, and thus there was no reason for her to use the expression in providing for disposition of her property after his death.

Secondly, referring to the language in the sixth paragraph of Mrs. Carter's will, reading:

"If at the time of my death I have transferred my estate into the trusts provided under the terms of the will of my husband, Fred M. Carter, for my benefit, then and in that event the bequests set forth in Subdivisions a, b, c, d, e, f, g, h, i, j, k, l, and m of Paragraph Fifth shall lapse and be of no effect for the reason that the said bequests will have been provided for under the terms of my said husband's will,"

respondent argues that Mrs. Carter says that if she transfers her estate into the trust provided under her husband's will the 13 enumerated bequests lapse because they are "provided for under the terms of my said husband's will"; that an examination of her husband's will shows that he provided for the same bequests but only if his wife transferred her property into the trusts and failed to exercise her power of appointment; and that therefore Mrs. Carter did not intend to exercise her power of appointment when she used the language in paragraph fifth (n) showing intent to dispose of "all her property."

This argument also fails for the reason that it does not take into consideration the fact that in addition to the 13 specific bequests mentioned, Mrs. Carter provided 34 specific bequests and directed that the residue be given to six charities, and that in the event she transferred her estate into the trusts, these bequests could not have been satisfied unless she did exercise her power of appointment. By the terms of Mr. Carter's will, in the absence of an exercise by Mrs. Carter of her power of appointment, an intestacy would have resulted not only as to the 13 bequests but as to the entire estate.

After providing for the care of his wife for her life, the only dispositive language in his will is in paragraph eighth, and on two conditions, (a) that his wife transfer her estate into the trusts, and (b) that she did not exercise her power of appointment. Mrs. Carter made no such transfer and there was thus a complete intestacy under her husband's will which was cured when the draftsman of the decree of distribution of his will inserted appropriate language in the decree. It thus is evident that there is nothing in Mrs. Carter's will contrary to the express language of paragraph fifth (n) whereby she disposed of "all" her property, which included the power of appointment.

[4] Applying the foregoing rules to the facts in the instant case, it is apparent that the language of Mrs. Carter's will was clear and unambiguous. Therefore, under rule (1), *supra*, it was the duty of the court to ascertain her intention from this document. Under rule (2), which is the established law of this state, the testatrix by disposing of "all the rest, residue and remainder" of her estate exercised her power of appointment, it being presumed under rule (3), *supra*, since her will and the codicils thereto were prepared by a lawyer of experience and competence that she understood the terms and meaning of the provisions of her will.

She was as much the owner of the corpus of Trust A as she was of the stocks, bonds and other personal property standing in her

own name. She received the entire income of the trust without deduction even for expenses of the trustee, and she had the absolute right to add to or make withdrawals from the corpus. In addition, she had an unlimited power of disposition over the corpus by her will. The power of appointment was thus not any different as a practical matter or in legal effect from a commercial bank account. It is obvious that respondent could not logically argue that notwithstanding her bequest of "all her property" she intended to omit funds on deposit with a bank. Her will shows her express intent to leave "all" her property to specified legatees and the remainder to six charities named in the codicil of March 1, 1953.

Second: Did the trial court err in permitting testatrix' attorney to testify regarding her oral declarations to show her intent to exercise or not exercise a power of appointment by her will?

Yes. Section 105 of the Probate Code provides: "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations."

In interpreting this section it has been held in California that oral declarations of a testator to the attorney who drew his will are admissible in two types of cases:

(1) Where there is a latent ambiguity in identification of the intended beneficiaries, that is, which of several persons fitting the description of the beneficiary in the will, was intended by the testator to be the recipient (In re Estate of Nunes, 123 Cal. App.2d 150, at page 156 [3], 266 P.2d 574; In re Estate of Donnellan, 164 Cal. 14, at page 19 et seq., 127 P. 166.); and

(2) Where there is a latent ambiguity in the description of property in a will (In re Estate of Hotaling, 72 Cal.App.2d 848, at page 856 [7], 165 P.2d 681; In re Estate of Greenwald, 19 Cal.App.2d 291, at page 296 [2], 65 P.2d 70; In re Estate of Dominici, 151 Cal. 181, at page 186, 90 P. 448; see also In re Estate of Sargavak, 41 Cal.2d 314, at page 318 [1], 259 P.2d 897).

The rule is thus accurately stated in *Hogle v. Hogle*, 49 Hun. 313, 2 N.Y.S. 172, at page 173: "In the case of *Charter v. Charter*, L.R. 7 H.L. 364, affirming L.R. 2 Prob. & Div. 315, the question of extrinsic evidence in regard to wills was fully discussed. 1 Moak.Eng.R. 249; 12 Moak.Eng. R. 1. It was held that evidence of the state, circumstances, and habits of the family was admissible to aid in the construction of a will; that the only case in which evidence of the declarations of the testator could be received is where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons or to two things. We have cited this English case because it was very carefully considered; and, while the opinions given in the house of lords did not agree in everything, they did agree as to the point above stated about declarations of the testator. If a testator gave a legacy to, 'my nephew John Smith,' and had two nephews of that name, or if a testator gave to a legatee 'my black horse Tom,' and had two black horses by that name, in each of those instances, according to that decision, declarations of the testator would be admissible. But only in such and similar cases. But in the present case declarations of the testatrix were admitted to show that she intended to execute a power of appointment. Such declarations were inadmissible. They do not come within the exception stated in that case, even assuming that such exception is the rule in this state. The same doctrine is distinctly stated in *White v. Hicks*, 33 N.Y. [383] 387."

The decision of *White v. Hicks*, 33 N.Y. 383, cited in the foregoing quotation, has been followed by this court. (See *Morffew*

v. San Francisco & S. R. R. Co., 107 Cal. 587, at page 600, 40 P. 810.)

Respondent concedes that there is not any latent ambiguity in Mrs. Carter's will justifying the admission of testimony of her oral instructions to her attorney, but concedes, as the trial court found, "on the face of the will its meaning would appear clear and free of doubt."

[5] In view of the foregoing authorities the trial court erred in admitting testimony relative to the oral declarations of the testatrix to her attorney.

For the above reasons, the orders are reversed, with directions to the trial court to enter orders instructing the executor and trustee respectively that decedent, Mabel C. Carter, did by her last will and testament exercise the power of appointment over Trust A which she held under the terms of the will and decree of distribution in the estate of her husband, Fred M. Carter.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



47 Cal.2d 209

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Earl Compton GREEN, Jr., Defendant and
Appellant.

Cr. 5782.

Supreme Court of California.

In Bank.

Oct. 19, 1956.

Rehearing Denied Nov. 14, 1956.

Defendant was convicted of first degree murder and penalty fixed at death by a jury's verdict. The Superior Court, Ventura County, Walter J. Fourt, J., rendered judgment sentencing defendant to death, and he appealed. The Supreme Court, Schauer, J., held that instruction to fix

penalty at death, if jury found defendant guilty of first degree murder and did not find extenuating facts or circumstances to lighten punishment, was error prejudicial to defendant as to penalty, so as to require reversal of judgment to such extent and remand of cause for retrial of such question of penalty only.

Judgment affirmed as to adjudication of defendant's guilt of first degree murder, but reversed on question of penalty and cause remanded for retrial and redetermination of such question only and pronouncement of new sentence and judgment in accord with such determination and applicable law.

Spence, J., Gibson, C. J., and Shenk, J., dissented in part.

1. Homicide \S 253(1)

Evidence was sufficient to support conviction of first degree murder.

2. Homicide \S 253(6)

In murder prosecution, jury could and having found defendant guilty of first degree murder, presumptively did, believe prosecution's theory of evidence that murder was of first degree because committed in perpetration of robbery, and could and did reject defendant's theory that if defendant formed no intention to take victim's money or other property until after he struck victim for last time, killing was not first degree murder committed in perpetration of robbery, as jurors were fairly instructed in event they accepted defendant's theory. West's Ann.Pen.Code, \S 189.

3. Criminal Law \S 721½(2), 1186(4)

In murder prosecution, district attorney's comment in argument to jury that defendant called no one to corroborate his testimony that he wore victim's watch, which he testified that victim loaned him, when he visited his wife for a few days before killing, was improper insofar as it could be understood by jury as referring to defendant's failure to produce his wife's testimony, but not sufficiently important to prejudice defendant in jury's eyes and re-

sult in miscarriage of justice. West's Ann. Const. art. 6, § 4½.

4. Criminal Law ⚖️703

A map or sketch, though not independently admissible in evidence, may be used as aid to prosecuting attorney's opening statement to jury, within trial court's discretion, if it fairly serves a proper purpose.

5. Criminal Law ⚖️703

The purpose of prosecuting attorney's opening statement to jury is to prepare jurors' minds to follow evidence and more readily discern its materiality, force and effect, and matters admissible and subsequently received in evidence may be used to aid such purpose.

6. Criminal Law ⚖️703

In murder prosecution, permission of prosecuting attorney to use, in connection with his opening statement to jury, a motion picture, subsequently received in evidence, of locations where events in question occurred, articles subsequently introduced in evidence as exhibits, and photographs of decedent's wounds and of defendant in prison garb, was within trial court's discretion.

7. Jury ⚖️97(1)

A sworn juror's bias, as disclosed by her statements during selection of alternative jurors, that she had concluded that she would be unable to act impartially and did not think she would be fair to prosecution, supported trial judge's finding of good cause for such juror's discharge, as requested by her. West's Ann.Pen.Code, §§ 1089, 1123.

8. Criminal Law ⚖️796

To aid jury in fixing punishment of one convicted of crime, court may instruct jury as to consequences of different penalties which may be imposed, so that intelligent decision may be made.

9. Criminal Law ⚖️1171(1)

In murder prosecution, district attorney's argument to jury that proper punishment of defendant, if convicted of first degree murder, was not life imprisonment,

but death penalty, because one sentenced to life imprisonment may be paroled after seven years, was not ground for reversal of such conviction on appeal, in absence of showing that defendant asked permission to produce evidence or to comment as to minimum, average and maximum terms of imprisonment being served for first degree murder. West's Ann.Pen.Code, § 190.

10. Homicide ⚖️354

Under statute providing that person guilty of first degree murder shall suffer death or life imprisonment at discretion of jury trying him, such discretion is not conditional on, or required to be guided by, any particular circumstances, nor is jury required to find extenuating facts or circumstances to lighten punishment in order to impose penalty of life imprisonment, as jury's function is not to lighten or increase punishment, but to select and designate in verdict which of two punishments prescribed by statute shall be imposed in given case. West's Ann.Pen.Code, § 190.

11. Homicide ⚖️354

The statute providing that person guilty of first degree murder shall suffer death or life imprisonment at discretion of jury trying him places no restriction on jury's exercise of such discretion and does not confine its exercise to cases presenting palliating or mitigating circumstances, but confines power to affix punishment within such two alternatives to jury's absolute discretion. West's Ann.Pen.Code, § 190.

12. Homicide ⚖️314

In murder prosecution, trial judge properly required jury to state specifically, in their verdict convicting defendant of first degree murder, whether penalty of death or life imprisonment was imposed. West's Ann.Pen.Code, § 190.

13. Criminal Law ⚖️872½

The statute providing that person guilty of first degree murder shall suffer death or life imprisonment at jury's discretion does not authorize holding that jurors are not required to agree unanimously on penalty as well as questions of defendant's guilt

and class and degree of offense. West's Ann.Pen.Code, § 190.

14. Homicide ⇨354

The statute providing that person guilty of first degree murder shall suffer death or life imprisonment at jury's discretion does not make death penalty mandatory or presumed penalty, either in absence of evidence of mitigating circumstances or on jury's failure to specify which of such two authorized punishments shall be imposed. West's Ann.Pen.Code, § 190.

15. Homicide ⇨282½

The jury, not law, determines whether penalty on conviction of first degree murder shall be death or life imprisonment. West's Ann.Pen.Code, § 190.

16. Homicide ⇨312

In murder trial, jury must first determine accused's guilt or innocence and then, if it finds him guilty of first degree murder, fix penalty of death or life imprisonment by unanimous agreement, and verdict not embracing both finding of accused's guilt of first degree murder and legal evidence that jury fixed penalty in exercise of its discretion is incomplete. West's Ann.Pen.Code, § 190.

17. Homicide ⇨311

An instruction that jury's discretion to determine whether defendant, if convicted of first degree murder, should suffer death or life imprisonment, was not arbitrary, but to be employed only if jury were satisfied that lighter punishment should be imposed, and that if they found no extenuating facts or circumstances to lighten punishment, they must fix penalty at death, was erroneous as perpetuating false concept that law fixes death as primary punishment for first degree murder and vests jury with only conditional discretion to relieve defendant of extreme penalty, if they find extenuating facts and circumstances. West's Ann.Pen.Code, § 190.

18. Homicide ⇨311, 340(1), 348

In murder prosecution, instruction to fix penalty on conviction of first degree murder at death, unless jury found exten-

uating circumstances justifying sentence to life imprisonment only, was prejudicial to defendant as to jury's choice of death penalty, so as to require reversal of judgment on verdict as to such penalty and remand of cause for retrial and redetermination of question of penalty only. West's Ann.Pen.Code, § 190.

19. Criminal Law ⇨1189

A judgment on jury's verdict of conviction will not be reversed and cause remanded for new trial on all issues, when impelling error relates only to sentence pronounced.

20. Homicide ⇨348

The Supreme Court, on reversing judgment on conviction of first degree murder as to death penalty fixed by jury because of erroneous instruction to fix such penalty, if jury did not find extenuating facts or circumstances to lighten punishment to life imprisonment, is not precluded from ordering new trial on issue of penalty only on ground that such new trial before different jury would be prejudicial to defendant, as such instruction, in absence of extenuating facts or circumstances, must have been deterrent rather than impellent; to finding of defendant's guilt of first degree murder, and instruction could have been prejudicial to defendant only as to penalty and will not be given on new trial. West's Ann.Pen.Code, § 190.

21. Constitutional Law ⇨270

Criminal Law ⇨192

Where death sentence, imposed by jury on conviction of first degree murder, is set aside by Supreme Court at defendant's behest, it cannot be successfully pleaded as constituting former jeopardy and there is no denial of due process. West's Ann.Pen.Code, § 190.

22. Homicide ⇨347

Error relating solely to question of punishment in instruction to jury cannot be corrected by Supreme Court's reduction of punishment from death penalty, fixed by jury on conviction of first degree murder, to life imprisonment, as jury is vested by

statute with exclusive discretion to determine punishment on such conviction. West's Ann.Pen.Code, § 190.

23. Homicide — 349

A limited new trial, ordered by Supreme Court for determination of punishment on reversal of jury's verdict imposing death penalty on conviction of first degree murder, should be a trial in full technical sense and governed by same rules of procedure as trial of issue of defendant's guilt. West's Ann.Pen.Code, § 190.

Edwin F. Beach, Santa Paula, and Ben E. Nordman, Oxnard, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., and Roy A. Gustafson, Dist. Atty., Ventura, for respondent.

SCHAUER, Justice.

Defendant was charged with the murder of Joseph LaChance. He pleaded not guilty and not guilty by reason of insanity. He was tried before a jury which found that he was guilty of first degree murder and expressly fixed the penalty at death, and further found that he was sane at the time he committed the offense. Defendant's motion for new trial was denied and he was sentenced to death. This appeal, wherein defendant asserts insufficiency of the evidence and various errors at law which are hereinafter discussed, is taken pursuant to the provisions of subdivision (b) of section 1239 of the Penal Code. We have concluded that the judgment and order denying a new trial should be affirmed insofar as relates to the conviction of murder of the first degree but must be reversed, and the cause remanded for a new trial on the issue of penalty only, because of the instruction that "The discretion which the law invests in you * * * is to be employed only when you are satisfied that the lighter punishment should be imposed. If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment it is your

duty to find a verdict of murder in the first degree and fix the penalty at death."

[1] The following summary of the evidence refutes defendant's contention that it is insufficient to support the finding that defendant was guilty of first degree murder: On August 20, 1954, defendant went to work as a kitchen helper at a country club in Pasadena. There he met LaChance, who was employed as a guard. LaChance learned that defendant was looking for a place to live and at the suggestion of LaChance defendant on August 28, 1954, moved into an apartment-room next to a cabin rented by LaChance. Defendant had been living in an apartment with his wife and her small daughter by a former marriage; he testified that he left there because he was in California in violation of a Florida parole and he feared that his mother-in-law would report him to the Florida parole officer.

On September 1, 1954, LaChance and defendant drove to Ojai in LaChance's car to look for work at an inn where LaChance had previously been employed. They stopped several times for beer. LaChance bore the expense of the trip; defendant had no money. At the inn they learned that the manager in charge of employment would not be in for two hours. They drank more beer, then drove into the country and shot at cans with LaChance's shot gun and played with a baseball and baseball bat. They walked to a creek to obtain drinking water, defendant carrying the bat. LaChance saw a water tank. It is the prosecution's theory (supported by circumstantial evidence and by a voluntary statement of defendant, which statement was made March 29, 1955, and which, insofar as it relates to motive, is contrary to defendant's testimony and other statements), that as LaChance was bending over a faucet on the tank, with his back to defendant, defendant hit him twice over the head with the bat; defendant's purpose was "to take that money" and "get my wife and kid and leave California." According to defendant's testimony and

other statements of defendant, he struck LaChance because LaChance proposed that they engage in a homosexual act. Either of the two blows was of sufficient force to have been fatal.

As related by defendant in his statement of March 29, he went through LaChance's pockets and took his money and his wrist watch. According to defendant's testimony, he had no recollection of taking money from LaChance, and LaChance had given defendant the watch three days before his death.

Defendant returned to Pasadena in LaChance's car. The next day, September 2, 1954, he left California in the car with his wife and her daughter. As he traveled across the country he sold tools which were in the car, pawned the watch, and finally sold the car, using various assumed names. He was apprehended in Texas in March, 1955.

[2] The jury could, and presumptively did, believe the prosecution theory of the evidence that the murder was of the first degree because committed in the perpetration of robbery (Pen.Code, § 189). They were fairly instructed as to the law applicable in the event they accepted the theory of defendant as expressed in his testimony, that "If you find that the defendant * * * had not formed an intention to take the money or other property of Joseph O. LaChance until after he struck Joseph O. LaChance for the last time, and even if you find that [defendant] * * * did in fact kill Joseph O. LaChance, then you are instructed that the killing of Joseph O. LaChance was not murder in the first degree committed in the perpetration of a robbery." (See *People v. Kerr* (1951), 37 Cal.2d 11, 13-14, 229 P.2d 777; *People v. Carnine* (1953), 41 Cal.2d 384, 388, 260 P.2d 16; *People v. Hudson* (1955), 45 Cal.2d 121, 124, 287 P.2d 497. Manifestly, the jury could and did reject defendant's theory.

[3] According to the confession of defendant which was in evidence, he mur-

dered in the commission of a robbery in which he took the wrist watch of LaChance (which defendant later admittedly pawned). At the trial defendant repudiated this confession and said that a few days before the killing LaChance had loaned him the watch and that defendant had thereafter worn it when he visited his wife and mother-in-law. In argument the district attorney called attention to the fact that defendant called no one to corroborate his story that he had worn the watch for a few days before the killing. Although the argument was not particularly and expressly directed to the failure of defendant's wife to testify, defendant, citing *People v. Wilkes* (1955), 44 Cal.2d 679, 687, 284 P.2d 481, urges that it constituted improper comment on her failure to take the stand. Insofar as this comment could be understood by the jury as referring to defendant's failure to produce his wife's testimony, it was undoubtedly erroneous. However, in the light of the entire record, we are satisfied that such brief and indirect reference to the matter was not sufficiently important to prejudice defendant in the eyes of the jury and result in a miscarriage of justice (Cal.Const., art. VI, § 4½). In the *Wilkes* case there was not, as there was here, a mere single, un-specific, passing reference; rather, there was particularized comment which "erroneously and deliberately struck at the heart of defendants' only defense" and which was aggravated by erroneous comment of the trial court (at page 688 of 44 Cal.2d, at page 486 of 284 P.2d).

[4-6] Over objection the prosecuting attorney, in connection with the opening statement, was allowed to show the jury a motion picture depicting locations where the events in question took place and articles which were subsequently introduced in evidence as exhibits. Later the film was properly identified and admitted in evidence. Also in connection with the opening statement the prosecuting attorney showed photographs of the wounds of deceased and of defendant in prison garb.

Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement. (*State v. Sibert* (1933), 133 W.Va. 717, 169 S.E. 410, 412.) The purpose of the opening statement "is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect" (*People v. Arnold* (1926), 199 Cal. 471, 486, 250 P. 168), and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose. In the circumstances, we conclude that it was within the discretion of the trial court to permit the use in connection with the opening statement of the pictures which were subsequently received in evidence.

[7] Defendant claims that the trial court erred in excusing Juror No. 4. After 12 persons had been sworn to serve as jurors and the selection of alternate jurors was proceeding, this juror asked if she could be excused. "If I had reconsidered one of my answers." The following shows the essential portions of the colloquy between the court and the juror which ensued:

"The Court: Did you make, in answer to some question, did you make a false reply?"

"Juror Number Four: I believe I have now, yes. I believe that you asked me if there was any reason that I couldn't be a juror and at that time I felt there was none but now, being up here, it has made a difference to me. I don't feel that I could qualify. * * *

"The Court: * * * [Y]our statement now in substance is this, * * * that you now would be unable to serve as a juror and act fairly and impartially to all sides of this case, is that correct?"

"Juror Number Four: That is right, sir. * * * [A]s long as there is a doubt in my mind, I don't think that I would be fair to the prosecution."

The court did not then act upon the request of Juror No. 4. Two alternate jurors were selected and sworn. Juror No. 4 was again questioned and restated her position. Thereupon the trial court ruled, over defendant's objection, that "The Court finds that there is good and sufficient cause and reason, pursuant to the provisions of Section 1089 of the Penal Code and for other good and sufficient reasons, to discharge the Juror No. 4." Juror No. 4 was replaced with one of the two alternate jurors, selected by placing the names of the alternate jurors in a box and drawing one.

Section 1089 of the Penal Code provides in material part, "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." Section 1123 provides in material part, "If before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order him to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged." Bias of Juror No. 4, as disclosed by her statements that she had come to the conclusion that she would be unable to act impartially and that "I don't think that I would be fair to the prosecution," supports the trial judge's finding that there was good cause for her discharge.

[8,9] Defendant urges that the district attorney was guilty of prejudicial misconduct in arguing as follows: "[A]s the Judge will no doubt tell you, the law in California is that a prisoner given a life

imprisonment sentence may be paroled after seven years. And why do I say that that is no punishment for this defendant? Because you have before you evidence of what regard he has for the law, what punishment it is for him to be incarcerated for a few years such as he was in the Florida prison.¹ Nothing. Nothing whatever. It just means that much time gone by on the calendar and he gets out again so that he can again pursue a criminal course. * * * The proper punishment for him is not the relatively slight imposition of a slap on the wrist that a life imprisonment sentence would be. The proper punishment for him is the death penalty." Defendant's objections to the foregoing argument and other argument of the district attorney to the same effect were overruled. It appears that the district attorney in his argument as to punishment had in mind the rule that "To aid the jury in fixing the punishment * * *, the court may instruct the jury [as it did in the present case] as to the consequences of the different penalties that may be imposed so that an intelligent decision may be made." (People v. Barclay (1953), 40 Cal.2d 146, 158, 252 P.2d 321.) There is no showing that defendant asked to be allowed to produce evidence, or to comment, as to the minimum, average and maximum terms of imprisonment actually being served for first degree murder in California. Inasmuch as the prosecution, over objection of the defendant, opened the subject of the minimum possible term of imprisonment under the law for such offense, it is to be presumed that the defendant would have been accorded opportunity to show and comment on the actual facts of the matter even if it had been necessary to reopen the trial to enable him so to do. In the circumstances, it does not appear that the prosecution's argument gives ground for reversal.

The most serious complaint of defendant concerns the italicized portions of the following given instruction:

"The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life.

"The discretion which the law invests in you is not an arbitrary one and is to be employed only when you are satisfied that the lighter punishment should be imposed. If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment it is your duty to find a verdict of murder in the first degree and fix the penalty at death." (Italics added.)

The idea stated in the last two sentences of the instruction was repeatedly emphasized by the prosecuting attorney in his voir dire examination of prospective jurors and in his argument to the jury at the close of testimony. It is an idea as to which the cases in this state have been in conflict since prior to 1900 but as to which the statute has been clear since 1874.

[10] As enacted in 1872 section 190 of the Penal Code read in material part, "Every person guilty of murder in the first degree shall suffer death * * *" It was amended in 1874 (Amendments to the Codes, 1873-1874, p. 457) to provide that "Every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same; or, upon a plea of guilty, the court shall determine the same * * *" There has never been any suggestion or intimation within the language of the statute since its 1874 amendment that the discretion of the jury was conditional on, or had to be guided by, any particular circumstances, or that the jury had to find, in the words of the instruction here, "extenuating facts or cir-

1. There is evidence that defendant served three years in a Florida penitentiary for a previous conviction of felony.

cumstances to lighten the punishment." It is *not* a function of the jury either to *lighten* the punishment or to *increase* the punishment; they have no such power. The statute clearly and equally states two alternatives as punishment; it gives preference to neither. It is the function and responsibility of the jury to select, and to designate in their verdict, which of the two punishments prescribed by the statute shall be imposed in any given case.

[11] Construing section 190 this court said in *People v. Bollinger* (1925), 196 Cal. 191, 207, 237 P. 25, "Before the amendment of that section in 1873-74 (Stats. 1873-74, p. 457) it read as follows: 'Every person guilty of murder in the first degree shall suffer death * * *'. It is clear beyond question that by the language of the amended section—'Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; * * *'—two changes were made in the law as to the punishment for murder in the first degree—first, that the punishment may be *either* death or life imprisonment; and second, that the discretion of determining which punishment shall be imposed was vested in the jury alone. For, as declared in * * * [*Winston v. United States* (1899), 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456], the law places no restriction upon the jury's exercise of such discretion, nor does it attempt to confine its exercise to cases presenting palliating or mitigating circumstances * * *. The legislature has 'conferred the power to affix the punishment within these two alternatives to the absolute discretion of the jury. * * *' (*People v. Leary*, 105 Cal. 486, 496, 39 P. 24.)"

In *Winston v. United States* (1899), supra, 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456, relied upon in the *Bollinger* case, the United States Supreme Court declared its views upon the effect of a liberalizing amendment to the federal law concerning the punishment for murder; it said, "These were three cases of indictments * * *

for murders committed since the passage of the act of * * * January 15, 1897, chap. 29, by the first section of which, 'in all cases where the accused is found guilty of the crime of murder * * * the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment * * * for life.' 29 Stat. at L. 487 * * *

"[172 U.S. at page 305, 19 S.Ct. 212, 43 L.Ed. at page 457] The judge instructed the jury * * * 'That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.' * * *

"[172 U.S. at page 312, 19 S.Ct. at page 215, 43 L.Ed. at page 459, reversing the trial court] The right to qualify a verdict of guilty, by [172 U.S. at page 313, 19 S.Ct. at page 215, 43 L.Ed. at page 460] adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other

consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

In *Andres v. United States* (1948), 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055, the United States Supreme Court again considered the statute involved in the Winston case. A conviction bearing the death penalty was reversed because the trial court had not clearly instructed that the jury must be unanimous upon the issue of penalty as well as upon that of guilt. The court said: "[at page 883 of 68 S.Ct.] If a qualified verdict is not returned, the death penalty is mandatory. The Government argues that § 567 properly construed requires that the jury first unanimously decide the guilt of the accused and, then, with the same unanimity decide whether a qualified verdict shall be returned. As the statute requires the death penalty on a verdict of guilty, the contention is that the jury acts unanimously in finding guilt and the law exacts the penalty. It follows, that if all twelve of the jurors cannot agree to add the words 'without capital punishment,' the original verdict of guilt stands and the punishment of death must be imposed. The petitioner contends that § 567 must be construed to require unanimity in respect to both guilt and punishment before a verdict can be returned. It follows that one juror can prevent a verdict which requires the death penalty, although there is unanimity in finding the accused guilty of murder in the first degree. * * * [at page 884 of 68 S.Ct.] Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict [under the federal statute] embodies in a single finding the conclusions by the jury upon all the questions submitted to it. We do not think that the grant of authority to the jury by § 567 to qualify their verdict permits a

procedure whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor. * * * This construction is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system than that presented by the Government. * * * [at page 885 of 68 S.Ct.] It seems to us, * * * that where a jury is told first that their verdict must be unanimous, and later, in response to a question directed to the particular problem of qualified verdicts, that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing, the jury might reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified. That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused."

It is therefore apparent that the United States Supreme Court in the *Andres* case (1948) not only continued zealously to follow but gave further emphasis to the policy which it announced in the *Winston* case (1899) and which this court declared in the *Bollinger* case (1925). And this court has never disapproved the above quoted view of the *Bollinger* case; on the contrary, it has reiterated that view.

Yet, despite the clear language of the liberalizing amendment of section 190 of the Penal Code (Stats.1873-1874, p. 457) and the equally clear judicial recognition of the intent of the Legislature in using that language, all as discussed in the *Bollinger* case (1925), supra, 196 Cal. 191, 208, 237 P. 25, this court has affirmed judgments (hereinafter cited) imposing the death sentence although the instructions contained the error which is found in the instruction here and also erroneously informed the jury that in the absence of extenuating circumstances it was their duty to find a simple verdict of murder in the first degree and to "leave with the law the responsibility of affixing the punishment."

The erroneous interpretation of section 190 originated in *People v. Welch* (1874), 49 Cal. 174. The case was tried shortly after the subject amendment to section 190 took effect.² The principal contention of the defendant on appeal related to the function and duty of the jury, and the validity of the verdict, under the new law. It was stated by his counsel as a quotation from Bishop (*Crim.Pro.*, Vol. 1, § 838) "In those states and those particular cases, in which the law submits the amount of punishment to be inflicted upon the defendant, to the determination of the jury, the verdict, when it is one of guilty, must specify the punishment, else it will be defective and insufficient" (at page 176 of 49 Cal.). The verdict which was the subject of defendant's attack read: "We, the jurors, do find the defendant Welch guilty of murder in the first degree, as charged in the indictment." The verdict was absolutely silent as to the penalty to be imposed. The court concluded that the silent verdict was valid because the jurors did not have to agree on the punishment; that if the jury failed to agree on the penalty or simply failed to declare that the punishment should be life imprisonment, the court must sentence the defendant to death.

The language of the court is (at page 178 of 49 Cal.): "Section 190 of the Penal Code, as amended by the Act of March 28, 1874, reads: 'Every person guilty of murder in the first degree shall suffer death, or confinement in the State Prison for life, at the discretion of the jury trying the same * *'" [at page 179 of 49 Cal.]. The nature of that discretion is to be ascertained by reference to the language of the statute. In Virginia it was held, that in an action *quidam* the verdict should fix the amount of damages. (*Scott's case* [*Commonwealth v. Scott*], 5 Grat. [Va.] 697.) Also, that where the duty was imposed on the jury of fixing the term of imprisonment, and the verdict did not ascertain such term, it

should be set aside. (*Mills' case* [*Mills v. Com.*], 7 Leigh [Va.], 751.)

"But the Act amending Section 190 of the Penal Code does not give the general discretion which juries exercised under the Virginia statute. Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed. It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result is capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the statute definitions, the Legislature intended to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty, and of substituting another punishment in its stead. A verdict fixing the punishment at imprisonment for life is somewhat analogous to the French verdict, 'Guilty with extenuating circumstances,' and is the equivalent of the Louisiana verdict, 'Guilty without capital punishment,' held good in *State v. Rohfrisch* (12 La. Ann. 382); and authorized by the statute which provides, 'In all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." And whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to hard labor for life in the State Penitentiary.' (Rev. Stat. of La. p. 163.)

[12] "This view of the question is not unsustained by authority in California. By the Act of April 22, 1851, it was enacted: 'Every person who shall feloniously steal, etc., shall be deemed guilty of grand larceny, and upon conviction thereof, shall be punished by imprisonment in the State prison

2. The 1874 amendment was approved March 28, 1874, and took effect from the

date of passage; the trial took place in May, 1874 [at pages 175, 176 of 49 Cal.].

for any term, not less than one year nor more than ten years, or by death, in the discretion of the jury.' And in *The People v. Littlefield* (5 Cal. 355), this Court said: 'It would seem, from the language of the Act, that it was the intention of the Legislature that the jury should only assess the punishment when, in the exercise of their discretion, they thought that the defendant deserved the punishment of death. If they did not agree to such punishment, upon finding the defendant guilty, then they should find a general verdict.' In that case, it was evidently considered that the object of the Legislature (actuated by the circumstance that certain kinds of property—as live stock—were peculiarly exposed, in portions of this State, or by some other motive equally just) was to confer upon the juries the power of affixing, at their discretion, a more severe penalty than had previously been imposed on those guilty of grand larceny. By parity of reasoning we may say, in view of the former punishment for the crime of murder of the first degree, and the history of legislation on the subject in this State and elsewhere, that it was the purpose of the Legislature (by the amendment of section 190) to permit the jury, in a case where the facts proved brought the crime of the defendant within the statutory definition of the higher offense, but they believed the punishment of death too severe, to declare that he should be imprisoned for life. We think, therefore, the statute should be construed as if it read: 'Shall suffer death, or (in the discretion of the jury) imprisonment in the State prison for life.' * * * [at page 185, of 49 Cal., on denial of petition for rehearing.] It results from the construction we have given to Section 190 of the Penal Code (as amended) that a jury may—in the exercise of its discretion—declare that a defendant guilty of murder of

the first degree shall be punished by confinement in the State prison for life. If a jury shall agree that a defendant is guilty of murder of the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the Court to pronounce judgment of death. The jury need not declare that death shall be inflicted—in cases where they cannot agree on imprisonment—since, if the verdict is silent in respect to the penalty, the Court must sentence the defendant to death."³

[13,14] Unqualifiedly contrary to the view announced in the Welch opinion is the language of section 190 itself. There is nothing in the statute which authorizes holding that the jurors are not required to agree unanimously on the penalty just as they must agree unanimously on the questions of guilt and class and degree of offense (*People v. Lee Gow* (1918), 38 Cal. App. 248, 250, 175 P. 917; *People v. Garcia* (1929), 98 Cal.App. 702, 704, 277 P. 747; *People v. Richardson* (1934), 138 Cal.App. 404, 409, 32 P.2d 433), nor is there anything in the statute which makes death mandatory, or the presumed penalty, either in the absence of evidence of mitigating circumstances or upon failure of the jury to specify which one of the two authorized punishments shall be imposed.

[15,16] Pertinent to the proposition that it is for the jury—not the law—to fix the penalty as between the two equally available alternatives is the following discussion by this court (speaking through Mr. Justice Shenk) in *People v. Hall* (1926), 199 Cal. 451, 456-458, 249 P. 859: "From a consideration of our decisions it appears to be the settled law of this state that in the trial on a charge of murder it is first incumbent

3. This erroneous and unfortunate reasoning also furnishes the basis for the often indulged practice (which up to this time has been tolerated) of instructing juries that verdicts which are "silent" in respect to punishment will be interpreted as meaning that the death penalty is implied. Commendably, the learned trial

judge in this case properly required the jury to specifically state in their verdict which penalty was to be imposed. (See also *People v. French* (1886), 69 Cal. 169, 176-180, 10 P. 378; 36 Cal.L.Rev. 632-634; cf. *People v. Green* (1932), 217 Cal. 176, 177, 184, 17 P.2d 730.)

upon the jury to determine the guilt or innocence of the accused. If he be found guilty of murder in the first degree it is then incumbent on the jury to fix the penalty. * * * Under the law the verdict in such a case must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements; first, a finding that the accused is guilty of murder in the first degree, and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion. * * * It was the duty of the jury to exercise its discretion and fix the penalty. Failing to do so no penalty was determined upon. The jury could not exercise its discretion and not exercise it in one and the same verdict. When a verdict, such as the one here under consideration [such verdict was, "We, the jury * * *, find the defendant * * * guilty of the crime of murder as charged in the indictment, of the first degree. But cannot come to an unanimous agreement as to degree of punishment"], discloses on its face that such discretion was not exercised as to either penalty it is not a verdict upon which the court is authorized to pronounce judgment of either death or life imprisonment. In receiving such a verdict and in imposing the sentence of death upon the defendant, the court usurped the function of the jury and its judgment was a nullity. The proceeding therefore resulted in a mistrial and the judgment must be reversed. * * * We cannot agree that the defect in the verdict was merely an error in 'matter of procedure' as contemplated by * * * section 4½ [of art. VI of the state Const.]. On the contrary the defect involved matter of substantial and substantive right. It was in effect the denial of a trial by jury. The amendment by which said section 4½ was added to the constitution was not 'designed to repeal or abrogate the guarantees accorded persons accused of crime by other parts of the same constitution, or to overthrow all statutory rules of procedure and evidence in criminal cases' [citations]. Trial by jury is guaranteed to every person charged with a

felony and the denial of that right is in itself a miscarriage of justice. * * * [H]owever degraded and hardened a criminal the evidence may disclose an accused to be, he is entitled under the constitution to trial by jury. In legal effect this right was denied to the defendant in the case at bar. The proceedings before the trial court [which imposed the death sentence] amounted to the same as if the court had denied the defendant a trial by jury in the first instance and, having heard the evidence and found the defendant guilty, proceeded to impose the judgment of death. Such a judgment may not stand even though there be the clearest proof of guilt." The above quotation from the Hall case (199 Cal. 451, 456-458, 249 P. 859), together with that portion of the Bollinger case (196 Cal. 191, 207, 237 P. 25) which quotes section 190 of the Penal Code (as amended in 1873-1874) with the declaration that its meaning is "clear beyond question," correctly states the law; the decision we make today at last requires compliance with that law.

After the erroneous interpretation of section 190 of the Penal Code in the Welch case, the practice—not consistent but recurrent—of carrying the error into instructions to the jury began. In *People v. Jones* (1883), 63 Cal. 168, 169-170, it was held, concerning an instruction the precise language of which does not appear in the opinion, that "It was not error to instruct the jury that if they found the defendant guilty of murder in the first degree, with some extenuating fact or circumstance in the case, it was within their discretion to pronounce such a sentence as would relieve the defendant from the extreme penalty of the law."

In *People v. Murback* (1883), 64 Cal. 369, 370, 371, 30 P. 608, this court affirmed a judgment imposing the death sentence where the jury had been instructed that "if you do find the defendant guilty of murder in the first degree, you have the discretion to determine the nature of his punishment; and if in your sound judgment and discretion there is any fact or circumstance in the case which ought to mitigate

the extreme penalty of death, you will by your verdict indicate the same; but if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted you will simply find him guilty of murder in the first degree." Yet this court also said, "whether he should suffer death or confinement in the State prison for life * * * was to be determined at their discretion. With this power of discretion a court cannot interfere. The jury should be left entirely free to act according to their judgment. If they see fit to exercise the power at all, they have the exclusive right to determine, within the limits prescribed by the law which gives them the power, the punishment for which the defendant ought to be sentenced. And we find nothing in the challenged instruction which limited or restrained them in the exercise of that power."

In *People v. Brick* (1885), 68 Cal. 190, 191, 8 P. 858, on the authority of *People v. Welch* (1874), *supra*, 49 Cal. 174, the court approved the following instruction: "*If the jury find the defendant guilty of murder in the first degree, and they also find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The Penal Code invests a jury in a criminal case for murder with that discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed.*" If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, *it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment.*" (Italics added.)

Again in *People v. French* (1886), 69 Cal. 169, 10 P. 378, this court, still following the Welch decision, and making unmistakably clear (if there were ever any doubt) the meaning which the court attributed to the

Welch decision and to the instruction from the Brick case above quoted, approved an instruction which specifically told the jury (at page 176 of 69 Cal., at page 382 of 10 P.): "The jury has the right, in case they find a verdict of guilty of murder in the first degree, to do so without fixing the penalty * * *" This court said (at page 179 of 69 Cal., at page 384 of 10 P.): "Of the duty of the court upon receiving such a verdict [a verdict silent as to penalty], there could have been no doubt in the mind of the judge. As declared by this court in *People v. Welch*, 49 Cal. 185: 'If a jury shall agree that a defendant is guilty of murder in the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the court to pronounce judgment of death. The jury need not declare that death shall be inflicted in cases where they cannot agree on imprisonment,—since, if the verdict is silent in respect to the penalty, the court must sentence the defendant to death.'

"In other words, a person convicted of murder in the first degree shall not escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or, which is equivalent to the same thing, returned a verdict which was silent as to the penalty."

In the following cases this court affirmed judgments imposing the death sentence where instructions based on the Welch decision and incorporating substantially the language used in the Brick case instruction quoted above, or variants of it, were given, yet, as the bracketed quotations show, the court repeatedly disapproved the giving of such instructions: *People v. Olsen* (1889), 80 Cal. 122, 128, 22 P. 125; *People v. Bawden* (1891), 90 Cal. 195, 197, 27 P. 204 ["If the question presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court; and that there is no warrant in the code for any dis-

tion, in this regard, between one kind of murder in the first degree and another. But these instructions are literal copies of instructions given and approved by this court in *People v. Brick*, 68 Cal. 190, 8 P. 858 * * *]; *People v. Rogers* (1912), 163 Cal. 476, 483-484, 126 P. 143; *People v. Harris* (1914), 169 Cal. 53, 70, 145 P. 520; *People v. Wolfgang* (1923), 192 Cal. 754, 762, 221 P. 907; *People v. Reid* (1924), 193 Cal. 491, 496, 225 P. 859; *People v. Casade* (1924), 194 Cal. 679, 682, 230 P. 9; *People v. Perry* (1925), 195 Cal. 623, 640, 234 P. 890; *People v. Craig* (1925), 196 Cal. 19, 28, 235 P. 721; *People v. Bollinger* (1925), *supra*, 196 Cal. 191, 208-209, 237 P. 25 ["While we are satisfied that the giving of such instructions is opposed to the provisions of section 190 of the Penal Code, we are not prepared to depart from the decisions on this point. In other words, we consider as settled that the giving of such instructions is not error. We have, however, gone into the subject in the hope, if not the expectation, that the practice of giving such instructions may be abated, thus giving assurance that the penalty reflects the decision of the jury alone and at the same time sparing this court the necessity of repeatedly passing on such assignments of error. And considering the numerous occasions this court has held that section 190 of the Penal Code confers on the jury alone the discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury"]; *People v. Arnold* (1926), *supra*, 199 Cal. 471, 500, 250 P. 168 ["This court, while it has refused to reverse cases solely because of the giving of the instruction [similar to the one under consideration], has, nevertheless, advised against any suggestion coming from the

court which might be regarded as a limitation upon the jury's right to exercise unhampered its discretion in determining whether the defendants should suffer death or be imprisoned in the state prison for life"]; *People v. Gosden* (1936), 6 Cal.2d 14, 30, 56 P.2d 211; *People v. Goodwin* (1937), 9 Cal.2d 711, 715, 72 P.2d 551; *People v. Smith* (1939), 13 Cal.2d 223, 229, 88 P.2d 682 [after quoting from the *Bollinger* case, "Just why this and similar warnings by this court have not been observed by prosecuting officers and trial courts, we are at a loss to understand"]; *People v. King* (1939), 13 Cal.2d 521, 525, 90 P.2d 291; *People v. Smith* (1940), 15 Cal.2d 640, 650, 104 P.2d 510.

At the same time that it was tolerating, although frequently deploring, the giving of instructions such as the one here under consideration, the court in other cases held that by section 190 of the Penal Code, the Legislature "confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect" (*People v. Leary* (1895), 105 Cal. 486, 496, 39 P. 24; *People v. Kamaunu* (1895), 110 Cal. 609, 613, 42 P. 1090; *People v. Martin* (1938), 12 Cal.2d 466, 470, 85 P.2d 880; *People v. French* (1939), 12 Cal.2d 720, 775, 87 P.2d 1014; see *People v. Waller* (1939), 14 Cal. 2d 693, 703, 96 P.2d 344).

In *People v. Kolez* (1944), 23 Cal.2d 670, 145 P.2d 580; *People v. Williams* (1948), 32 Cal.2d 78, 85, 195 P.2d 393; and *People v. Byrd* (1954), 42 Cal.2d 200, 210, 266 P.2d 505 (see also *People v. Lindley* (1945), 26 Cal.2d 780, 793, 161 P.2d 227),⁴ the court again, over dissents, respectively, of Justice Traynor, Justice Schauer, and Justice Carter, refused to disturb judgments imposing the death penalty where the instructions required the jury to find extenuating

4. Statements to the effect that there must be mitigating circumstances to warrant life imprisonment also appear in the following cases which do not concern the correctness of instructions to the jury: *People v. Rollins* (1919), 179 Cal. 793,

796, 179 P. 209; *People v. Lininger* (1941), 17 Cal.2d 851, 852, 112 P.2d 626 [comment of trial judge where defendant pleaded guilty and judge fixed penalty].

facts as a condition to selecting the penalty of life imprisonment; *but in none of those cases or in any other case has the court declared that the law was not, as stated in People v. Leary (1895), supra, 105 Cal. 486, 496, 39 P. 24, that the fixing of the punishment was confided "to the absolute discretion of the jury."* The instructions in the Kolez, Williams, and Lindley cases contained the further statement that "If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating facts or circumstances, it is the duty of the Jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of fixing the punishment."⁵

[17] Such further statements, are merely corollary or slightly variant expressions of the doctrine of the Welch case as further elucidated in Murback, Brick, and French. When given, they serve to accentuate the effect of, but otherwise add little if anything to, the basic error inherent in the instruction given in this case. The basic error in the criticized instruction is the perpetuation of the Welch case concept that the law still fixes death as the primary punishment for murder of the first degree, which penalty automatically attaches upon a finding of guilt of that offense; that the amendment of 1874 invested the jury not with absolute discretion to select either of the two penalties but with only a conditional discretion to "relieve the accused of the extreme penalty"; and that the jury were not entitled to exercise any discretion as to punishment unless they found extenuating facts and circumstances. All of that concept is inherent in the first of the italicized sentences of the instruction quoted supra, 302 P.2d at page 313: "The discretion which the law invests in you * * *

is to be employed only when you are satisfied that the lighter punishment should be imposed." This erroneous concept should have been regarded as overruled (if not by People v. Leary (1890), supra, 105 Cal. 486, 496, 39 P. 24) at least as early as People v. Hall (1926), supra, 199 Cal. 451, 456-458, 249 P. 859, wherein the court in a then liberal, if not revolutionary, decision took a definite turn toward the statute and the Leary (105 Cal. 486, 39 P. 24) line of cases and away from the Welch-Murback-Brick-French line. It reversed a conviction of murder in the first degree, with death penalty, on the ground *that the jury had not exercised their discretion and fixed the penalty.* The court, as has been hereinabove noted, said (at page 456 of 199 Cal., at page 860 of 249 P.): "[I]t appears to be the settled law of this state that in the trial on a charge of murder it is first incumbent upon the jury to determine the guilt or innocence of the accused. If he be found guilty of murder in the first degree it is then incumbent on the jury to fix the penalty. * * * Under the law the verdict in such a case must be the result of the unanimous agreement of the jurors * * * [at page 457 of 199 Cal., at page 860 of 249 P.]. It was the duty of the jury to exercise its discretion and fix the penalty." This holding is irreconcilable with the Welch, etc. doctrine discussed supra, and with the instruction given in the case at bar. Such instruction, as is apparent from its language above quoted, precludes the jury from exercising any discretion unless they find mitigating facts and circumstances and "are satisfied that the lighter punishment should be imposed." The opinion, however, stopped short of a complete departure from Welch (see at page 456 of 199 Cal., at page 860 of 249 P.) and the

5. Statements to the effect that it is "the law" rather than the jury which has the responsibility of fixing the penalty where a verdict of guilty of first degree murder is silent as to penalty also appear in People v. Adams (1926), 199 Cal. 361, 366, 49 P. 186; People v. La Verne (1931), 212 Cal. 29, 32, 97 P.

561; People v. Farrington (1931), 213 Cal. 459, 466, 2 P.2d 814; People v. Farolan (1931), 214 Cal. 396, 397, 5 P.2d 893; People v. Perry (1939), 14 Cal.2d 387, 392, 94 P.2d 559, 124 A.L.R. 1123; see People v. Hoyt (1942), 20 Cal.2d 306, 317, 125 P.2d 29.

erroneous instruction has persisted to plague us.

It is indisputable that if it is true that the jury's discretion as to choice of penalty is absolute, it is manifestly inconsistent to instruct the jury that they must (or that the law does) impose the death penalty unless they find extenuating circumstances. The law, as hereinabove emphasized, indicates no preference whatsoever as between the two equally fixed alternatives of penalty. Although the two irreconcilable lines of authority have been extant for many years, this court has criticized the one line but not the other. Its criticisms of and protest against the giving of the type of instruction given in *People v. Brick* (1885), *supra*, 68 Cal. 190, 8 P. 858 and in this case are quoted above; on the other hand this court has never held that it was error to instruct in accordance with the statute and with the views supporting the statute expressed in such cases as *Leary* (1895), *supra*, 105 Cal. 486, 39 P. 24; *Bollinger* (1925), *supra*, 196 Cal. 191, 237 P. 25; *Martin* (1938), *supra*, 12 Cal.2d 466, 85 P.2d 880, and similar cases cited above.

Understandably, under the doctrine of *stare decisis*, this court has been reluctant to overrule the line of cases stemming from the *Welch* opinion. We recognize also that trial judges and prosecuting officers have justifiably understood that legally they could continue to follow practices based on that line although, commendably, many of them have voluntarily acceded to the admonitions hereinabove quoted. The recurrence of the problem, however, has not been prevented by the admonitions or by any of the decisions to date. Such problem, it appears, will be a recurrent one so long as the statute, with its admonitory-supporting line of decisions, purports to require one practice while the cases, even those which pronounce the admonitions, tolerate another. This faces us with a question as to what ruling will best serve the administration of justice and at the same time be "consonant with the general humanitarian purpose of the statute." (See *Andres v. United States*

(1948), *supra*, 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055.) We are satisfied that it is in accord with the better judicial policy and the more certain and expeditious administration of justice to refuse to continue longer the two inconsistent positions which have been delineated. The one line of instructions as to the capacity and duty of the jury cannot be right if the other is right. In this circumstance we conclude that the statute and the uncriticized decisions supporting it should prevail and that we should hold it error to instruct contrary to the terms of the statute. *People v. Welch*, 49 Cal. 174; *People v. Murback*, 64 Cal. 369, 30 P. 608; *People v. Brick*, 68 Cal. 190, 8 P. 858; and *People v. French*, 69 Cal. 169, 10 P. 378, and all other cases approving the instruction herein held to be erroneous, including *People v. Kolez*, 23 Cal.2d 670, 145 P.2d 580; *People v. Lindley*, 26 Cal.2d 780, 161 P.2d 227; *People v. Williams*, 32 Cal.2d 78, 195 P.2d 393; and *People v. Byrd*, 42 Cal.2d 200, 266 P.2d 505, are overruled insofar as they are inconsistent with the conclusion above declared.

[18] Since the fixing of the punishment by the selection of one of the two alternatives is within the absolute discretion of the jury, an instruction such as the one given here, which directs them to fix the penalty at death unless they find extenuating circumstances, is (when the death penalty is fixed) manifestly prejudicial to defendant and evidential of a miscarriage of justice. This prejudicial error, however, goes only to the choice of penalty. As already shown, there is in this case no prejudicial error which affected the jury's determinations as to the issues of guilt, class, and degree of homicide. In these circumstances, and under section 1260 of the Penal Code, it is not necessary that those issues be retried.

[19] The error here is analogous to an error in sentence. It is the established practice of this court not to reverse and remand for a new trial on all issues when the impelling error relates only to the sentence pronounced. (See, e. g., *People v.*

Carrow (1929), 207 Cal. 366, 369, 278 P. 857; *People v. Eppinger* (1895), 109 Cal. 294, 298, 41 P. 1037; *People v. d'A Filippo* (1934), 220 Cal. 620, 629, 32 P.2d 962; *People v. Murray* (1940), 42 Cal.App.2d 209, 220, 108 P.2d 748; *People v. McChesney* (1940), 39 Cal.App.2d 36, 42, 102 P.2d 455; *People v. Hayes* (1934), 3 Cal.App.2d 59, 64, 39 P.2d 213; *People v. Foster* (1934), 3 Cal.App.2d 35, 42, 39 P.2d 271; *People v. Arnest* (1933), 133 Cal.App. 114, 123-124, 23 P.2d 812; *People v. Darling* (1932), 120 Cal.App. 453, 456, 7 P.2d 1094; *People v. Willison* (1931), 116 Cal.App. 157, 161, 2 P.2d 543.) The crime of which the defendant has been convicted is murder in the first degree. Every element of that offense has been proven and in respect to every element of that offense the defendant has been accorded a fair trial. The verdict which was returned embraces "two necessary constituent elements; first, a finding that the accused is guilty of murder in the first degree, and, secondly legal evidence that the jury has fixed the penalty." (*People v. Hall* (1926), *supra*, 199 Cal. 451, 456, 249 P. 859.) The error, as above shown, relates only to the selection of penalty and, hence, affects only the question of sentence, not the determination of guilt of the basic offense.

[20] In *People v. Morton* (1953), 41 Cal.2d 536, 543, 261 P.2d 523, this court considered the propriety of ordering a limited new trial on the issue of a prior conviction, an issue which, obviously, related only to punishment. Speaking through Mr. Justice Traynor, we held: "There is nothing prejudicial involved in a limited new trial on the issue of the challenged prior conviction by a jury different from that which tried the issue of guilt of the primary offenses. That issue and the proof of prior convictions are clearly severable." Here although the evidence which proved guilt is also relevant to the question of penalty, it is obvious that we may say in the circumstances of this case, paraphrasing the language of the Morton case, that "there is nothing" prejudicial involved in a

limited new trial on the issue of the penalty to be imposed by a jury different from that which tried the issue of guilt"; such limited new trial before a different jury cannot possibly be prejudicial to the defendant because the first jury found him guilty of murder in the first degree notwithstanding the instruction that "If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment it is your duty to find a verdict of murder in the first degree and fix the penalty at death." The natural effect of that instruction, in the absence of extenuating facts or circumstances—and, impliedly, the jury found none—must have been deterrent rather than impellent to the finding that the defendant was guilty of murder in the first degree. The erroneous instruction could have been prejudicial only in respect to the penalty. Although the fixing of the penalty is normally one of the "two necessary constituent elements" of the verdict it involves a determination which is clearly separate and distinct from the determination of guilt. Upon the limited new trial the erroneous instruction will not be given. Thus this defendant will have had at the first trial the presumably favorable influence of the erroneous instruction insofar as it conceivably could have had any effect in determining the class and degree of the offense, and upon the limited new trial as to penalty he will have the benefit of an instruction committing the question of penalty to the absolute discretion of the jury in accord with the statute and the views hereinabove expressed.

In *People v. Marshall* (1930), 209 Cal. 540, 547, 289 P. 629, this court, in disposing of the contention that a reversal in part necessitated a complete trial *de novo*, said (adopting an opinion of the District Court of Appeal 283 P. 119): "A trial on the issues presented by a plea of 'not guilty' and a plea of 'not guilty by reason of insanity,' under the provisions of section 1026 of the Penal Code, constitutes but one trial. * * * The next point urged is

that the appellate court had no power to reverse this case without either ordering a retrial of all the issues or a dismissal of the case, and that there should have been a trial *de novo*. The order made on the previous appeal is as follows: 'The judgment is reversed and the case remanded for trial upon the issue presented by the special plea.' Appellant argues that since no pleas are denominated special pleas by statute, all being equally general and equally special, the appellate court intended to order a trial *de novo* on all pleas. We think it is clear that the order of that court was to have the case completed on the one issue only (the question of insanity), and not to have all of the issues retried. It is further argued that if a new trial from the beginning was not ordered, the defendant must be discharged. Section 1260 of the Penal Code provides:

"The court may reverse, affirm, or modify the judgment or order appeal from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."

[21] "Under the power here given to modify a judgment or order, the court may reverse in part and affirm in part * * *. The court here did not disturb the verdict in the first of two necessary steps which constitutes but one trial. On the contrary, the court held there were no errors of law

in the proceedings up to and including that verdict. It was held that since the verdict was not yet complete the trial court had no power to pronounce judgment and sentence and the case was sent back to be completed. It was then the duty of the trial court to proceed, as should have been done in the first instance, to a hearing on the remaining issue. The appellate court had the power to remand the case to the trial court for proper action." (See also *People v. Eggers* (1947), 30 Cal.2d 676, 691, 185 P.2d 1; *People v. Carrow* (1929), supra, 207 Cal. 366, 369, 278 P. 857; *People v. Dillon* (1924), 68 Cal.App. 457, 478, 229 P. 974; *Ballew v. United States* (1895), 160 U.S. 187, 203, 16 S.Ct. 263, 40 L.Ed. 388; *In re Bonner* (1893), 151 U.S. 242, 262, 14 S.Ct. 323, 38 L.Ed. 149.) Inasmuch as the original sentence is set aside at the behest of the defendant it cannot be successfully pleaded as constituting former jeopardy and there is no denial of due process. (*People v. d'A Filippo* (1934), 140 Cal.App. 236, 238, 35 P.2d 134; certiorari denied, *d'A Filippo v. People of State of California* (1934), 293 U.S. 614, 55 S.Ct. 149, 79 L.Ed. 704.)

[22] In some situations of error related solely to the question of punishment, that error could be corrected by the appellate court's reducing the punishment, but that cannot be done here⁶ because under the pertinent statutes as construed by this

6. In other jurisdictions it has been held that where there was error affecting only the fixing of the penalty by the jury, the error can be cured by the reviewing court modifying the judgment of the lower court to reduce the punishment to life imprisonment. (*Cook v. State* (1929), 179 Ark. 244, 15 S.W.2d 323, 324 [the error so "cured" was the failure to instruct the jury that it had the right to impose either the death penalty or the penalty of life imprisonment]; *State v. Ramirez* (1921), 34 Idaho 623, 203 P. 279, 29 A.L.R. 297 [the statute provided that "the jury may decide which punishment shall be inflicted"; the appellate court said that the Legislature "is without authority to clothe the jury with the exclusive right to fix the extent of the punishment, this being a judicial act" (at page 283 of 203 P.);

"We perceive no logical reason why * *, in a case where there was error in the record, but not of such a character as to warrant a reversal, in order to avoid the imposition of the extreme penalty when not warranted by the evidence, this court should be put to the alternative of reversing the judgment nevertheless or of permitting injustice to be done" (at page 282 of 203 P.); *O'Hearn v. State* (1907), 79 Neb. 513, 113 N.W. 130, 25 L.R.A., N.S., 542 [the statute provided that defendant suffer death or life imprisonment "in the discretion of the jury"; the appellate court reduced the penalty because of errors in the admission of evidence which did not require reversal but probably influenced the jury in choice of penalty].)

court the trier of fact is vested with exclusive discretion to determine punishment (see *People v. Odle* (1951), 37 Cal.2d 52, 57-58, 230 P.2d 345; *People v. Thomas* (1951), 37 Cal.2d 74, 77-78, 230 P.2d 351). We note that in *People v. Pantages* (1931), 212 Cal. 237, 270, 297 P. 890 (a statutory rape case), the jury's selection of punishment is referred to as an "inseparable part of the verdict" but it is obvious that such reference in its context has no bearing on the separation of the question of punishment from the properly decided issues in the case in a situation such as that now before us.

[23] There arises the question of the character of the evidence to be received on the limited new trial for the determination of punishment. Where the question (together with that of the degree of the crime) is determined by the court on defendant's plea of guilty to a charge of murder, the hearing "is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial," and the court in aggravation or mitigation of the offense may consider matters not admissible on the issue of guilt (*People v. Gilbert* (1943), 22 Cal.2d 522, 528, 140 P.2d 9; *People v. Thomas* (1951), supra, 37 Cal.2d 74, 76-77, 230 P.2d 351), although the determination must be made upon "competent evidence" (*People v. Mendez* (1945), 27 Cal.2d 20, 23, 161 P.2d 929). Where the matter is to be determined by a jury, however, it would appear that the proceeding should be "a trial in the full technical sense, and * * * governed by the same * * * rules of procedure" as the trial of the issue of guilt.

For the reasons above stated the judgment and order denying a new trial are affirmed insofar as relates to the adjudication that defendant is guilty of murder and that the murder is of the first degree, but on the question of penalty the judgment and order denying new trial are reversed and the cause is remanded for retrial and redetermination of such question of penalty only, and for the pronouncement of a new

sentence and judgment in accord with such determination and the law thereunto applicable. (See *People v. Barnett* (1946), 27 Cal.2d 649, 658-659, 166 P.2d 4.)

CARTER, TRAYNOR and McCOMB, JJ., concur.

SPENCE, Justice (concurring and dissenting).

I concur insofar as the judgment and order are affirmed, but I dissent insofar as the judgment and order are reversed.

The majority orders a partial reversal "on the question of penalty" and remands the cause "for retrial and redetermination of such question of penalty only." Such partial reversal is based solely upon alleged prejudicial error in the giving of the instruction quoted in the majority opinion.

As recently as 1954 the same instruction was held to be "not erroneous" in *People v. Byrd*, 42 Cal.2d 200, 210, 266 P.2d 505. That decision was based upon a similar holding by this court in 1948 in *People v. Williams*, 32 Cal.2d 78, 85-86, 195 P.2d 393, where the entire subject was exhaustively discussed. It would thus appear that the precise question presented here has been settled by the decisions of this court, and that a wholesome regard for the doctrine of stare decisis should dictate an affirmance here.

The majority opinion, however, discusses certain erroneous statements found in some of the earlier decisions and suggests that the same "idea" is embraced in the instruction given here. Such is not the case. This suggestion might be urged more plausibly with respect to the instruction given in *People v. Lindley*, 26 Cal.2d 780, 794, 161 P.2d 227, 234, which contained further and broader language indicating that the jury might leave to the law "the responsibility of affixing the punishment." In that case Mr. Justice Schauer joined the majority in holding that the giving of such broader instruction "does not constitute error." There was no dissent in that case. Mr. Justice Traynor wrote a special concurring

opinion but joined in affirming the judgment. No language similar to the above-quoted language of the Lindley instruction is found in the challenged instruction here. On the contrary, the challenged instruction is the identical instruction which was given in *People v. Byrd*, supra, 42 Cal. 2d 200, 210, 266 P.2d 505, and which was approved by this court only two years ago.

It would serve no useful purpose to review all the cases cited in the majority opinion. Any erroneous statements in the earlier cases which may have indicated that the jury was not required to agree unanimously upon the punishment were finally set at rest in 1926 by the opinion written by Mr. Justice Shenk in *People v. Hall*, 199 Cal. 451, 249 P. 859. The jury there brought in a verdict finding the defendant guilty of murder in the first degree but added "But cannot come to an unanimous agreement as to degree of punishment." The trial court received the verdict and sentenced the defendant to suffer the death penalty. This court properly reversed the judgment, holding that the jury must agree unanimously upon the punishment. No subsequent decision has contained any language indicating that a jury is not required so to agree, and no such point is urged by respondent here. In fact, it is conceded by all that the jury did unanimously agree upon the verdict, which expressly provided for the death penalty.

Therefore the matter for decision here is not whether the language contained in some of the earlier cases and relating to a different problem should be overruled or disapproved, but whether the decisions of this court involving precisely the same problem should be followed. The basic question, which is one of statutory construction, may be stated as follows: Should the jury be instructed in effect that it has an absolute and unbridled discretion in fixing the punishment for first degree murder or should it be instructed that its discretion is a legal discretion which may not be arbitrarily exercised? In other words, should or should not the jury be instructed that the choice of the penalty should de-

pend upon whether the jury finds "extenuating facts and circumstances" in the particular case? If the question were an open one, a plausible argument could be made for either construction. But the question is not an open one, at least with respect to the propriety of the particular instruction given here, and I find no sound reason for overruling our recent decision in *People v. Byrd*, supra, 42 Cal.2d 200, 266 P.2d 505. It is significant that the instruction given here appears to embrace only the considerations which would influence the decision of any reasonable juror in fixing the penalty, and that the broad implications of the term "extenuating facts or circumstances" allow a wide range for the exercise of the juror's discretion. I am therefore of the opinion that upon reason and authority, there was no error in the giving of the challenged instruction.

I would affirm in toto the judgment and order denying a new trial.

GIBSON, C. J., and SHENK, J., concur.

Rehearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.



145 Cal.App.2d 261

Raymond DISHMAN et ux., Plaintiffs and Appellants,

v.

UNION OIL COMPANY OF CALIFORNIA et al., Defendants and Respondents.

Civ. 21537.

District Court of Appeal, Second District,
Division 1, California.

Oct. 23, 1956.

Rehearing Denied Nov. 13, 1956.

Hearing Denied Dec. 19, 1956.

Action for declaratory relief. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., both sides appealed. The District Court of Appeal, Doran, J., held that even though Civil Code section, providing for apportionment, according to value, of benefit of

covenant running with land, was enacted before discovery of oil in America, it was applicable to agreement by mineral owner to pay surface owners a portion of proceeds of wells drilled.

Reversed with directions.

1. Mines and Minerals ⚡55(7)

Agreement, by mineral owner to pay to surface owners a specified portion of proceeds of wells drilled and providing that right to receive payments should at all times be and remain appurtenant to lands involved, manifested intent to make ineffective any attempt to separate right to payments thereunder from ownership of land; and, in any event, instrument by which owners, deeding away a portion of one of involved tracts, transferred to grantee rights under agreement between mineral owner and surface owners could not be construed as a grant of all of grantor's interest in such agreement.

2. Mines and Minerals ⚡55(7)

Even though Civil Code section, providing for apportionment, according to value, of benefit of covenant running with land, was enacted before discovery of oil in America, it was applicable to agreement by mineral owner to pay surface owners a portion of proceeds of wells drilled. West's Ann.Civ.Code, § 1467.

3. Improvements ⚡1

Permanent improvements to land become as much realty as land itself.

4. Mines and Minerals ⚡55(7)

Civil Code section, providing for apportionment, according to value of benefit of covenant, contemplated inclusion of improvements in determining value. West's Ann.Civ.Code, § 1467.

5. Mines and Minerals ⚡79(1)

Oil royalty return which lessee renders to his lessor for estate in land is "rent", or so closely analogous to rent as to partake of incidents thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Rent".

Russell H. Pray, William C. Price, Pray & Price, Long Beach, and Henry F. Walker, Los Angeles, for appellants, Dishman.

Frank W. Doherty, Los Angeles, for respondents and cross-appellants, Roche.

L. A. Gibbons, Douglas C. Gregg, A. Andrew Hauk, Lewis D. Lawrence, Los Angeles, for respondent, Union Oil Co.

DORAN, Justice.

The present action for declaratory relief was brought to secure a determination of the proportion or percentage of certain sums of money impounded by the respondent Union Oil Company, resulting from oil drilling operations and allocable under contract to Lot 82, La Habra Heights Tract. The defendants Roche, as joint tenants, own a portion of Lot 82, and the plaintiffs Dishman, as joint tenants, own the remaining portion of said lot. Both the plaintiffs Dishman and the defendants Roche have appealed from the judgment.

In March, 1904, the Rudisills, owning several thousand acres of land, granted to the Union Oil Company the oil, gas and similar items in the lands which included Lot 82 here involved. In 1940 Union determined to explore the area for oil, and as stated in the trial court's memorandum, "concluded that it was advisable to enter into a contract with all the surface owners whereby they would as a unit participate to the extent of 10% of the net proceeds in any wells drilled by it in the entire large unit parcel". On April 1, 1940 Union entered into such an agreement with surface owners including La Habra Heights Co., the then owner of part of the lands formerly owned by the Rudisills, including Lot 82. The purpose of this agreement, as found by the trial court was "to gain and maintain the cooperation and good will of the owners, and their successors in interest, of the surface rights of the real property described".

The agreement provided that each month or period not exceeding three months, Union would "set aside * * * a sum equal to ten per cent (10%) of the value of all

oil produced, saved and removed" from the area. This sum was to be paid by Union "to each signatory Owner of lands * * * subject to this agreement, in the same proportion for each such Owner as the assessed value of his holding (land and improvements thereon), subject to this agreement, bears to the total assessed value of all of the lands (and improvements thereon) then subject to this agreement, as shown by the Los Angeles County assessment roll for the fiscal tax year immediately preceding the date upon which Union may have started drilling operations * * *, which assessment roll is hereby fixed as the final criterion of proportionate values hereunder". The assessed valuation for 1943-44 as to Lot 82 was: Land \$790, Improvements \$2,080 (buildings) and \$250 (trees), —a total of \$3,120.

It is provided in said agreement that "The right to receive payments * * * shall at all times be and remain appurtenant to the lands in respect to which such payments accrue and shall be and remain inseparable from the ownership of such lands. Any attempt to separate such rights and ownership, respectively, shall be without effect hereunder and shall not be binding upon Union".

As stated in plaintiff-appellants' brief, "Mr. and Mrs. Cole became the owners of Lot 82. The property had a very steep hill * * *. He decided to sell off this unimproved portion keeping the improved portion himself and he did so by deed dated November 21, 1944, to a Miss Deckert. By mesne conveyances this portion, deeded to Miss Deckert, became owned by defendants Roche by deed dated January 21, 1948. Mr. and Mrs. Cole retained ownership of the improved portion of Lot 82 until March 21, 1948, on which date they conveyed the same to plaintiffs Dishman. Plaintiffs Dishman paid \$27,000.00 for this portion of Lot 82 and the defendants Roche paid \$8,500.00 for their portion of said Lot".

The trial court found that on the basis of acreage, the defendants Roche own 58.24% of Lot 82 and the plaintiffs Dishman own

41.76%, and in accordance with these percentages directed that division be made of the sums due Lot 82. It is plaintiffs' contention that apportionment should be made not according to acreage but according to value. The value of the portion of Lot 82 owned by the Dishmans including the residence thereon was stipulated to be 74.235% and that of defendants Roche 25.765%.

Section 1467 of the Civil Code provides that "Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity."

It appears that Section 1467 has never received judicial construction but the trial court in a Memorandum Ruling took the position that this section "should be construed, it having been enacted prior to a discovery of oil in America, as applying to agricultural and perhaps other lands, but not to oil lands. If however, the statute should be held applicable, it seems to me that the property subject to the covenant running with the land may be construed as referring in the case of oil lands to the land acreage, without regard to the improvements thereon. If that may not be done, then of course my view is erroneous".

[1] In the cross-appeal of defendants Roche, "It is submitted that Defendant as the successor of Deckert is entitled to 100% of the rights of Lot 82 in the Union Oil-La Habra Agreement" for the reason that the Cole to Deckert deed "grants all of the interest of Cole to Deckert by a writing which this Court can give full force and effect". This is based on the fact that Mr. and Mrs. Cole, owning all of Lot 82, in selling that portion to Deckert which now belongs to cross-appellants Roche, transferred to Deckert "that certain contract and agreement dated April 1, 1940, executed by the La Habra Heights Company and the Union Oil Company * * *". It is the

Roche claim that "This language is a grant of *all* of the Cole interest" in the agreement, and that therefore the Dishmans have no right to receive any of the money allocated to Lot 82 under the agreement. The trial court quite properly refused to accept this view and, as hereinbefore noted, apportioned the funds on the basis of acreage owned by the respective parties. However, as will hereafter appear, the mode of apportionment on the basis of acreage, is deemed incorrect.

"The position of defendant-respondent Union Oil Company of California (not an appellant herein) is essentially one of neutrality", as stated in Union's brief. Attention is, however, therein called to the fact that the agreement "does not transfer any interest in the oil whatsoever", and Union requests that therefore "this money payment be referred to as a payment and not as royalty or rent".

The instant appeals present no serious controversy in respect to material facts, and the single point of law requiring attention relates to the mode of distribution of payments allocated to Lot 82, now owned in part by plaintiffs Dishman and in part by the defendants Roche. As hereinbefore indicated, the cross-appellants' claim that the Dishmans are entitled to no part of the Union payments and that the Roches are entitled to 100% thereof, is untenable and cannot be sustained. To hold otherwise would be to adopt a forced and unnatural interpretation of the language used in the deed from the Coles to Deckert. Moreover, as stated in the Dishman brief, "it is clear that the intent and purpose of the 1940 community agreement is to make ineffective any attempt to separate the right to payments thereunder from ownership of the land". Whatever these payments may be called "The right to receive payments * * shall at all times be and remain appurtenant to the lands".

In the absence of some agreement between the parties as to the method of distribution, and there is none in this case, three possible theories are open, namely,

(1) distribution according to the relative acreage owned by the parties, which was that adopted by the trial court; (2) distribution according to the relative values of the Dishman and Roche lands including improvements; and (3) distribution according to relative values not including improvements.

Whatever method is considered, a solution should be sought which will effect a distribution practical rather than theoretical; and one which will neither do violence to any intention evidenced by the written instruments nor to any applicable statutory or case law. Should acreage be taken as the deciding factor, the Dishmans will be entitled to receive 41.76% of the payments, whereas, if apportionment be made on the theory of relative value of the Dishman and Roche parcels, appellants Dishman will receive 74.235%. No case has been cited which furnishes a direct and positive answer to the problem.

In *Carlson v. Lindauer*, 119 Cal.App.2d 292, 304, 259 P.2d 925, 931, involving the same 1904 Rudisill grant to Union Oil and the same 1940 agreement with Union, it was held that "The estate in the oil and gas when owned by Union was a profit *à prendre*" and when Union made the agreement "it granted to the owner of the land the right to receive future royalties, and incorporeal hereditament, and an interest in land. * * * The agreement was a grant within the meaning of section 1462" of the Civil Code.

[2-5] Whatever the present payments are called, the matter should receive no different or special treatment from that accorded in other cases, and it appears entirely logical to conclude all payments allocated to Lot 82 should be apportioned in the manner required by Section 1467 of the Civil Code, that is, according to value. As hereinbefore indicated, the value of the two parcels has been settled beyond controversy. If this statute applies, there is therefore no reason to resort to the matter of acreage in making an apportionment.

The language used in Section 1467 of the Civil Code is general and the prescribed method of distribution according to value seems clearly intended to apply to any and all situations. Oil payments such as those here involved, created by an agreement which, by its terms, is made appurtenant to the land, are not excluded from its purview by any reasonable interpretation. To hold otherwise would amount to judicial legislation and to write into a statute something which is not there.

The assertion by defendants Roche that Union possessed no surface rights and that therefore a different rule should be applied, is without merit. As found by the trial court, under the original Rudisill deed, Union Oil acquired "petroleum, coal oil, naptha, natural gas, other hydro-carbons and like substances, including asphaltum and brea, *in and upon and under*" the described tract, with a "right to enter upon the surface" of the lands to explore, mine, drill and dig for the substances named. (Italics added.)

It is to be further noted that Section 1467 requiring apportionment according to value of the property, does not mention improvements nor exclude any such improvements. Had it been intended to exclude improvements it would have been an easy matter to have so stated. It is fundamental that permanent improvements to land become as much realty as the land itself. Such being the case, it must be held that the statute contemplated the inclusion of improvements in determining value.

The agreement itself, is persuasive if not decisive that improvements on the lands are to be considered as affecting value, and that assessed value rather than area shall be deemed controlling. As hereinbefore mentioned, the sum in question is to be paid by Union "to each signatory Owner of lands * * * subject to this agreement, *in the same proportion for each such Owner as the assessed value of his holding (land and improvements*

thereon); subject to this agreement, bears to the total assessed value of all of the lands (and improvements thereon)". (Italics added.) There is no apparent reason why this measuring stick should not be applied all along the line. Such method of division is consistent with the terms of the agreement as well as being in harmony with Section 1467 of the Civil Code. Whether such section was enacted before or after the discovery of oil cannot be deemed important in the present controversy, and no California case exists as authority for excepting oil interests from the operation of such statute. Section 1467 is apparently a restatement of the common law in reference to apportionment of rents.

Whatever the payments under the present agreement be properly called, the situation is certainly analogous to the matter of rents. As said in *Callahan v. Martin*, 3 Cal.2d 110, 123, 43 P.2d 788, 795, 101 A.L.R. 871, "The [oil] royalty return which the lessee renders to his lessor for this estate in the land is rent, or so closely analogous to rent as to partake of the incidents thereof." Likewise in *Standard Oil Co. of California v. John P. Mills Organization*, 3 Cal.2d 128, 43 P.2d 797, 800, the court follows the principle laid down in the *Callahan* case, regarding oil royalty "as rent, an incorporeal hereditament, issuing from the profits of land and payable by the lessee in consideration of the privileges and estate vested in him under the lease", and is subject to apportionment. While these cases are not factually identical with that now at hand, the principles announced seem clearly applicable to the present controversy, and decisive thereof.

The judgment is reversed with directions to enter a judgment apportioning the payments involved between plaintiffs Dishman and defendants Roche in proportion to the assessed valuations of the real estate owned by such parties, including improvements thereon.

WHITE, P. J., and FOURT, J., concur.

145 Cal.App.2d 275

Virginia MAECHERLEIN, Plaintiff and
Respondent,

v.

SEALY MATTRESS COMPANY, Defendant
and Appellant.

Civ. 21809.

District Court of Appeal, Second District,
Division 1, California.

Oct. 23, 1956.

Rehearing Denied Nov. 13, 1956.

Action for personal injuries sustained when spring came through mattress manufactured by defendant and penetrated into plaintiff's "gluteal prominence." Recovery was sought on theory of warranty and theory of negligence, and doctrine of *res ipsa loquitur* was invoked. The Superior Court of Los Angeles County, J. F. Moroney, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained verdict for plaintiff.

Affirmed.

1. Negligence ⇨134(4)**Sales** ⇨441(1)

In action for personal injuries sustained when spring came through mattress manufactured by defendant and penetrated into plaintiff's "gluteal prominence", wherein recovery was sought on theory of warranty and theory of negligence, evidence sustained verdict for plaintiff.

2. Negligence ⇨138(2, 3)

In action for injuries sustained when spring came through mattress manufactured by defendant and penetrated into plaintiff's "gluteal prominence", *res ipsa loquitur* instruction was sufficient, and justified by evidence.

3. Sales ⇨285(2)

Notice of breach of warranty, given to manufacturer within a few days after spring came through mattress and penetrated into plaintiff's "gluteal prominence", was timely, as against contention that notice should have been given when it first became apparent that mattress was "bunching".

Moss, Lyon & Dunn, Arvin H. Brown, Jr., and Henry F. Walker, Los Angeles, for appellant.

Downey A. Grosenbaugh, Hollywood, Grayce M. Smith, Los Angeles, for respondent.

DORAN, Justice.

After a trial by jury, a judgment was entered in favor of plaintiff-respondent in the sum of \$3,000 for personal injuries sustained when a spring came through a mattress manufactured by the appellant, and purchased from a Los Angeles retail dealer who was not an agent of the appellant.

In the language of appellant's brief, "After plaintiff and her husband had used the same for a year or year and a half, they noticed it was getting soft in the center; there was a lumping or bunching. Several years later, i. e., in April of 1953 more than five years after their said purchase, plaintiff, according to her testimony, was awakened when a spring came through the mattress and, in the words of her pleading, 'penetrated into the said plaintiff's gluteal prominence'."

Recovery was sought on two theories, namely, "Manufacturer's Express Warranty", and "*Res Ipsa Loquitur*". There was testimony that the plaintiff placed reliance on billboard and radio advertising and upon a ten-year warranty evidenced by a label on the mattress, to which attention had been called by the seller. Shortly after the accident plaintiff's husband talked with the seller who picked up the mattress and took it to the defendant where it was repaired. Plaintiff was given an exchange mattress.

It is appellant's contention that there is lack of evidence of negligence and of express warranty; that the *res ipsa loquitur* doctrine is inapplicable, and that the trial court's instructions to the jury were erroneous. Appellant also complains that essential elements for recovery on an express warranty were not proven, particularly in reference to reliance on such warranty;

that "The claimed guarantee was restricted to structural defects and did not encompass personal injury damage", and that there was "Lack of timely notice of plaintiff's intention to claim damages by reason of the claimed breach".

[1] In respect to the alleged insufficiency of evidence, a survey of the record discloses substantial evidence in support of the verdict and judgment. Such being the case, the well established rule of appellate review prohibits any re-valuation of the weight and sufficiency of the evidence. This was a matter within the province of the jury which rendered a verdict in favor of the respondent.

[2] The appellant complains of the instruction, (B.A.J.I. No. 206-B), given at plaintiff's request, on the *res ipsa loquitur* doctrine. This instruction told the jury that "From the happening of the accident involved in this case, *as established by the evidence*, there arises, an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore you should weigh any evidence tending to overcome the inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part". (Italics added.)

As stated in respondent's brief, "the instruction must be considered in its entirety and * * * in the light of all of the other instructions given. It is improper to single out a portion of any given instruction", such as the italicized words, "as established by the evidence" in the above quoted instruction. Moreover, the quoted phrase was not incorrect or prejudicial, since "both Mr. and Mrs. Maerchlein testified to the occurrence", and "there

was corroborative evidence that the mattress was immediately returned * * *". Therefore, the "happening of the accident" was "established by substantial evidence * * *".

There is no merit in the appellant's argument that the doctrine of *res ipsa loquitur* "is not applicable in this case". Although the final decision rested with the jury, there was substantial evidence justifying submission of this issue. There was evidence that every tenth mattress was pulled off the line and inspected, and, as the respondent says, the jury might reasonably infer that such inspection did not constitute ordinary care.

As said in respondent's brief, "Having made an express warranty the rule of foreseeability follows. In a case such as this where there has been a breach of guarantee on the structure of the mattress and a spring protruded with the force and power which occurred in this case, the natural and foreseeable consequences are that a person resting on the mattress will sustain a personal injury". Even without a guarantee, a manufacturer may be held liable in such a case under appropriate evidence. There is nothing to show on which theory the jury decided in favor of the plaintiff, but there is substantial evidence in support of the verdict.

[3] Appellant's contention that there was "Lack of timely notice of plaintiff's intention to claim damages by reason of the claimed breach", must be deemed untenable. Adequate notice was promptly given within a few days after the accident occurred. Appellant's argument that notice should have been given within a year and a half after purchasing the mattress because it was "bunching and sagging and lumping", would require plaintiff to anticipate that a broken spring would ultimately protrude and result in the injury. The defendant's expert witness testified that this bunching of the mattress would not indicate that there was a broken spring.

The record indicates that the defendant manufacturer has been accorded a full

and fair trial of all issues, that there is substantial evidence in support of the verdict and that appellant has suffered no prejudice either in respect to the instructions given, or otherwise.

The judgment, and order denying defendant's motion for judgment notwithstanding the verdict, are affirmed.

WHITE, P. J., and FOURT, J., concur.



145 Cal.App.2d 336

Nettlemay CALLAHAN, Plaintiff and Respondent,

v.

Nicolas THEODORE, Lucille Theodore, George Theodore, Aphroditl Theodore, Raphael Glass, The City of Los Angeles, a Municipal Corporation, et al., Defendants.

The City of Los Angeles, a Municipal Corporation, Appellant.

Civ. 21642.

District Court of Appeal, Second District, Division 3, California.

Oct. 23, 1956.

Rehearing Denied Nov. 14, 1956.

Hearing Denied Dec. 19, 1956.

Action for injuries sustained by plaintiff when she fell after stepping into hole in sidewalk. The Superior Court, Los Angeles County, Ellsworth Meyer, J., rendered judgment for plaintiff, and defendant-municipality appealed. The District Court of Appeal, Shinn, P. J., held that instructions given on contributory negligence issue were sufficient as against contention that they merely stated abstract principles of law without disclosing to jury municipality's theory of case.

Affirmed.

1. Municipal Corporations ⚡822(4)

In action for injuries sustained by plaintiff when she fell after stepping into

hole in sidewalk, instructions given on contributory negligence issue were sufficient as against contention that they merely stated abstract principles of law without disclosing to jury defendant-municipality's theory of case.

2. Municipal Corporations ⚡822(4)

In action for injuries sustained by plaintiff when she fell after stepping into hole in sidewalk, it was proper to refuse instruction that plaintiff, who had glasses and was nearsighted but testified that she did not use them and saw better without them, was required to use greater care because she had defective eyesight.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., William E. Still, and Moses A. Berman, Deputy City Attys., Los Angeles, for appellant.

Edwin D. Lasker, David L. Mohr, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by the City of Los Angeles from a judgment for \$9,000 damages for personal injuries suffered by plaintiff due to a fall over a defective portion of a sidewalk. At the close of plaintiff's testimony, a nonsuit was granted to all the other defendants. The case was tried to a jury, and the sole contention on this appeal is that the court erred in refusing to give certain instructions on contributory negligence which were requested by defendant.

The evidence, stated most favorably to plaintiff, is as follows. On September 21, 1952, at about 6:30 p. m., plaintiff, a 65-year old widow, was being taken to dinner by a Mr. and Mrs. Mercer and their son at a restaurant on Beverly Boulevard near its intersection with Martel Avenue. The sun was going down but it was still light. Mr. Mercer parked his car on Martel, just north of Beverly, and the party proceeded to walk south along Martel toward Beverly. As the group reached the corner of Martel and Beverly, they started to turn east on

Beverly. In the middle of the turn, Mr. Mercer saw plaintiff lurch and fall on her face. Immediately prior to the fall, plaintiff had been talking to Mrs. Mercer. Mr. Mercer testified that he went to plaintiff's assistance and then noticed a triangular-shaped hole in the sidewalk, about 3 or 4 inches wide and about 16 or 18 inches long. He stuck his finger in the hole and estimated that it was over 3 inches deep. He was about six feet away from the hole when he first observed it.

Plaintiff testified that "I was talking to Mr. and Mrs. Mercer, and I glanced right ahead of me, just a casual glance, and I saw the sidewalk was—looked a little different, a little dark, but I certainly felt so secure. I felt that it was safe * * *. Before I fell, when I was a step or perhaps a couple of steps or a step and a half before I fell, I noticed an unusual—as I glanced over I noticed an unusual dark place, but I assumed that it was perfectly safe. It looked to me as I glanced at it that it had been repaired and was perfectly safe." She then caught her foot in the hole and fell, lurching forward on her face. On cross-examination, she added that although the area was dark, she did not notice any break in the pavement. She also testified that she owned glasses but never wore them, because even though she was nearsighted her vision was better without them.

The court instructed the jury that contributory negligence was an issue in the case, that plaintiff could not recover damages if this were proved, and that the burden of proving contributory negligence by a preponderance of the evidence was upon defendant. The court defined negligence and contributory negligence. At

plaintiff's request, it gave the following instruction: "While I have instructed you that if the plaintiff was guilty of negligence which contributed proximately to the happening of this accident she cannot recover, such question is one for you to determine from all the facts and circumstances in this case. You must, in determining this question, take into consideration the physical facts and circumstances surrounding the accident, that is, the location, nature and size of the alleged defect, the familiarity or lack of familiarity of plaintiff with the location of the accident, the opportunity, if any, plaintiff had to observe and avoid the same. In other words, the question of her negligence, or lack of it is to be determined from all the circumstances present at the time and place."

At defendant's request, the court instructed the jury that: "It is the duty of a pedestrian traveling on a public street to use ordinary care for his personal safety and to reasonably exercise the faculties with which he is endowed. The law requires that one exercise ordinary care in observing where he is going so as to avoid perils which ordinary prudence and reasonable use of his eyes would disclose; the failure so to do, is negligence."

[1] Defendant contends that these instructions were mere abstract principles of law which did not disclose to the jury its theory of the case, namely, that plaintiff was negligent in looking at, but failing to see, an obvious defect in the sidewalk and in not exercising the care required of a person with impaired vision. It argues that the court erred prejudicially in refusing the four requested instructions which are quoted in the margin.¹

1. "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary

care, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

"It is as much negligence to look and fail to see a defective and dangerous condition in the sidewalk or street which is in plain sight, or which is plainly to be seen by the exercise of ordinary care, as it is negligence not to look at all, and if, therefore, you believe from all the

Plaintiff contends, on the other hand, that the court fully and fairly instructed the jury as to the issue of contributory negligence. We agree.

The first three instructions were argumentative. Assertions such as that one who is looking usually sees what is in plain sight and observes dangers that are clearly apparent will usually be heard in the course of argument that some one was guilty of contributory negligence. Whether the defect in the sidewalk was clearly visible and the danger of it apparent and whether plaintiff either failed to look or to look carefully were factual questions to be argued to the jury. The use in instructions of such terms as "clearly visible and apparent danger" in wholly unnecessary statements of truisms well known to all persons of average intelligence serves no useful purpose and is conducive to misunderstanding. The instructions in question were not proper statements of law and had no place in the court's instruction. Such digressions into the fields of fact and argument are likely to be taken by jurors as suggestions as to the court's impressions. They derive no virtue from the fact that they constitute a somewhat common fault. The three instructions were subject to criticism in other respects which it is unnecessary to discuss.

[2] The instruction that plaintiff was required to use greater care because she had defective eyesight was properly refused. She had glasses and was near-

evidence in this case that plaintiff, Nettie-may Callahan, should have, by the exercise of ordinary care, seen the claimed dangerous defect in question before walking or driving into it, and if you further find that by the exercise of ordinary care plaintiff could have avoided the accident, then she was guilty of negligence, and if you further find that such negligence on her part, if any, in some degree contributed and was a proximate cause of the accident, then plaintiff may not recover."

"If a danger is so apparent that a person can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning, and if a person fails to heed such warning and

sighted but she testified that she did not use them and saw better without them. In refusing the instruction the court made a notation that there was no evidence that plaintiff's eyesight was defective. In effect the instruction declared that plaintiff's eyesight was defective. This vice alone warranted its rejection. Also it stated the law incorrectly inasmuch as it implied that plaintiff was required to use more than ordinary care. *Conjorsky v. Murray*, 135 Cal.App.2d 478, 287 P.2d 505.

The jury was instructed "The law requires that one exercise ordinary care in observing where he is going so as to avoid perils which ordinary prudence and reasonable use of his eyes would disclose; the failure so to do, is negligence," and was also instructed as to the matters to be considered in judging the reasonableness of plaintiff's conduct. These were proper and pertinent declarations of legal principles.

The question of plaintiff's negligence was a simple one. She saw an irregularity in the sidewalk, did not recognize it as a hole and stepped into it. The instructions that were given clearly defined the issue for decision. Moreover, there is no reason for a belief that the verdict would have been different had the requested instructions been given.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

is injured as a result thereof, she is guilty of contributory negligence."

"It is the rule that one who has defective vision is required to exercise care sufficient to make good such defect. Plaintiff herein was bound, therefore, to use greater care than a person of good eyesight in order to exercise that care which is required of a person having such impairment of vision. Ordinary care to protect herself from injury, however, was all that was required of her, and ordinary care in the case of such person is such care as an ordinarily prudent person with a like infirmity would have exercised under the same or similar circumstances."

145 Cal.App.2d 296

Gilbert S. FORTE, Plaintiff and Respondent,
v.John M. SCHIEBE, Defendant and
Appellant.
Civ. 21351.District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Modification of Opinion Filed Nov. 14, 1956.

Rehearing Denied Dec. 13, 1956.

Action for compensatory and exemplary damages for assault and battery. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where evidence presented a question for jury as to whether defendants' assault and battery was with malice, or was the result of defendant acting upon a sudden impulse with considerable provocation under a mistaken notion as to plaintiff's intentions, yet without legal justification, remarks of trial court that malice existed on the part of both parties, was prejudicial error not cured by its instructions to disregard, but in view of fact that action was the third time parties were in court, in the interest of justice, District Court of Appeal would order judgment reversed and purported appeal from order denying defendant's motion for new trial dismissed unless plaintiff agreed to a modification of judgment eliminating award of exemplary damages.

Judgment modified, and as modified, affirmed.

1. Evidence ⇨378(1)

In action for assault and battery, where a comparison of the typing of a defamatory letter allegedly written by defendant concerning plaintiff disclosed significant similarities with the typing of defendant's typewriter, evidence was sufficient to allow introduction of such letter in evidence.

2. Witnesses ⇨372(2)

In action for assault and battery, sustaining of plaintiff's objection to a question directed to plaintiff on cross-examination as to whether defendant had been acquitted

in a prosecution for battery to show bias of plaintiff was not error under the circumstances.

3. Judgment ⇨713(1)

In action for compensatory and exemplary damages for assault and battery, objection to introduction in evidence of the record of a prior civil suit between the parties as allegedly conclusive upon the issue of malice, was properly sustained.

4. Appeal and Error ⇨1046(5), 1140(4) Trial ⇨29(1)

Where evidence presented a question for jury as to whether defendant's assault and battery was with malice, or was the result of defendant acting upon a sudden impulse with considerable provocation under a mistaken notion as to plaintiff's intentions, yet without legal justification, remarks of trial court that malice existed on the part of both parties was prejudicial error not cured by its instruction to disregard, but in view of fact that action was the third time parties were in court, in the interest of justice, District Court of Appeal would order judgment for plaintiff reversed and purported appeal from order denying defendant's motion for new trial dismissed, unless plaintiff agreed to a modification of judgment eliminating award of exemplary damages.

C. Douglas Wikle, Los Angeles, for appellant.

Wallace E. Wolfe and Percy V. Hammon, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by defendant from a judgment on verdict awarding plaintiff \$3,250 compensatory and \$3,000 exemplary damages for assault and battery.

Plaintiff and defendant are law enforcement officers. Plaintiff is Supervising Liquor Enforcement Officer, Alcoholic Beverage Control Act, Southern California; he had been a chief petty officer in the U. S. Navy for 20 years and an employe of the federal government in the days of prohibi-

tion. Defendant is a crier in the United States District Court, having previously been in the office of the United States Marshal. The parties had known each other since 1928. At the time of the events that led to the present litigation neither was engaged in the performance of official duties.

The parties lived opposite each other in San Pedro. For a long time they had been on unfriendly terms. Plaintiff testified that defendant had threatened him frequently, using toward him foul and insulting language and on several occasions had shoved him and poked him in the ribs with an elbow while they were leaving a Pacific Electric station. Defendant testified that plaintiff had threatened to kill him and his family, had thrown a rock through a window of a house of defendant's relative, had come across the street on three occasions uttering threats and using bad language until he had been taken by the collar by his, plaintiff's wife and led back home. Each denied in toto all accusations of ungentlemanly conduct upon his part, claiming to have acted only defensively at all times. As we shall see, the trial produced some tall lying.

The undisputed facts of the alleged assault were that on a Sunday morning plaintiff was traversing an alley behind defendant's residence; defendant was in the rear, in or near his garage. Lucas, defendant's brother-in-law, was in his own yard nearby. There was an altercation characterized by the use of foul language and a physical encounter in which plaintiff received injuries to his head. At this point agreement among the witnesses as to the progress of events ceased and the problem of the jurors in the realm of the credibility of witnesses commenced. Plaintiff testified that he was unarmed and was leading a Pomeranian on a leash; defendant ordered him out of the alley and without provocation struck him violently about the left cheek with a shovel. Defendant testified that plaintiff had telephoned him twice early that morning and threatened to come over and bash in de-

fendant's skull; Lucas was in the adjoining yard and called to him that plaintiff was coming; plaintiff entered the garage and struck him with a club; he shoved plaintiff out with his shoulder, plaintiff re-entered the garage twice more and may have fallen against an incinerator in the scuffle. Lucas testified that plaintiff came running down the alley carrying a club and that he warned defendant; plaintiff entered the garage. Lucas did not testify whether he saw blows struck. A neighbor of defendant's, Mrs. Blake, from her window saw Schiebe strike Forte with a shovel. Her testimony fully corroborated that of plaintiff. Another neighbor, Mrs. Hansen, a witness for defendant, testified she heard loud swearing, saw plaintiff enter defendant's garage, but was concerned that her small son finish his breakfast and did not follow further developments. Plaintiff suffered substantial injuries.

[1] The first assignment of error to be considered is that the court allowed the introduction in evidence of a defamatory letter allegedly written by defendant concerning plaintiff upon insufficient evidence that defendant wrote the letter. The evidence was sufficient. A comparison of the typing of the letter and that of defendant's typewriter disclosed significant similarities.

[2] Upon complaint of Forte, Schiebe was prosecuted for battery and was acquitted. Defendant questioned plaintiff on cross-examination whether Schiebe had not been acquitted. Plaintiff's objection was sustained and the ruling is assigned as error. As nearly as we can understand from the record the fact of the acquittal was offered to prove that plaintiff, having instituted an unsuccessful prosecution of defendant, would feel frustrated, and biased and prejudiced in his testimony. The court ruled at one time that the judgment would be admitted, if produced, but the matter appears to have been dropped. We need not discuss the admissibility of the evidence. According to plaintiff he suffered from more than frustration. Moreover, time and again it was stated by the court and counsel in the

presence of the jury that defendant had been acquitted. Plaintiff's attorney requested that the jury be instructed to disregard the discussion of the acquittal but the court declined to do so saying: "Oh, don't get worried. That jury is there performing a function."

[3] Next defendant offered in evidence the record of a civil suit of *Forte v. Schiebe*. Plaintiff's objection was sustained. The record does not disclose the nature of the action except by vague statements which cast no light on the subject. However, we recognize the action as one that was before us in 1949 and is reported in 93 Cal.App.2d 22, 207 P.2d 881. It is now asserted that plaintiff and his witness O'Malley, who testified in the present case to verbal abuse of plaintiff by defendant in the Pacific Electric Railway Station, testified in the same manner in the former case, and that since the court in that case found the allegations of such abuse to be untrue, the former judgment is conclusive of some material issue in the present case. Counsel says "The record of the prior case was offered as conclusive evidence upon the issue of malice upon which Respondent had offered testimony in the instant trial." There is no logic in this argument. It appears to have been born of the confusion during the trial in connection with defendant's endeavor to introduce the records of the former cases.

[4] We now come to the assignment of error attributed to the allegedly prejudicial remarks of the trial court. Counsel for defendant cited to the court the case of *Marriott v. Williams*, 152 Cal. 705, 93 P. 875, to the proposition that the fact that Forte had unsuccessfully prosecuted Schiebe for assault would tend to prove bias and prejudice affecting Forte's testimony in the present case. In the cited case there was also a question of malice. In the discussion of defendant's offer of the record in the civil case, it was confused with the offer of the record in the criminal case and the question of bias of plaintiff as a witness was confused with the question of malice

of the defendant in the assault. During the discussion the court made remarks as follows:

"For a half a dozen good legal reasons the objection to the introduction of that record will have to be sustained. It has nothing to do with this case. The sole purpose that it could ever be used for would be to prove malice, and that, as this court says in this case, is so evident here by the actions of the parties that it is patent that no one can deny that they had the malice. * * *

"Mr. Wolfe: If your Honor please, if there are to be any more statements, may they be made out of the hearing of the jury?

"The Court: No. The jury is part of this court.

"Mr. Wolfe: I realize that, but, if your Honor please, we are now arguing the admissibility—

"The Court: You are not arguing it. I am not going to let you argue it. * * * the only relation that this case could bear to the previous case that you are now offering would be on the thin thread of a connecting line involving malice; and I am telling you that there is no basis for offering it here in support of malice when malice is confessed on both sides. The testimony of both these parties makes it manifest that there is malice between them. * * * Now, that shows that in that case the court let it get by as harmless error because it was admissible only in support of malice, and that the malice was already admitted by them in the record, the same as in this case. In this case the existence of malice on both sides cannot be disputed by either as to the other."

There was ample evidence to support a finding of malice on the part of defendant but it was not conclusive upon that issue. It could have been found that defendant acted upon a sudden impulse, with considerable provocation and under a mistaken notion as to plaintiff's intentions, and yet

without legal justification. But after hearing the statements of the court it was unlikely that the jury would have found an absence of malice. To be sure the court gave an instruction that the court had not stated nor intended to state its conclusions as to any of the controverted issues, and that any statement indicating the court's views should be disregarded. But the court had done exactly what it told the jury it had not done and there was no retraction of the statement that malice on the part of both parties was not only conclusively proven but admitted.

No fact is better known to trial lawyers than that the minds of jurors are easily swayed by statements from the bench as to the merits of the matters in issue. Especially is this true in the case of a venerable and respected judge whose considered and definite statements convey to the eager minds of jurors an implied direction as to what their finding should be on a material issue. Words spoken with finality, as in the present case, leave an indelible impression. The mere formal admonition that they should be forgotten was no more effective than would have been a statement that although the court meant what it said the jurors should forget that the court said it. The instruction did not remove the harm.

Plaintiff contends that defendant cannot complain of the statements of the court because he made no objection to them and no request that the jury be admonished to disregard them. By failure to protest in the trial court defendant did not forfeit the right to urge the point on appeal. We think a special admonition would not have cured the harm caused by the court's remarks respecting the existence of malice. Moreover, it appears from the record that if defendant had requested that the jury be admonished the request would have been refused.

Defense counsel experienced much difficulty in his efforts to produce his evidence as to the earlier litigation. He was not permitted to make a desired offer of proof

nor to present any argument. There was extensive discussion between the court and counsel and numerous statements by the court in addition to those we have quoted. Some of them were considered by plaintiff's attorney to be prejudicial and he made a request with the result that is illustrated by the following passages:

"Mr. Wolfe: Your Honor, I must protest against this continually talking about that case as prejudicial.

"The Court: We will get rid of that by simply ignoring any further consideration of the matter. This case will have to stand and be decided on the facts that have been produced here through the regular channels of our method of procedure.

"Mr. Wolfe: Would your Honor instruct the jury to disregard the discussion between Court and counsel regarding this file?

"The Court: Never mind. Don't be worrying about the jury. When I get through reading my instructions to them, they will have a complete set-up of what the law is which is to govern them. The colloquy, argument during the course of the trial in the presence of a jury between counsel and the Court, is a constant occurrence in busy courts. Notwithstanding that, each time the attorneys usually get up and say 'Please instruct the jury it is none of their business to listen to this,' or they want to go into chambers. I am not one of those judges that tries my cases half in the dark and half in the light. I have them tried out in the wide open light, in the courtroom. If the jurors can't control their judgment and their consideration under the guidance and instruction of the Court, why, then it is just too bad that we don't have different kind of jurors. I have no fear of submitting any of these cases to the jurors that we are getting here in our courts at the present time."

Following this the court instructed the jurors that they should not pay any at-

tention to and should not believe or accept anything that the lawyers said. Although this would have been a proper occasion for an instruction that the jurors should disregard what the court had said, no reference was made to the court's remarks. We are convinced that any protest by defendant respecting the court's remarks would have been unavailing.

We entertain no doubt as to the prejudicial effect of the court's statements upon the defendant's case. There was evidence from which the jury could have concluded that Schiebe's attack upon Forte was actuated by malice. At the same time it could have been concluded that although he was guilty of an assault he acted upon sudden impulse, with considerable provocation and without malice. But the jury found that Schiebe entertained malice and it assessed exemplary damages of \$3,000. This issue was not fairly tried and that award may not be allowed to stand. However, the situation respecting compensatory damages is different. The court's statements respecting the existence of malice reflected upon the credibility and motives of Forte and Schiebe equally. They would have been as likely to convey a suggestion that Forte attacked Schiebe with a club as that Schiebe attacked Forte with a shovel. They bore no relation to and we think could not have affected the award of compensatory damages. As to those damages, the judgment should be affirmed. As to the exemplary damages it should be reversed unless plaintiff consents to a modification which will eliminate the award of exemplary damages.

This is the third time the parties have been in court during the course of their ridiculous feud. They have had more than a fair share of the court's time. Plaintiff's right to compensatory damages was well established. The amount is reasonable. The evidence would have sustained the award of exemplary damages, and a like award might be made in another trial. In the interests of justice this litigation should be put to rest at the present stage and under the following conditions.

If plaintiff and respondent within ten days after the filing of this opinion files a written consent to a modification of the

judgment, eliminating the award of exemplary damages, the judgment will be modified and affirmed; if such consent be not filed the judgment will be reversed and the purported appeal from the order denying motion for new trial will be dismissed.

PARKER WOOD and VALLÉE, JJ.,
concur.

Order Re Modification of Opinion

PER CURIAM.

Plaintiff and respondent having filed herein a written consent to a modification of the judgment eliminating the award of exemplary damages in accordance with the opinion heretofore filed, the judgment appealed from is modified by striking out the award of \$3,000 as exemplary damages and, as so modified, is affirmed. Each party shall bear his own costs on appeal.



145 Cal.App.2d 279

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Conrad MENDOZA, Defendant and
Appellant.
Cr. 5617.**

District Court of Appeal, Second District,
Division 1, California.

Oct. 23, 1956.

Prosecution for violation of narcotics statute. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence sustained finding that police officers had reasonable cause to believe that defendant, whose house was under surveillance and who had been visited by known narcotic users, may have committed a felony thereby entitling officers to arrest him without a warrant and that evidence obtained by search incidental to arrest was admissible.

Judgment affirmed and appeal from order denying new trial dismissed.

1. Arrest ⇨63(4)

In prosecution for violation of State narcotics statute, evidence was sufficient to sustain finding that police officers had reasonable cause to believe that defendant, whose house while under surveillance had been frequented by known narcotic users, may have committed a felony so as to justify arrest without first procuring a warrant. West's Ann. Health & Safety Code, § 11500.

2. Arrest ⇨63(4)

Probable cause sufficient to justify arrest of defendant without first obtaining a warrant, has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. West's Ann. Pen. Code, § 836, subs. 3, 5.

3. Municipal Corporations ⇨189(1)

Police officers may make calls upon suspects and interview them when they have observed suspicious activities.

4. Arrest ⇨63(4), 71**Criminal Law** ⇨394

In prosecution for violation of State narcotics statute evidence sustained finding that police officers, who had kept defendant's apartment under observation and noticed it being frequented by known narcotic violators and who had arrested persons coming therefrom under the influence of narcotics, and who entered house with landlady's consent, knocked upon door and were told by defendant to come in and thereupon observed defendant under influence of narcotics and saw narcotic materials lying around, entered defendant's apartment with his consent and were justified in making arrest and search without a warrant and therefore evidence was properly admitted.

FOURT, Justice.

The defendant was charged in an information in the county of Santa Barbara with the crime of violation of section 11500 of the Health and Safety Code, a felony, in that he did, on or about, October 14, 1955, unlawfully possess heroin. It was further alleged that the defendant had suffered four prior convictions, namely, robbery in 1938, the Federal Narcotic Act in 1945, each under the name of Ray M. Teran, forgery in 1950, and a violation of section 11721 of the Health and Safety Code in Santa Barbara in 1955. A jury was waived and it was stipulated that the People's case be submitted on the transcript of the preliminary examination. The defendant admitted the four prior convictions. The court found the defendant guilty as charged in the information and sentenced him to the state prison.

Defendant filed a notice of appeal from the judgment and "from the order denying Defendant's motion for new trial." No motion for a new trial was made and consequently no order denying a motion for a new trial was made, and any purported appeal therefrom should be dismissed.

A fair résumé of the facts is as herein set forth. At about 9:30 o'clock p. m., on October 14, 1955, Officer Thompson of the Police Department of Santa Barbara, with other peace officers, went to 117 West Canon Perdido Street in Santa Barbara, and on the second floor level of the house knocked on a door. The defendant Mendoza, whose voice was recognized by Thompson from a previous arrest having to do with narcotics, said, "Who's there? Come in." Upon entering Thompson identified himself and found the room occupied by the defendant and one Sanford. Officer Thompson observed the defendant's eyes and noticed they were contracted and the pupils were almost pinpointed, and there was no reaction to light—he appeared to be in a stupor and had a glassy look. The officer saw a bowl on the dresser, and in it he found two empty capsules, a piece of wadded cotton and a small amount of liquid. The liquid was

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

identified as containing heroin. Thompson was of the opinion that Mendoza was under the influence of a narcotic and placed Mendoza and Sanford under arrest for illegal use of narcotics and being under the influence of narcotics. A search of the room followed and nine capsules containing a whitish powder, identified as heroin, were found.

When the nine capsules of heroin were found the defendant was asked if that was all he had, and he replied, "Yes, that's all I have", and then he was asked if it was "pretty good junk?", and he replied, "It's supposed to be."

On cross-examination, Thompson testified that he had gained entrance to the house by going through the back door which was a private apartment of the landlady and that they had secured her consent so to do. The officer also testified that the door into Mendoza's room was not locked and there was no force applied when they entered.

The officer further testified that prior to the arrest he had had an occasion to watch the house and see known narcotic users frequenting the place. On the day of the arrest he had the house under surveillance from about 2:50 o'clock p. m., and from a vantage point he could see the windows of the front of the house, and further, that he knew and could see the windows of the room occupied by Mendoza; that he saw people walk into the room and saw the defendant arrive at the room with another man. The officer was able to identify the other man who stayed upstairs about fifteen minutes and when he came out he was arrested and examined and found to be under the influence of narcotics. A second man was seen to go to the house, call up to the window, be acknowledged and admitted, and then stayed approximately fifteen minutes. This man was arrested when he left and Officer Crawford testified that he was under the influence of narcotics.

Officer Thompson stated that after observing the establishment occupied by the defendant he entered with the intent of making an arrest for sale and possession of

narcotics. Officer Crawford of the Santa Barbara police department testified that on October 14, 1955, he had observed people leaving the defendant's house under the influence of narcotics. He further stated that when he took Mendoza to the county hospital the next day at Mendoza's request, because he was then and there suffering from withdrawals, Mendoza told him he had a big habit of "ten capsules a day".

The defendant took the stand and testified, in substance, that the narcotics found in the room did not belong to him; that the door was forced open; that he had not injected himself with any heroin on the evening in question. He further stated that he had refused to submit to a doctor's examination on the night in question and that he did not recall seeing Officer Thompson before.

In substance, the defendant first contends that there was ample time within which the officers could have secured a search warrant, there being no emergency or element of surprise involved, and that therefore the search was illegal and the evidence illegally obtained and improperly admitted. Secondly he contends that the permission obtained from the landlady to enter a part of the premises did not extend to that part of the house occupied by the defendant; and thirdly, that there was a conflict in the evidence as to whether Mendoza gave permission to enter his room, and that in any event the officer used a ruse to gain entrance and had the defendant known the knock or inquiry originated with police officers, he would not have said "Come in", and further, that he did not intend to extend permission to other than friends and therefore his permission was not free and voluntary.

We are of the opinion that the contentions of the defendant are without merit.

In *People v. Kilvington*, 104 Cal. 86, 92, 37 P. 799, 801, the court said, with reference to what constitutes reasonable cause:

"There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in

arresting or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C. J., in *Bacon v. Towne*, 4 Cush., Mass., 217: 'There must be such a state of facts,' said he, 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.'

[1] If that rule be applied to this case we believe it is evident that the officer had reasonable cause to believe that the defendant may have committed a felony. The defendant had been convicted in January of 1955 of a violation of section 11721 of the Health and Safety Code, and the officer knew of that conviction. The officer had the house under surveillance for a period of time and he determined during this period that persons who were known narcotic users were entering the house and the room of the defendant. Some of these persons were arrested as they left the place and were found to be under the influence of narcotics at the time. One man went up to the house, called up to the window, was acknowledged, went in and stayed approximately fifteen minutes. Upon his leaving he was arrested and found to be under the influence of narcotics.

[2] Probable cause has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *People v. Brite*, 9 Cal.2d 666, 687, 72 P.2d 122. Knowing what the officers knew and seeing what they saw, it is difficult to see how they could have believed anything other than that the defendant had committed a felony.

In the case of *People v. Maddox*, 46 Cal. 2d 301, 294 P.2d 6, 8, the court said, in reference to the matter of observing known narcotic users:

"Moreover, in the present case Officer Taylor had defendant's home under surveillance for about a month and had observed known narcotics users

frequenting it, and the information Davis gave him before the arrest was reasonable cause for the arrest."

Penal Code section 836 provides in part as follows:

"A peaceofficer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

* * * * *

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

* * * * *

"5. At night, when there is reasonable cause to believe that he has committed a felony."

We believe that the officers in this case had good cause to proceed under either subdivision 3 or 5 above quoted.

[3] It is the rule that officers may make calls on suspects and interview them when they have observed suspicious activities. *People v. Michael*, 45 Cal.2d 751, 754, 290 P.2d 852; *People v. Simon*, 45 Cal.2d 645, 650, 290 P.2d 531. When the officers were invited into the room they saw enough then and there to confirm their belief that a felony had been, and was being committed by the defendant Mendoza.

It was apparently obvious to the officer that the defendant was under the influence of narcotics, and as said in *People v. Jauriqui*, 142 Cal.App.2d 555, 298 P.2d 896, 900:

"A narcotic addict is defined as a person who unlawfully uses or is addicted to the unlawful use of narcotics, Health and Safety Code, § 11009. Any person convicted of being an addict is guilty of a misdemeanor. It would appear that, under the Code, addiction is a chronic rather than an ordinary acute offense, and one may be guilty of being a 'drug addict' at any time and place he is found so long as the character remains unchanged, although then and

there innocent of any act demonstrating his character."

As to the contention that the officers had ample time and should have secured a search warrant, a complete answer is set forth in the case of *People v. Sayles*, 140 Cal.App.2d 657, 295 P.2d 579, 581:

"When entering the house Officer Hill acted quickly in order to forestall destruction of evidence that he reasonably believed to be there. He testified: 'At the time I was—my main purpose was getting in there and getting to this particular defendant before he could get to the bathroom and flush whatever evidence he had down the toilet, which is quite common. We meet that quite often. By the time we get to the defendants they are usually near a bathroom and they go to a bathroom and flush it down the toilet.' He had a right to make a forcible entry for the purpose of an immediate arrest. See *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6; *People v. Martin*, 45 Cal. 2d 755, [763,] 290 P.2d 855. This carried with it a right to search the person and premises of defendant.

"The claim that failure to procure a search warrant, given reasonable time so to do, precluded a search as an incident to the arrest, was rejected by the Supreme Court in *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40, 47. The court there said: 'Defendant unavailingly argues that here the police officers had ample time to procure a search warrant and therefore such warrant was required in order to validate the search and seizure of the incriminating evidence at the time of his arrest. *Trupiano v. United States*, 334 U.S. 699, 708, 68 S.Ct. 1229, 92 L.Ed. 1663. In *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, it was held that a search of the defendant's premises incident to his lawful arrest at those premises was not unreasonable.' In the cited case of *United States v. Rabinowitz*,

339 U.S. 56, 65-66, 70 S.Ct. 430, 435, 94 L.Ed. 653, it was observed: 'It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.'"

[4]. There is no merit in the contention that the consent of the landlady to enter a part of the house did not give the officer a right to go upstairs to the defendant's room. The defendant told the officers, "Come in", and the officers did so. The officers thereupon had the consent to enter the house and they were invited into the defendant's room. See *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469; *People v. Caritativo*, 46 Cal. 2d 68, 292 P.2d 513.

On the record before us we have concluded that the officers' testimony constituted sufficient evidence that the entry

into the room was made with the consent of the defendant—having lawfully entered and seeing what they saw, the officers were perfectly proper in making the arrest and the search. The evidence was, therefore, properly received.

The judgment is affirmed and the purported appeal from the "order" denying a motion for a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.



145 Cal.App.2d 242

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert Donald HAMM, Defendant and
Appellant.

Cr. 5692.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Defendant was convicted in the Superior Court of Los Angeles County, LeRoy Dawson, J., of a narcotics offense and of a prior felony conviction, and he appealed. The District Court of Appeal, Shinn, P. J., found evidence to support the narcotics conviction but none to support the adjudication that defendant had suffered a prior conviction.

Reversed and remanded with directions.

1. Poisons ☞9

Conviction for wilful, unlawful and felonious possession of a preparation of heroin was sustained by evidence. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ☞1202(3)

Defendant's admission, on cross-examination, that he had previously been con-

victed of a felony was available to people for purpose of impeachment only, and could not serve as predicate for adjudication that defendant had suffered prior conviction.

Robert Donald Hamm; in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Robert Donald Hamm was charged with the wilful, unlawful and felonious possession of a preparation of heroin, Health & Safety Code, § 11500, and with a prior felony conviction, to wit, attempted robbery. Defendant denied the former conviction. Trial was to the court and the evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Defendant was represented by counsel. The court found defendant guilty and also found the charge of prior conviction to be true. He appeals from the judgment and an order denying him a new trial.

There was evidence of the following facts: At about 7:30 p. m. on March 1, 1956, plain-clothes officers White and Northrup were driving northward in an unmarked car on Towne Avenue in the City of Los Angeles. Officer White testified that it was dark and that the only artificial lighting came from the car headlights. He observed defendant and one Rollins walking southward on Towne. Defendant was nearest the curb. His attention was directed to the men by defendant's apparent nervousness. As the car approached, White saw defendant make a backhand flipping motion with his right hand and noticed a light object leave his hand. Rollins did not make a throwing motion. White got out of the car and discovered a cellophane bundle lying on the parking strip in the dirt next to the curb. The bundle was beside a parked car about three feet from where defendant was standing when he threw it. Both men's arms were examined; old needle marks were

found on Rollins' arms; none was found on defendant. Officer White placed the bundle in an envelope, sealed it and sent it to the central property police officer where it was examined the next day by Jay Allen, a police chemist. Allen testified that he opened the envelope and found it to contain seven paper bindles, each one holding a quantity of powder. He analyzed the powder and determined it to be heroin.

Defendant, testifying in his own behalf, stated that while he and Rollins were walking southward on Towne Avenue, they were stopped by two plain-clothes policemen. The officers asked him if he was a narcotics user. He told them he had been but had quit it. The officers then examined both men for needle marks. They found none on defendant, but one of the officers accused defendant of being under the influence of narcotics. The officers were about to let them go when one suggested that defendant and Rollins might have dropped something. The officer searched the area with a flashlight and discovered a small package by the curb. Defendant denied that either he or Rollins had thrown the package away. On cross-examination, he admitted the prior conviction, but it was conceded that he had not served a term in prison.

Lovell Rollins, testifying on behalf of defendant, admitted being a narcotics user, but stated that defendant did not have the heroin in his possession.

Upon application of defendant for appointment of counsel, this court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals. The record on appeal was examined by a member of the committee and a report was made to the court that in the attorney's opinion no meritorious ground for appeal existed and that the filing of a brief would be unjustified. Defendant was duly so advised and his time to file a brief was substantially extended. No brief has been filed. In accordance with our practice, we have made an independent study of

the record. See *People v. Logan*, 137 Cal. App.2d 331, 290 P.2d 11.

[1] The evidence supports the judgment. There was testimony justifying a reasonable inference that Hamm had actual dominion and control over the heroin, and his knowledge that the package was contraband was sufficiently shown by his attempt to dispose of it when he feared apprehension. *People v. Tennyson*, 127 Cal.App.2d 243, 273 P.2d 593 and cases cited.

[2] The People produced no evidence of defendant's former conviction. He was questioned on cross-examination as follows:

"Q. Have you ever been convicted of a felony, sir? A. Yes, sir, I have.

"Q. What felony? A. Robbery.

"Q. Really it was attempted robbery, wasn't it? A. Yes, sir.

"Q. Rather than robbery? A. Yes.

"Q. You never served a term in the Federal or State prison for it? A. No, sir."

This admission of a former conviction was relevant only to the matter of defendant's credibility and was available to the People for the purpose of impeachment only. *People v. Carrow*, 207 Cal. 366, 368-369, 278 P. 857; *People v. Batwin*, 120 Cal.App.2d 825, 828, 262 P.2d 88. The adjudication that defendant had suffered a prior conviction was without support in the evidence.

The judgment and order are reversed and the cause remanded to the trial court with direction to that court that if, within twenty days after the filing therein of the remittitur from this court, the district attorney shall apply for an order dismissing that portion of the information which charges defendant with having been convicted of a felony prior to the commission of the offense under section 11500 of the Health and Safety Code charged therein, and said application be granted, and the court shall pronounce judgment and sentence upon defendant, thereupon such

judgment shall stand affirmed. If the district attorney shall not within said period of twenty days make said application, the trial court shall grant appellant a new trial as to the accusation of the former conviction only.

PARKER WOOD and VALLÉE, JJ., concur.



145 Cal.App.2d 374

Mila D. TODD, Executrix of the Estate of
Newton M. Todd, Deceased, Plaintiff
and Respondent,

v.

Eldred L. VESTERMARK and Virginia Vestermark, husband and wife; James R. Burnett and L. Doris Burnett, husband and wife, Defendants,

Eldred L. Vestermark and Virginia Vestermark, husband and wife, Appellants.

James R. BURNETT and L. Doris Burnett, husband and wife, Plaintiffs and Respondents,

v.

Eldred L. VESTERMARK and Virginia Vestermark, husband and wife, Defendants and Appellants.

Civ. 21653, 21654.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1956.

Rehearing Denied Nov. 19, 1956.

Vendors brought quiet title action against purchasers. A trust deed lienor brought separate action against both vendors and purchasers to have it adjudged that property was subject to lien of first trust deed, for foreclosure of same, and for other appropriate relief. The Superior Court, Los Angeles County, Harold C. Shepherd, J., entered judgment quieting the vendors' title against the purchasers and another judgment granting the prayer

of the trust deed lienor, and ordering her trust deed foreclosed, and appeals were taken from each judgment. The District Court of Appeal, Ashburn, J., held that escrow agent, authorized to deliver purchase money upon filing for record of instruments entitling agent to procure title insurance, could not accept personal assurance and liability of title insurance company that title was in shape for writing of policy, and held that where embezzlement of funds by escrow agent occurred while trust deed lien against property was outstanding, loss fell upon purchasers.

Affirmed.

1. Escrows ⇨9

Terms and conditions of an escrow agreement must be strictly performed.

2. Escrows ⇨9

Doctrine of substantial performance is inapplicable to escrow agreements.

3. Escrows ⇨8(1)

Escrow holder is agent for both parties at all times prior to performance of conditions of escrow, but when that event transpires, nature of such dual agency changes to an agency not for both, but for each of parties to said transaction in respect to those things placed in escrow, to which each has thus become completely entitled.

4. Escrows ⇨12

When conditions of escrow have been fully performed, title passes eo instanti, and recordation of documents merely operates to evidence passing of title previously accomplished.

5. Escrows ⇨14(1)

A delivery or recordation by or on behalf of escrow holder prior to full performance of terms of escrow is a nullity, and no title passes.

6. Escrows ⇨8(1)

If escrow holder embezzles funds deposited in escrow and does so before moment for closing arrives, the loss must be borne by him who deposited it, because it is still his money.

7. Escrows ⇨5

Where escrow instructions of vendors and purchasers were on single printed form, signed separately but contemporaneously by parties, they were to be read and considered together, and if, when so read and considered, they contained all of necessary constituent elements to make contract, they were to be regarded as a contract in writing between the parties.

8. Evidence ⇨20(1)

It is a matter of common knowledge that, in Long Beach, policies of title insurance are almost universally demanded by purchasers, and that escrow agent which cannot write such insurance will have to actually close through a title insurance company so that title can be brought down and escrowed instruments recorded simultaneously, or substantially so.

9. Escrows ⇨3, 4

Where escrow agent could not write title insurance and it was accordingly provided that closing of escrow would be handled through title insurance company, and separate escrow for financing transaction also contemplated closing through title insurance company, title insurance company was subagent of escrow agent for purpose of receiving from lender money loaned to purchasers, and when title company received funds from lender, the escrow agent, in contemplation of law, had funds in hand.

10. Escrows ⇨8(1), 9

Escrow agent authorized to deliver purchase money upon filing for record of instruments entitling such agent to procure title insurance could not accept personal assurance and liability of title insurance company that title was in shape for writing of policy; and where embezzlement of funds by escrow agent occurred while trust deed lien against property was outstanding, loss fell upon purchasers.

11. Escrows ⇨8(1)

Purchase money could not be paid to lienor by escrow agent until it became payable to vendors, who were using it to clear their title, and where embezzlement by in-

solvent escrow agent occurred prior to time when purchase money became payable to vendors, loss could not fall upon lienor, who had authorized escrow agent to use trust deed transmitted to agent only when agent could deliver sum in payment of debt secured thereby.

Roy J. Brown, Long Beach, for appellants.

James J. Baker and Alfred D. Williams, Long Beach, for respondent Todd.

Denio, Hart, Taubman & Simpson and Roger W. Young, Long Beach, for respondents Burnett.

ASHBURN, Justice.

An insolvent escrow holder embezzled moneys deposited with it as soon as they were received. Who must stand the loss—vendor, vendee, holder of trust deed upon the subject land?

On August 25, 1954, plaintiffs James R. Burnett and wife entered into an escrow with defendants Eldred L. Vestermark and wife, depositing with Broadway Escrow of Long Beach (hereinafter referred to as Broadway) instructions appropriate to consummating a sale by the Burnetts to the Vestermarks of certain property owned by the Burnetts and situated on Pomona Street in the city of Long Beach. The property was subject to the lien of a trust deed held by Mila D. Todd, as executrix of the estate of Newton M. Todd, deceased. She deposited in escrow a demand for the amount necessary to pay her note in full. The escrow holder could not write title insurance and it was contemplated that the closing of escrow would be handled through Title Insurance and Trust Company of Los Angeles so that a policy of title insurance could be obtained for the protection of the buyer. In order to finance the deal the Vestermarks borrowed \$7,500 from Beneficial Standard Life Insurance Company, and to that end established a separate escrow with Broadway; it also contemplated closing through Title Insurance and Trust

Company. The instructions provided that the money from this loan was to be used in the Burnett escrow.

On September 21, 1954, Broadway requested Title Insurance to file and record all papers then in hand. This request was carried out on September 22, 1954. The title company, having previously received from Beneficial Standard Life Insurance Company the proceeds of its loan to the Vestermarks, transmitted the net amount of \$6,421.71 to Broadway, which received the title company check that same day, September 22nd. The check was deposited in a Long Beach bank on the 23rd to the credit of Broadway and the proceeds immediately embezzled by its president. The evidence shows that the bank balance in its trustee account was \$1.98 on September 20th. Its business was closed by action of the corporation commissioner on October 8th.

At the time of recordation of the documents by the title company on September 22nd, it did not have in hand any request for reconveyance of the Todd trust deed; it had been requested by Broadway to file the papers and "hold for reconveyance to come." Pursuant thereto it recorded all papers on the 22nd, although it obviously could not clear title at that time because of the continued existence of the Todd lien. It accepted the business risk involved and at some time after September 23rd issued a policy of title insurance dated September 22, 1954, showing property vested as of that date in the Vestermarks free of the Todd lien. Actually it did not receive Mrs. Todd's request for reconveyance until September 30th, and the document was not recorded until October 4th.

The Burnetts brought an action against the Vestermarks in the familiar form of quiet title. Mrs. Todd brought an action against the Burnetts and the Vestermarks to have it adjudged that the property is subject to the lien of her first trust deed, that it be foreclosed, and other appropriate relief granted. The trial court entered judgment quieting the Burnett title against

the Vestermarks, and another judgment granting the prayer of Mrs. Todd and ordering her trust deed foreclosed. Appeal having been taken from each judgment, the cases are presented here on a single set of briefs.

[1-6] In order to determine whose money was embezzled by Broadway on September 23, 1954, a careful scrutiny of the escrow instructions is required, and it must be made in the light of certain settled legal principles. It is established in this state that the terms and conditions of an escrow must be strictly performed. *Shreeves v. Pearson*, 194 Cal. 699, 711, 230 P. 448; *Los Angeles City High School Dist. of Los Angeles County v. Quinn*, 195 Cal. 377, 383, 234 P. 313; *McCarthy & Myer v. Bank of Italy*, 68 Cal.App. 166, 170, 228 P. 724; *Watts v. Mohr*, 86 Cal. App.2d 256, 262, 194 P.2d 758. The doctrine of substantial performance does not apply. *Watts v. Mohr*, supra, 86 Cal. App.2d at page 262, 194 P.2d at page 761; 19 Am.Jur. § 20, p. 438. The escrow holder is agent for both parties at all times prior to performance of the conditions of the escrow, but when that event transpires " * * * the nature of this dual agency changes to an agency not for both but for each of the parties to said transaction in respect to those things placed in escrow, to which each has thus become completely entitled." *Shreeves v. Pearson*, supra, 194 Cal. 699, 707, 230 P. 448, 451; see also, *Greenzweight v. Title Guarantee & Trust Co.*, 1 Cal.2d 577, 582, 36 P.2d 186. When the conditions have been fully performed, title passes *eo instanti* and recordation of documents operates to evidence the passing of title previously accomplished. 18 Cal. Jur.2d § 24, p. 341, § 14, p. 325; *Holman v. Toten*, 54 Cal.App.2d 309, 313-314, 128 P.2d 808. On the other hand, a delivery or recordation by or on behalf of the escrow holder prior to full performance of the terms of the escrow is a nullity. No title passes. *Hildebrand v. Beck*, 196 Cal. 141, 147, 236 P. 301, 39 A.L.R. 1076; *Greenzweight v. Title Guarantee & Trust Co.*, su-

pra, 1 Cal.2d 577, 581, 36 P.2d 186; Drinkwater v. Hollar, 6 Cal.App. 117, 121, 91 P. 664; see also, 30 C.J.S., Escrows, § 11, p. 1211. If the escrow holder embezzles funds deposited in the escrow and does so before the moment for closing arrives, the loss must be borne by him who deposited it, because it is still his money. Hildebrand v. Beck, supra, 196 Cal. at page 146, 236 P. at page 303; 18 Cal.Jur.2d § 18, p. 331.

[7] The instant instructions of the Burnetts and Vestermarks are on a single printed form, buyers and sellers signing separately but apparently having done so contemporaneously. "These instructions, having been signed on the same day and as a part of the same transaction, are to be read and considered together. When so read and considered, if they contain all of the necessary constituent elements to make a contract, they are to be regarded as a contract in writing between the parties." Neher v. Kauffman, 197 Cal. 674, 683, 242 P. 713, 717; to the same effect are Thorman v. David, 199 Cal. 386, 390, 249 P. 513; 18 Cal.Jur.2d § 29, p. 354.

The buyers' instructions of the Vestermarks say that they will hand Broadway the sum of \$6,000, together with necessary notes and other instruments, "which you are authorized and instructed to use and deliver provided instruments have been filed for record entitling you to procure assurance of title in the form of a Joint Protection Policy of Title Insurance issued by Title Insurance and Trust Company, Los Angeles, California, in its usual form," showing title vested in the buyers subject to a trust deed in the sum of \$1,300 to be made by them as a part of the purchase price. The instructions of the Burnetts as sellers say: "The foregoing instructions and conditions are hereby approved and accepted in their entirety and concurred in by me." They agree to supply any funds, notes and other instruments necessary to carry out their end of the instructions, "which you are authorized to use and deliver provided you hold for my account any instruments accruing to me and the sum

of \$6,000.00." Also, "Recordation of any instruments delivered through this escrow, if necessary or proper in the issuance of the policies of title insurance called for, is authorized, and in connection therewith funds and/or instruments received in this escrow may be delivered to or deposited with the Title Insurance and Trust Company or the Land Title Insurance Company, for the purpose of complying with the terms and conditions of these escrow instructions.

"You are also authorized to open a sub-escrow with the Title Insurance and Trust Company or the Land Title Insurance Company for deposit of the funds accruing in this escrow from a loan or loan which proceeds are to be used toward the financing of this property. * * * Pay demand for release of encumbrance, now of record."

[8,9] The trial judge expressed the opinion that Broadway did not hold any funds for the sellers at the time the escrow was closed because the title company check which it received on the 22nd was not cashed until the 23rd. We do not share this view. The instructions recognize and effectuate a matter of common knowledge, namely, that in this community where policies of title insurance are almost universally demanded by the buyer, the escrow agent which cannot write such insurance must actually close through a title insurance company so that title may be brought down and escrowed instruments recorded simultaneously, or substantially so. Specific recognition of this fact appears in the quoted paragraph concerning the opening of a sub-escrow with Title Insurance and Trust Company. The money which was loaned to the buyers by Beneficial Standard Life Insurance Company was handled in this manner, being paid to Title Insurance and Trust Company. It was the sub-agent of Broadway for that purpose, and when it, the Title Company, received the money Broadway, in contemplation of law, had it in hand. This occurred before the documents were recorded or the sale escrow otherwise closed. The fact that this sum

of \$6,421.71 was not transferred from the loan escrow to the sale escrow on the books of Broadway, the embezzler, is immaterial. If the fact that the check was not cashed before recordation were the only defect in the closing of the escrow, it would have to be held that Broadway, as escrow holder, had in hand money belonging to the sellers and that they had become entitled to it through performance of all the terms of the escrow, but the status of the Todd lien gave the situation a substantially different complexion.

[10] The buyers' instructions authorize the escrow holder to use and deliver cash, notes and other instruments, "provided instruments have been filed for record entitling you to procure assurance of title in the form of a Joint Protection Policy of Title Insurance." This does not say, and cannot fairly be construed to mean, that the escrow holder can accept the personal assurance and liability of Title Insurance and Trust Company that the title is in shape for the writing of a policy. The buyer must be "entitled" to procure the same, and that right must be based upon instruments filed for record which would *per se* entitle the buyer to a policy of insurance. This event had not occurred. The authorities above cited forbid substitution of the title company's assurance that title is or will be good when the evidence shows that that was not so at the time of the closing. The buyer had exacted good title which must exist at the moment of closing. It did not exist and therefore the closing was premature, title did not pass to him though the deed and other instruments had been recorded, and the money was still his money when embezzled by Broadway.

The sellers' instructions provide that their money and instruments may be used and delivered "provided you hold for my account any instruments accruing to me and the sum of \$6,000.00." The closing of the escrow being premature, Broadway did not

then hold any instruments accruing to the sellers, nor did it hold the sum of \$6,000 for them. *Hildebrand v. Beck*, supra, 196 Cal. 141, 145, 236 P. 301, 39 A.L.R. 1076. No question of waiver is here presented, for no opportunity for a waiver was afforded to either party. The closing was wrongful and the money which was embezzled belonged to the buyers, *Vestermark*.

[11] What about Mrs. Todd's trust deed lien? She was not a party to the escrow. Upon request from Broadway to submit a demand and pertinent papers looking toward payment of that loan, Mrs. Todd's attorneys on September 20th forwarded to Broadway the note, trust deed and a request for reconveyance, concluding their letter of transmittal as follows: "You are authorized to use these instruments when you can deliver to us the sum of \$1391.13 plus interest at 6% from July 10, 1954." As above shown, the money in the escrow at the time of actual closing was that of the *Vestermarks* and there was no authority to pay it to Mrs. Todd, for the moment of proper closing of the escrow had not arrived. That money could not be paid to Mrs. Todd until it became payable to the sellers, *Burnett*, who were using it to clear their title. The *Burnett* instructions to "Pay demand for release of encumbrance" could not be carried out, for the money did not belong to the *Burnetts*. Hence, the escrow company was not in position to deliver to Mrs. Todd the sum she demanded, and the recordation of her request for reconveyance was improper and ineffective.

By its judgments the trial court quieted title of the *Burnetts* against all claims of the *Vestermarks*, determined that the Todd trust deed continues as a valid lien on the property and ordered it foreclosed. No complaint is made as to the form of either judgment.

Both judgments are affirmed.

MOORE, P. J., and FOX, J., concur.

145 Cal.App.2d 341

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joe Arthur WASHINGTON, Defendant and
Appellant.

Cr. 5612.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Prosecution for violation of the Dangerous Weapons Control Law. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment of conviction and denied defendant's motion for a new trial and defendant appealed. The District Court of Appeal, Shinn, P. J., held that trial court's remarks to the jury after it had reported its inability to agree upon a verdict, asking them to deliberate for a reasonable time longer and telling them that if they could not then agree they would be discharged, did not amount to an attempt to coerce a verdict and did not exceed the bounds of permissible comment upon the issue to be decided, and were not so prejudicial as to require a new trial.

Judgment and order affirmed.

Criminal Law §§865(1), 1174(1)

In prosecution for violation of the Dangerous Weapons Control Law, trial court's remarks to the jury after it had reported its inability to agree upon a verdict asking them to deliberate for a reasonable time longer and telling them that if they could not then agree they would be discharged, did not amount to an attempt to coerce a verdict and did not exceed the bounds of permissible comment upon the issue to be decided, and were not so prejudicial as to require a new trial. West's Ann.Pen.Code, §§ 1237, 12021.

Charles F. Legeman, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was accused of violating the Dangerous Weapons Control Law, Pen. Code, § 12021, in that he willfully, unlawfully and feloniously had in his possession and under his custody and control, a .38 Special Smith & Wesson chrome-plated revolver, capable of being concealed upon the person. He had previously been convicted of assault with intent to ravish, a felony, in Alabama, and is still on parole for that offense. The trial was to a jury and after a verdict of guilty the court suspended proceedings and granted probation for a period of five years, the first two years to be spent in the county jail. Defendant appeals from the judgment, Pen.Code; § 1237, and the order denying him a new trial. The sole contention raised on the appeal is that the court erred prejudicially in making certain remarks to the jury after it had reported its inability to agree upon a verdict.

Roosevelt Harper, a witness for the People, testified that he had been at defendant's home during the early morning hours of June 18, 1955 and returned there about 5:30 a.m. to get a camera which he had left by mistake. He then walked to his own home and as he passed from the rear to the front of his house he saw defendant sitting in his own car nearby. Defendant called him over to the car. Defendant accused him of stealing \$65 which he denied. He testified that he saw a revolver in a holster on the seat and that defendant picked up the gun and held it in his hand. Harper then told defendant that he would ask his wife if she would write a check for the \$65, went into his house and called the police. After telephoning he returned to the car and told defendant to get rid of the gun. Defendant said "what gun" and suggested that Harper was drunk. The police officers who answered Harper's call searched both men, but found no gun.

They told Harper that he may have been mistaken and defendant started to drive away.

Officer Bignell testified that he and his partner, Officer Chapman, arrived at about 6 a.m. They searched the men and the car but did not find the gun; that shortly after defendant began to drive away, he looked in the bushes on the west side of Harper's house and found the gun and holster. He then stopped defendant and placed him under arrest.

Officer Chapman stated that he had a conversation with defendant at the police station and that defendant admitted hiding the gun in the bushes. Detective Inspector Harvey testified to a similar conversation. A fingerprint expert testified that a fingerprint pattern found on the gun was the same as one taken from defendant two days after the arrest. It was stipulated that the gun belonged to a George Grey, who resided in the same house as defendant.

Reverend Lawrence Rodgers, defendant's pastor, testified to his good reputation for truth, honesty, and integrity. He stated that on the day following the arrest Harper told him that he had not seen defendant with the gun. This was denied by Harper on cross-examination.

Defendant, testifying in his own behalf, denied he had had a gun in his possession, denied having had a conversation with Officer Chapman, but admitted having had a conversation with Inspector Harvey. During the conversation with Harvey the gun was present and defendant stated that it was handed to him.

The jury retired at 10:45 a.m. and returned at about 3 p.m. to have the information and the testimony of Officer Chapman read. It returned again at 4:12 p.m. and the foreman stated: "Your Honor, we have agreed that we are a hung jury with a nine to three count. Further debate, apparently, seems to be useless to the members of the jury." The court then asked whether the jurors were deliberating in a friendly manner, and upon ascertaining that they

were, told them that they had not been out long enough for him to discharge them because of their inability to agree. He asked the foreman whether there was a chance to reach a verdict within a reasonable time and the foreman replied: "Your Honor, before we came in at this time we discussed this matter. * * * It was the opinion of all 12 of us that further discussion would not change this vote even though we are, you might say, listening to each other." A juror then asked the court whether, if defendant were merely living in a house with someone who had a gun, that would constitute possession. The court replied that the question was speculative, that it would be for the jury to decide, but that he did not think that would be possession. He told the jurors that if they did not believe that defendant had the gun in his possession on the morning of June 18th, then the evidence of defendant's fingerprint on the gun would not be sufficient to convict. He stated that: "In other words, it boils down to this, That unless you believe and are convinced beyond a reasonable doubt that defendant had possession of that gun, possession and custody and control of that gun * * * that * * * morning, unless you believe that beyond a reasonable doubt you ought to find him not guilty. * * * It boils down to Leigh [the street on which the car was parked] on that Saturday morning. You either believe that or you don't believe it. If he had possession, control and custody there—he either did or didn't, and that is your issue."

A juror asked the court whether mere knowledge that the gun was hidden in the bush would constitute possession. The court replied that: "He either put it in the bush or had possession or somebody else put it in the bush and he didn't have possession. * * * I don't see how you can believe both ways. He either had possession or he didn't. I don't think the gun walked over there in that bush. * * * So you can take your choice who put the gun in the bush or who had possession of

the gun. It is a rather simple issue; it is just a question of what you believe, that is all."

The foreman told the court that the jury was divided as to who put the gun in the bush and the court stated: "I am certainly not going to force a verdict. I will never do that. I will never just hold a jury so long that I am going to force a verdict because it might be a bad verdict. * * * It isn't legal to do that, but I do feel that a little bit more deliberation on your part might bring a verdict and if it doesn't, why then you should be discharged. * * * I think you ought to deliberate a little longer and see if there is any change." A juror then said he thought that the jury ought to deliberate a while longer. The court stated: "We are all reasonable people * * * and here is a rather simple issue to decide and of course there is room for a difference of opinion * * * and you could be absolutely sincere and believe two people could sincerely differ as to their belief and opinion here." One of the jurors then remarked that he didn't think the difference of opinion was so deep that it couldn't be settled.

The colloquy between the court and jury was unduly extended. It lasted for 23 minutes. We have given a fair summary of it, omitting nothing of which complaint could justly be made. The jury retired at 4:35 p.m. and returned at 5:42 with a guilty verdict.

We said in *People v. Crowley*, 101 Cal. App.2d 71, 75, 224 P.2d 748, 751: "It is well settled that a conviction will not be allowed to stand if the court has made remarks to the jurors which might reasonably be interpreted as indicating the court's belief of the guilt of the accused, and if it also appears upon the entire record that the infringement upon the rights of the defendant resulted in a miscarriage of justice. Under our system of law no reviewing court could hold otherwise. These questions must be answered on the factual basis of the individual case. The courts

have not hesitated to reverse convictions where trial judges have urged that an agreement be reached after learning that a small minority of the jurors were holding out for acquittal. [Citing cases.] It is manifestly true that insistence upon an agreement with knowledge that the jurors favoring acquittal constitute a small minority, is an indication of the court's belief that the verdict should be against the accused. The jurors would naturally suppose the court's remarks to be addressed to those who were in the minority. * * * [W]hen the court gains information as to how the jurors are divided greater care should be exercised in order that the court's remarks may not be taken as an indication that the verdict should be one way or the other. However, the forbidden result can be accomplished without its having been disclosed how the jurors are divided upon the question of guilt. The jurors know how they are divided, and the minority, especially if few in number, would be the ones to feel the weight of the pressure."

With these cautionary principles in mind, we have concluded that the statements of the court were not prejudicial. *People v. Crowley*, supra, 101 Cal.App.2d 71, 224 P.2d 748, and other cases relied upon are not in point. It is unnecessary to point out the particulars in which they are distinguishable. The jurors had deliberated for a few hours when they reported their disagreement. The court ascertained on several occasions that they were discussing the case in a friendly manner and that although they were deadlocked, they were not averse to further deliberation. The court told them that he would not force a verdict because a forced verdict is generally a bad verdict. He asked them to deliberate for a reasonable time longer and told them that if they could not then agree they would be discharged. There was no attempt to coerce a verdict, either by a threat to lock up the jury for the night, by insistence upon a verdict, or reference to the expense of another trial.

The court's remarks were fair to the defendant and did not exceed the bounds of permissible comment upon the issue to be decided. Defendant did not object to any of the court's remarks and we are of the view that he had no valid reason for objecting. The evidence, though in conflict, supports the verdict.

The judgment and order are affirmed.

WOOD and VALLÉE, JJ., concur.



145 Cal.App.2d 231

Mary Helen GORDON, Plaintiff and
Respondent,

v.

James C. GORDON, Defendant and
Appellant.
Civ. 21590.

District Court of Appeal, Second District,
Division 3, California.
Oct. 22, 1956.

Action for divorce by wife wherein the husband filed a cross complaint. From an order of the Superior Court of Los Angeles County, Philbrick McCoy, J., granting plaintiff a new trial, the defendant appealed. The District Court of Appeal, Shinn, P. J., held that action of trial judge was proper.

Order affirmed.

1. Trial ⚖️6(1)

The statute requiring service of notice of trial, and when the adverse party fails to appear, proof of service is mandatory. West's Ann.Code Civ.Proc., § 594, subd. 1.

2. New Trial ⚖️20

Failure to give five days' notice contemplated by the statute of trial is a proper

ground for the granting of a new trial, either on the theory that there has been an error in law or on the theory that the lack of notice constituted an irregularity in the proceedings of the court by which either party was prevented from having a fair trial. West's Ann.Code Civ.Proc., §§ 594, subd. 1, and 657, subds. 1, 7.

3. Divorce ⚖️151

In wife's action for divorce where the husband cross complained and default judgment was rendered for the husband for failure of the wife to appear, wife's motion for new trial on the ground that she was not served with written notice of trial and that she had no actual notice thereof, was properly granted. West's Ann.Code Civ.Proc., §§ 594, subd. 1, 657, subds. 1, 7, 284, subd. 1, 285.

4. Divorce ⚖️184(1)

When a trial judge in a proper proceeding vacates a judgment of divorce he has rendered in ignorance of material facts which he believes the party had a duty to disclose to him and which, if known to him, would have caused him to refrain from ordering the judgment, the appellate court will not question his action.

5. Divorce ⚖️194

On an appeal from an order granting plaintiff a new trial in an action for divorce, appeal was deemed frivolous and penalty by way of costs of \$100 was awarded.

Charles T. Lester, Altadena, for appellant.

Caryl Warner, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal from an order granting plaintiff a new trial in an action for divorce.

On June 10, 1954, plaintiff, through her then attorney A. A. Goldstone, filed an action for divorce charging defendant with extreme cruelty. She sought all the com-

munity property, reasonable support for herself and their minor son, and custody of the child. Defendant answered and cross-complained, likewise seeking custody of the child and all the community property. Plaintiff answered the cross-complaint.

On September 16, 1954, Lester, defendant's counsel, filed a memorandum for setting for trial, which was served by mail on attorney Goldstone. By minute order entered December 27, 1954, the case was set for trial on April 7, 1955. Notice of trial was served by mail on attorney Goldstone on December 29, 1955 and filed on December 31, 1955. Upon receipt of the notice, Goldstone notified attorney Lester that he no longer represented plaintiff, that plaintiff was being represented by Jerry Geisler, and that he had forwarded the notice to Geisler's office. On January 3, 1955, attorney Lester learned from Geisler's office that Mr. Geisler was not representing plaintiff and that she was appearing in propria persona. Two substitutions of attorneys, from Goldstone to Geisler, and from Geisler to plaintiff, were filed on December 31, 1954, but neither was served on attorney Lester.

On March 25, 1955, attorney Lester caused another notice of trial to be mailed to plaintiff, in propria persona, at 300 North Garfield, Alhambra, California, which was the business address of plaintiff's mother's employer. An affidavit of service by mail was filed on April 7th, the case was called for trial in the master calendar department, and plaintiff having failed to appear, it was transferred to the short cause department to be heard as a default matter. Attorney Lester informed the court below that "although I gave notice of trial, nobody appeared." The court thereupon proceeded to hear evidence on defendant's cross-complaint, and at the conclusion of the testimony granted defendant an interlocutory decree, awarding him the community property, including all real and personal property, and custody of the two year old child. The decree recites, *inter alia*,

that plaintiff had been duly served with notice of trial, but did not appear, either in person or by counsel.

Subsequently thereto, plaintiff, through her present counsel, made a motion for a new trial on the grounds that she was not served with a written notice of trial and that she had no actual notice of the trial of the cause on April 7, 1955. The motion was granted.

By affidavit of plaintiff filed in support of her motion she averred that she substituted attorney Goldstone out of the case on December 15, 1954 (prior to the mailing of the first notice of trial) and that thereafter he was no longer her attorney of record. She also averred that she never received the second notice of trial which was allegedly mailed to the Alhambra address and that her mother told her that such notice was never received there. Her mother averred that had a notice of trial been mailed to that address, she would have received it and forwarded it to plaintiff, and that no notice of trial was ever mailed to that address. In this connection, plaintiff states in her brief that attorney Lester admitted at the hearing of the motion for a new trial that the second notice of trial had been returned undelivered by the United States mail and that attorney Lester exhibited the returned envelope to the court; he also admitted that attorney Goldstone told him that his substitution out of the case had occurred prior to receipt of the first notice of trial. These statements are not contradicted by defendant in his reply brief.

The counter-affidavit of attorney Lester set forth the chronology of events to which we have already referred. It also stated that the court had granted defendant the right to see his son on alternate Sundays, that on plaintiff's refusal to comply with the order a bench warrant was issued on January 4, 1955, and that the true reason for plaintiff's failure to appear at the trial was to avoid service of the warrant.

[1,2] The sole question involved on this appeal is whether the court abused

its discretion in granting the motion. Section 594, subdivision 1 of the Code of Civil Procedure requires the service of notice of trial and when the adverse party fails to appear, proof of service. Compliance with this section is mandatory. *Simon v. Tomasini*, 97 Cal.App.2d 115, 217 P.2d 488; *Lapique v. Kelley*, 82 Cal.App. 586, 587, 256 P. 229; *Beal v. Superior Court*, 78 Cal.App. 33, 247 P. 922. And failure to give the five days' notice contemplated by the statute is a proper ground for the granting of a new trial, either on the theory that there has been an "error in law", *Smith v. Halstead*, 88 Cal.App. 2d 638, 641, 199 P.2d 379; Code Civ. Proc. § 657, subd. 7, or on the theory that the lack of notice constituted an "Irregularity in the proceedings of the court * * * by which either party was prevented from having a fair trial," Code Civ.Proc. § 657, subd. 1." *Simon v. Tomasini*, supra, 97 Cal.App.2d 115, 123, 217 P.2d 488, 493.

[3] Defendant contends that due and timely notice of the trial was given by the service of notice of trial on Goldstone, who was then plaintiff's attorney of record. In this connection, he relies on sections 284, subdivision 1 and 285 of the Code of Civil Procedure. The former provides that: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; * * *". The latter provides that: "When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney." It is defendant's position that service of the notice on attorney Goldstone prior to the time defendant received written notification of the substitution of attorneys was binding on plaintiff under the above-quoted code sections, cit-

ing *Starkweather v. Minarets Min. Co.*, 5 Cal.App.2d 501, 504, 43 P.2d 321; *Sherman v. Panno*, 129 Cal.App.2d 375, 378-379, 277 P.2d 80; *Reynolds v. Reynolds*, 21 Cal.2d 580, 584, 134 P.2d 251 and *Carrara v. Carrara*, 121 Cal.App.2d 59, 61, 262 P.2d 591. But there is more involved here than merely a question of technical compliance with the statute.

Before the court could proceed with the trial on April 7, 1955, satisfactory proof of notice to plaintiff was mandatory. At that time, the court had before it the two notices of trial and the two affidavits of service by mail. The only reference to notice in the reporter's transcript of the trial is attorney Lester's statement that "although I gave notice of trial, nobody appeared." Attorney Lester did not disclose to the court at the trial the communications from attorney Goldstone and attorney Geisler's office, by which he learned, within a few days of the service of the first notice, that plaintiff was without counsel.

Concealment from the court of the facts that attorneys Goldstone and Geisler had been released as plaintiff's attorneys before the first notice was given, that attorney Lester knew of their release, and the further fact that the second notice had not been received by plaintiff fully justified the court in granting plaintiff's motion.

The action of the court in granting the motion when the facts were disclosed indicates beyond peradventure that had they been disclosed at the time the matter came on for trial the court would have ruled that sufficient notice had not been given and would not have proceeded with the trial.

Regardless of any question of the legal sufficiency of either notice of trial it is clear to us that attorney Lester had a duty to inform the court that one notice was served on an attorney whose employment had been terminated by plaintiff, that the other notice had not been received by

plaintiff and that she had no actual notice of the time of trial. The trial court obviously was of the same opinion.

[4, 5] When a trial judge in a proper proceeding vacates a judgment he has rendered in ignorance of material facts which he believes a party had a duty to disclose to him, and which, if known to him, would have caused him to refrain from ordering the judgment, we will not question his action. The order under review represents, in our opinion, an eminently proper exercise of discretion. It would have been surprising to us if, under the circumstances, the court had suffered plaintiff to lose by default her marital rights, including the custody of the child. We deem the appeal from the order frivolous and deserving of a penalty by way of costs of \$100.

The order is affirmed, plaintiff to have \$100 additional as costs.

PARKER WOOD and VALLÉE, JJ.,
concur.



145 Cal.App.2d 201

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William Fred ANDERSON, Defendant and
Appellant.
Cr. 5657.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1956.

Defendant was convicted of bookmaking and of keeping and occupying a residence for purpose of recording bets. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and order denying motion for trial, and defendant appealed. The District Court

of Appeal, Fox, J., held that as a result of information obtained by telephone call to house and use of listening device outside rear window, officers had sufficient grounds for believing that house was being maintained as a bookmaking establishment to justify forcible entry and search of house without a warrant, after receiving no reply to demand for admittance, and that evidence obtained by such search and by use of listening device was admissible.

Judgment and order affirmed.

1. Criminal Law ☞1023(12)

Where defendant was convicted of offenses, though he was granted probation, such order was deemed a final judgment for purposes of appeal. West's Ann.Pen. Code, § 1237.

2. Gaming ☞60

Searches and Seizures ☞7(10)

As a result of information obtained by means of telephone call and use of listening device outside rear window of house, officers had sufficient grounds for believing that house was being maintained as a bookmaking establishment to justify forcible entry of house without a warrant of arrest or search warrant, after receiving no reply to demand for admittance, and search of house and seizure of evidence of bookmaking found therein were not unlawful and did not violate constitutional rights of man found in house. West's Ann.Pen. Code, § 337a, subds. 2, 4.

3. Criminal Law ☞394

Where officers had sufficient grounds for believing that house was being maintained as a bookmaking establishment, evidence obtained as a result of forcible entry and search of house without a warrant, after receiving no reply to demand for admittance, was admissible in prosecution for bookmaking and for keeping and occupying a residence for purpose of recording bets. West's Ann.Pen.Code, § 337a, subds. 2, 4.

4. Criminal Law ☞394

Searches and Seizures ☞7(1)

Use of sound amplifier listening device by officers outside rear window of house

did not violate constitutional guarantee against "unreasonable search," and evidence as to defendant's part of telephone conversation overheard by means of such device was admissible in prosecution for keeping and occupying a residence for purpose of recording bets and for bookmaking. West's Ann.Pen.Code, § 337a, subs. 2, 4.

See publication Words and Phrases, for other judicial constructions and definitions of "Unreasonable Search".

5. Criminal Law §419(3)

Testimony of officer as to telephone conversation with one who answered call to house was admissible as a circumstance tending to show that officers had reasonable cause to believe that bookmaking was being carried on in house and hence had reasonable basis for forcible entry and search thereof without a warrant, over objection that such testimony was hearsay. West's Ann.Pen.Code, § 337a, subs. 2, 4.

Albert Jack Chotiner, Russell E. Parsons, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

FOX, Justice.

[1] Defendant was convicted of violating subdivision 2 of section 337a, Penal Code, in that he kept and occupied a residence at 715 E. Arbor Vitae, Inglewood, for the purpose of recording bets on horse races; he was convicted also on a second count of bookmaking in violation of subdivision 4 of the section. He appeals from the judgment¹ of conviction and the order denying his motion for a new trial.

On October 18, 1955, at approximately 4:30 in the afternoon, Deputy Sheriff Allen took up surveillance of the dwelling in question. Soon after 5:00 o'clock defendant emerged and left in his car. About 9:00 o'clock that evening Officer Allen returned to the location. He found no

lights on in the house and no other signs of activity. Allen resumed his surveillance shortly before 7:00 o'clock the next morning. Defendant arrived a little after 8:00 o'clock, entered the house, locked the screen and closed the front door.

During the morning of October 19th, Lieutenant Martin requested the telephone company to furnish him the listing of the telephone number ORchard 2-6263. He was advised that this number was listed at 715 Arbor Vitae, Inglewood. Sometime between 1:30 and 1:45 that afternoon Sgt. Johnson, with Officers Gentzvein, Wallace, Seltzer and Fowler, arrived in the vicinity of the above address. Officer Gentzvein had previously ascertained from a newspaper or scratch sheet that a particular horse was scheduled to run at a particular race track on that date. Gentzvein entered a public telephone booth, located at a gasoline station on the corner of Prairie and Arbor Vitae, and dialed ORchard 2-6263. Someone answered, "Hello." The officer then said, "This is Bill for 5 in the 5th at B.M., Third Dawn, 5 to win, 5 to show." The voice replied "OK." At the time Gentzvein entered the booth Sgt. Johnson was some 20 feet to the rear of the Arbor Vitae house in an alley that runs on the east side of the property. After completing this call, Gentzvein signalled Officers Wallace and Seltzer. The officers then proceeded to the house.

Johnson and Wallace used a hearing-aid type of listening device at a rear window which was boarded up with plywood that had a series of quarter-inch holes from which artificial light appeared. Johnson overheard a voice from within say, "Hello, at Bay Meadows" and "I got you." Johnson thereupon stated, "This is the vice detail" and demanded that the door be opened. He announced, "This is the Sheriff's Department. You are under arrest for bookmaking." Upon receiving no reply, he repeated, substantially, his an-

1. Although defendant was granted probation, such an order is deemed a final judgment for purposes of appeal. Pen.Code, § 1237.

nouncement and demand. The officers then heard a scuffling noise right next to the window and smelled what appeared to be something burning. Johnson ordered Gentzvein and Wallace to enter through the door. Being unable to make such an entrance, Johnson ordered them to "try the wall just adjacent to the door." They effected entrance in this fashion. They then assisted Johnson through the window, which he had broken after removing the plywood. He entered a small bedroom in the rear of the house. The room was furnished with two desks, two telephones, a radio, a metal barbecue-type brazier, and a stand with pencils, papers, and pads. The brazier was burning profusely and the smoke in the room was dense. Defendant, who was in this room, was arrested. Several small cards with penciled notations thereon were seized. These were betting markers. There was also a racing form of that date in the room. While the officers were there, the telephone rang several times. The callers were attempting to place bets on the races.

Defendant told Johnson and Wallace that he had been at that place approximately two weeks; that he was paid "\$100.00 per week to handle action coming over the phone"; that he took in about \$1,000 a day; and that he did not live there. Defendant refused to divulge the name of his employer.

The officers did not have a warrant for defendant's arrest; nor did they have a search warrant.

Defendant's principal contention is that the arresting officers forcibly entered the house in question without reasonable or probable cause; that they thereby invaded his constitutional rights against unreasonable search and seizure; and that the evidence thus obtained was not admissible under the decision in the Cahan case, *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. He argues, "There is no showing whatsoever that they [the officers] had any information that any public offense was being committed at that establishment."

The record does not support factually defendant's argument. We need only refer to the telephone call that Gentzvein placed and to what Johnson overheard by the use of his listening device outside the rear window. But, argues defendant, "the evidence shows, without question of a doubt, that Johnson was actually pulling off the plywood, was actually making a forcible entry of this establishment, before he even received the signal from the officer [Gentzvein] who placed the telephone call." The record does not warrant defendant's position. The inference is quite to the contrary. After Gentzvein concluded his telephone call he signaled Wallace and Seltzer. Wallace was with Johnson at the rear window that was covered with the plywood when they employed the listening device. It is a reasonable inference that Wallace informed Johnson, who was his superior and apparently in charge of this operation, that he had received the signal from Gentzvein. Furthermore, it was Gentzvein and Wallace who, on orders of Johnson, first effected entrance into the house. Wallace then helped Johnson enter through the rear window.

[2, 3] With the information revealed by Gentzvein's telephone call and Johnson's listening device the officers had sufficient grounds for suspecting, and even for believing, that the house occupied by defendant was being maintained as a bookmaking establishment. See *People v. Moore*, 140 Cal.App.2d 870, 295 P.2d 969, for a definition of "reasonable or probable cause." In *People v. Miller*, 143 Cal.App.2d 558, 299 P.2d 1010, substantially this identical technique of investigation was employed and by three of the same officers. Upon receiving no response, in the Miller case, to their demand for admission to the apartment the officers kicked in the door and entered. Presiding Justice Shinn there stated, 143 Cal.App.2d at page 561, 299 P.2d at page 1012, that "under the authorities, which it is unnecessary to review, the forcible entry of the premises after demand for admittance and refusal was not

unlawful." The court held that it was not error to admit the evidence of bookmaking activities. So, in the case at bar, the forcible entry of the house was not unlawful, the search and seizure that followed did not violate defendant's constitutional rights, and the evidence thus procured was admissible.

[4] In the caption of his second point, defendant enumerates a number of his constitutional rights that he asserts were violated by the use of the listening device on the outside of the rear window. However, his constitutional guarantee against unreasonable search is the only one that he supports with any argument. He claims that this right was violated by the use of the sound amplifier and that his portion of the telephone conversation thus overheard should have been excluded from evidence under the Cahan case. His position is not well taken in view of the decisions in *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, and *People v. Graff*, 144 Cal.App.2d 199, 300 P.2d 837 (hearing denied). In these cases a sound amplifier was placed against the outer wall of defendant's room by which incriminating conversation between the occupants was overheard as well as, in one instance, defendant's part of a telephone conversation, as in the instant case. It was held in both of these cases that the defendant's constitutional right against unreasonable search had not been violated and that the evidence thus acquired was admissible. Under these authorities, defendant's part of the telephone conversation that was overheard by means of the sound amplifier was properly received in evidence.

[5] Defendant's third point is that the telephone conversation of officer Gentzvein to the house under surveillance was hearsay and therefore inadmissible in evidence. Defendant misconceives the purpose of this evidence. It was admissible as a circumstance going to show that the officers had reasonable cause to believe that bookmaking was being carried on in the house and that

they therefore had a reasonable basis for their subsequent acts. *People v. King*, 140 Cal.App.2d 1, 294 P.2d 972. There is no suggestion that the other evidence is not sufficient to support the conviction.

The judgment and order are affirmed.

MOORE, P. J., and ASHBURN, J., concur.



145 Cal.App.2d 318

Aubrey WALKER and Lucille Walker,
Plaintiffs and Respondents,

v.

The HOME INDEMNITY COMPANY and
J. D. Palmer, Defendants.

The Home Indemnity Company, Appellant
Civ. 21540.

District Court of Appeal, Second District
Division 3, California.

Oct. 23, 1956.

Rehearing Denied Nov. 14, 1956.

Action by prevailing plaintiff in action for damages arising out of automobile accident, against insurer of defendant therein and its agent to recover amount of judgment. The Superior Court, Los Angeles County, Harold P. Huls, J., granted nonsuit as to agent and judgment against insurer and insurer appealed. The District Court of Appeal, Parker Wood, J., held that where insurer had sent notice of cancellation of automobile policy to insured who understood English very poorly and insured thinking it was a notice of premium payment due paid portion of balance due on yearly premium to agent who retained same for some six weeks and until after the accident, question of insurer's waiver of cancellation of policy and estoppel to deny policy was in force at time of accident, presented questions of fact.

Affirmed.

1. Insurance Ⓒ235

In action by the prevailing party in an action for automobile accident damages, against insurer of defendant therein and its agent to recover amount of judgment, evidence supported finding that insured was unable to read notice of cancellation of automobile policy sent by insurer prior to accident and insured reasonably believed that it was a notice to pay money on insurance premium.

2. Insurance Ⓒ235

In action by prevailing plaintiff in action for damages arising from automobile collision against alleged insurer of defendant therein and its agent to recover amount of judgment, where insurer had sent formal notice of cancellation of policy to insured before accident but insured believing it to be a notice of money due on premium made a partial payment of balance due on yearly premium to agent who retained same for some six weeks before attempting to return it after the accident, evidence supported findings that insurer had received and accepted premium payment from insured, waived attempted cancellation of policy and was estopped to claim cancellation.

3. Insurance Ⓒ668(2)

In action by prevailing plaintiff in automobile damage action against alleged insurer of defendant therein and its agent to recover amount of judgment, the extent of agent's authority in accepting insured's partial payment on balance due on yearly premium of automobile policy after insurer had sent him a formal notice cancelling the same, presented question of fact.

4. Insurance Ⓒ645(3)

In action by prevailing plaintiff in action for damages arising from automobile collision against alleged insurer of defendant therein and its agent to recover amount of judgment where insurer pleaded cancellation of a policy as a defense, plaintiff was not required to plead estoppel and waiver in order to introduce evidence thereon and even in absence of such pleadings there was no error by trial court in

receiving testimony and making findings based on such issues. West's Ann.Code Civ.Proc. § 462.

5. Insurance Ⓒ83(1)

Where action was upon contract of insurance and evidence showed that a person signed policy or contract as agent for insurer, the agent was not liable on contract.

Thomas P. Menzies and James O. White, Jr., Los Angeles, for appellant.

Crawford & Baker, and J. Ames Crawford, Los Angeles, for respondents.

PARKER WOOD, Justice.

Prior to the commencement of this action, plaintiffs recovered judgment for \$9,286.27 against one Paolo Bonomo for damages sustained as a result of an automobile collision.

The present action is to recover the amount of that judgment from Home Indemnity Company which had issued an automobile insurance policy covering the automobile of Bonomo. The agent of the indemnity company, J. D. Palmer, who represented the company in issuing the policy, was also a defendant. In a trial without a jury, a nonsuit was granted as to the agent. Judgment was for plaintiffs against defendant Home Indemnity Company. The indemnity company appeals from the judgment.

Appellant, hereinafter referred to as defendant, denied in its answer that the policy was effective on the date of the collision, and alleged that prior to the collision the policy had been cancelled.

The court found, among other things, that defendant is estopped to claim cancellation of the policy and that the defendant waived any attempted cancellation of the policy.

Defendant contends in effect that the evidence was insufficient to support such findings.

On June 14, 1952, defendant, acting through its agent Palmer, issued its policy

of automobile liability insurance covering the automobile of Bonomo for a year, commencing on said date, at a premium of \$48.-60, and at that time Bonomo paid \$10 as part payment of the premium. It does not appear that any arrangement was made as to the payment of the remainder of the premium. Bonomo resided in Yucaipa, California. Palmer's office was in San Bernardino. The defendant, through its Los Angeles branch office, caused an investigation to be made of Bonomo by the Retail Credit Company. In June or July, 1952, a representative of that company went to Bonomo's home and interviewed him. About July 18, 1952, the Los Angeles office of defendant received the investigation report which stated, among other things, that Bonomo's hearing, speech, understanding of English, and financial condition were poor, and that he was not recommended. On August 27, 1952, the Los Angeles office of defendant mailed a notice to Bonomo which was entitled "Cancellation Notice," and which stated:

"We elect to cancel our Policy No. 7073519 issued to you on June 14th 1952 and hereby give you notice hereof, as provided by the terms of said policy.

"Take notice that at 12:01 A.M., Standard Time, on the 6th day of September, 1952, the said policy will terminate and cease to be in force.

"The excess of paid premium above the pro rata premium for the expired time (if not tendered) will be refunded as soon as practicable.

"Respectfully yours,

"The Home Insurance Company

"The Home Indemnity Company

"Per _____

"Agent"

Bonomo received the notice about August 30, 1952. Palmer received a copy of the notice on August 29, 1952. Bonomo testified that he did not understand the notice; he presumed it was a premium notice; he asked his neighbor to explain and interpret it; the neighbor said "to send the money on through before they cancel on you";

on the same day that he received the notice he sent a money order for \$20 "to the company." Palmer received the money order on September 2, 1952. He testified that he deposited the money order in "my trustee account for the insurance company." Palmer was asked: "That was an account which you kept for the Home Indemnity Insurance Company to deposit sums of money in and forward out for them, is that right, sir?" Palmer replied, "Correct."

On October 12, 1952, a collision occurred between Bonomo's automobile and plaintiffs' automobile. The following morning Mr. Grasso, acting on behalf of Bonomo, telephoned Palmer's office and reported the collision. Also, on that day (October 13) Bonomo mailed a money order for \$18.60 to Palmer. This amount and the \$10 and \$20 paid previously totalled the full amount of the premium.

On October 17, 1952, Palmer mailed a check for \$18.82 to Bonomo, as the unearned portion of the premium as of the date of cancellation on September 6, and he also returned the money order for \$18.-60 to Bonomo. It therefore appears that Palmer, after the collision, deducted \$1.18 from the \$20 which Bonomo had paid at the time he received the notice of cancellation (which \$20 Palmer had held approximately six weeks after the notice of cancellation and prior to the accident, without advising Bonomo whether or not the \$20 was acceptable). A few days later Palmer sent his check for \$9.15 to defendant as its share of the earned premium. There was no communication between Bonomo and Palmer, or Bonomo and defendant, from August 30 to October 13, 1952. Bonomo testified that between August 30 and October 17, 1952, he believed he had an insurance policy in effect with Home Indemnity Company. He was asked to explain why he believed he had an insurance policy in force between those dates. He replied (through an interpreter) that "he believed it was in force for the simple reason that after he sent payment of \$20.00 and they kept it until

October 17, that he had every reason to believe it was in force at that time that the accident occurred."

Appellant argues, in support of its contention regarding insufficiency of the evidence, that there was no basis for a reasonable belief on the part of Bonomo that the notice of cancellation was a notice to pay more money; and that there was no evidence that Palmer had authority to rescind or waive cancellation of the policy.

[1] With reference to the reasonableness of Bonomo's belief, there was substantial evidence that Bonomo's understanding of English was poor—defendant's records show that an investigator reported that Bonomo's understanding of English was poor; and Bonomo testified that he could not read English very well. The notice of cancellation stated that the policy would be cancelled on September 6 (which was about a week after the notice was received by Bonomo). Nor reason for the cancellation was stated in the notice. At the time the notice was received, the fact was that more money was due on the policy (the \$10 which had been paid was about $\frac{1}{5}$ of the full premium of \$48.60, and the policy had been in effect about $\frac{1}{5}$ of a year—from June 14 to August 30). The neighbor of Bonomo, who read and explained the notice to Bonomo, told him to send in some money before the policy was cancelled. Bonomo sent \$20 immediately. The court found that Bonomo was unable to read the notice of cancellation and reasonably believed that it was a notice to pay money on the insurance premium. That finding is supported by the evidence.

With reference to the authority of Palmer, it was admitted in the answer that he had authority to issue policies and collect premiums. The manager of defendant's Southern California office (at Los Angeles) testified that Palmer had authority to return money, and that it was a standard practice among defendant's agents to have a trustee account for money collected as premiums. Palmer testified that he maintained a trustee account for defendant. It

is true that the manager also testified that an agent does not have authority "to continue a policy in effect after the company has sent notice of cancellation." It is to be noted, however, that about five weeks before the notice of cancellation was sent to Bonomo, the Los Angeles office of defendant sent a letter to Palmer requesting the return of the Bonomo policy for cancellation. Also, it is to be observed that about three weeks before the notice of cancellation was sent to Bonomo, the Los Angeles office sent another letter to Palmer stating that the policy had not been received, and "We are wondering if you prefer to have us send Mail Notice direct from this office. If we do not hear from you within the next ten (10) days, we will assume that it is your wish to have us cancel the policy and will mail the Notice direct to the assured."

It is also to be noted that Palmer, after he had received a copy of the notice of cancellation, deposited the payment in the trustee account which he kept for the defendant and in which he kept money that belonged to the defendant. He did not advise Bonomo, during the six weeks preceding the collision, that the money was not acceptable. Prior to the collision he did not return any money to Bonomo but he retained it in the trustee account. Five days after the collision, Palmer returned \$18.82 of the \$20 payment, and he retained \$1.18 as payment of balance of earned premium to September 6.

[2,3] The court found, among other things, that Palmer was authorized by defendant to rescind and waive cancellations. There was no evidence that defendant had expressly authorized Palmer to receive or waive cancellations. It is not necessary to decide whether said finding is supported by the evidence. Regardless of the sufficiency of the evidence to support that finding, there was substantial evidence to support the findings that defendant received and accepted the premium payment sent by Bonomo about August 30, 1952, and that defendant waived the attempted cancella-

tion of the policy and is estopped to claim cancellation. As above stated, Palmer deposited the \$20 in the trustee account where he kept money that belonged to defendant. Palmer said that the money in the trustee account belonged to defendant. The manager of defendant's Los Angeles office said that it was standard practice for defendant's agents to have a trustee account for money collected as premiums. It is conceded, as above shown, that Palmer was authorized to issue policies and collect premiums. The notice of cancellation stated that the excess of paid premium would be refunded as soon as practicable. During the six weeks following the notice of cancellation and preceding the collision, the defendant did not make a refund to Bonomo and it did not advise him whether or not there would be a refund. The failure of defendant to communicate further with Bonomo with respect to a refund, as contemplated in the notice of cancellation, would tend to indicate that defendant was satisfied with Palmer's acceptance of the \$20. The trial court could have inferred that Palmer's act in accepting and keeping the \$20 payment, after notice of cancellation, was with the approval of defendant, even if Palmer had not been expressly authorized to accept payment after cancellation. Whether there was an estoppel was a question of fact. See *Parke v. Francis*, 194 Cal. 284, 297, 228 P. 435; *Pacific Gas & Elec. Co. v. State Bd. of Equal.*, 134 Cal.App.2d 149, 156, 285 P.2d 305. Also, the question as to whether there was a waiver of the cancellation was a question of fact. See *Kerr v. Reed*, 187 Cal. 409, 414, 202 P. 142. "If a forfeiture has occurred for breach of any condition in a policy of insurance * * * and the company * * * or its duly authorized agent, thereafter, with knowledge of the facts, unconditionally accepts and retains a premium * * * it thereby waives such forfeiture * * * and is thereafter estopped from setting the same up as a defense * * *." (*Couch, Cyclopaedia of Insurance Law*, vol. 3, § 687a, p. 2275.) "It is a well-settled rule of law that an in-

surer which with knowledge of facts entitling it to treat a policy as no longer in force, receives and accepts a premium on the policy, is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums." (29 Am.Jur., § 857, p. 653.) In *Bittinger v. New York Life Ins. Company*, 17 Cal.2d 834, at page 837, 112 P.2d 621, at page 623 the court said: "But assuming that respondent company is correct in its contention that the policy provided that it would immediately lapse on non-payment of interest, such provision was waived by the acceptance of the premium payment. The company could not at the same time accept the premium payment and declare the policy lapsed, nor could it lapse automatically at that time." In *Bank of Anderson v. Home Ins. Co.*, 14 Cal.App. 208 at page 218, 111 P. 507, at page 510, it was said: "[W]here there is an agency, the company is bound as to the third persons dealing with the agent in good faith as to all matters within the scope of his real or apparent authority." The extent of the agent's authority, and whether under the circumstances of this case the agent was authorized to accept the \$20, were questions of fact. See *Phillips v. Reserve Life Ins. Co.*, 128 Cal.App. 2d 540, 546, 275 P.2d 554. In *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440 at page 448, 89 P. 102, 105, it was said (in quoting from *Cooley's Briefs on Insurance*): "'If an insurer, or authorized agent, consents to changes which are required to be indorsed on the policy, and promises to make the necessary indorsement, having access to the policy for this purpose, but fails to make the indorsement through mistake, oversight, or neglect, the insurer will be bound, if not by a waiver, at least by an estoppel *in pais*.'" In *Truck Ins. Exchange v. Industrial Accident Comm.*, 36 Cal.2d 646, 226 P.2d 583, an employer failed to pay the premium on a compensation insurance policy, and the insurance company

mailed a notice of cancellation to the employer at an address given by him. The employer had made various changes of address and by reason of time lost in forwarding mail the employer did not receive the notice of cancellation prior to the time an employee was injured. Other facts were stated therein pertaining to the insurance agent's method of handling the employer's insurance. It was held therein that an implied finding that the insurance company was estopped to rely upon the notice of cancellation was supported by the evidence. In the present case the evidence was sufficient to support the findings that defendant is estopped to claim cancellation of the policy and that the defendant waived any attempted cancellation of the policy.

[4] Appellant contends that the court erred in receiving testimony and making findings based on estoppel and waiver which were not pleaded. The complaint alleged that the defendants executed and delivered the policy and that about October 12, 1952, while the policy "was in full force and effect," Bonomo caused injuries to plaintiffs, and thereafter plaintiffs recovered the judgment (above referred to) against Bonomo. The answer denied that the policy was in effect on October 12, 1952, and alleged that prior to October 12, 1952, the policy had been cancelled. Defendant objected to the introduction of any evidence as to estoppel and waiver, on the ground that neither estoppel nor waiver was pleaded in the complaint. The objection was overruled. At the conclusion of plaintiff's case, defendant made a motion to strike the evidence as to estoppel and waiver. The motion was denied. At the conclusion of the trial, plaintiff made a motion to amend the complaint to conform to proof by alleging waiver and estoppel. The motion was denied on the ground that the action had been tried on the theory that evidence of estoppel was admissible without pleading estoppel in the complaint.

Cancellation was an affirmative defense that was brought into the case by the answer. It was deemed controverted under section 462 of the Code of Civil Procedure. Under the circumstances here, plaintiffs were not required to plead waiver or estoppel. In *Atha v. Bockius*, 39 Cal.2d 635, at pages 644-645, 248 P.2d 745, 750, it was said: "The plaintiff was not required to plead the defense of equitable estoppel. Her complaint relied on her title to the automobile and the comity doctrine was brought into the case by the answer. In this state of the pleadings, the new matter in the answer must be deemed controverted, Code Civ.Proc., § 462, and there was no need for the plaintiff to plead lack of diligence on the part of the defendants, since estoppel was relied upon as a defense to matter set up in the answer." See also *Buford v. Florin Fruit Growers' Ass'n*, 210 Cal. 84, 91, 291 P. 170; *Arnold v. American Insurance Co.*, 148 Cal. 660, 668, 84 P. 182, 25 L.R.A.,N.S., 6.

[5] Appellant contends further that the nonsuit in favor of Palmer and the judgment against defendant are inconsistent. He argues to the effect that the judgment was based upon the acts of the agent Palmer in retaining the money, that the basis for the finding of estoppel was "akin to a tort of misrepresentation," and that if the agent is not liable the principal is not liable. The action was upon the contract of insurance, and the evidence shows that Palmer signed the policy or contract as agent for defendant. Palmer, the agent, was not liable on the contract. (See *Carlesimo v. Schwebel*, 87 Cal.App.2d 482, at pages 488-489, 197 P.2d 167, wherein rules are stated with reference to nonliability of an agent who signs a contract for a disclosed principal.)

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

145 Cal.App.2d 235

Cite as 302 P.2d 367

Justin E. NIPPOLD, Plaintiff and Appellant,

v.

John S. ROMERO and Thomas Chavez,
Defendants and Respondents.

Civ. 21613.

District Court of Appeal, Second District,
Division 3, California.

Oct. 22, 1956.

Rehearing Denied Nov. 14, 1956.

Hearing Denied Dec. 19, 1956.

Action for injuries sustained by pedestrian who was struck by automobile of defendant while pedestrian was crossing street between intersections. From a judgment for defendants in the Superior Court, Los Angeles County, J. F. Moroney, J., the plaintiff appealed. The District Court of Appeal, Vallée, J., held that the evidence was insufficient to justify the application of the last clear chance doctrine and that there was no reversible error in refusing instructions.

Affirmed.

1. Trial ⚭252(8)

In action for injuries sustained by pedestrian when struck by automobile while attempting to cross street between intersections, where plaintiff claimed that defendant's automobile came over the center line, and jury was plainly informed that it was a violation of the statute to drive other than on the right half of the highway and there was no evidence that defendant was attempting to pass another vehicle, court did not err in refusing to read to jury paragraph of the statute prohibiting motorists from driving to the left of the center line of the highway. West's Ann.Vehicle Code, § 525.

2. Negligence ⚭136(32)**Trial** ⚭252(7)

Whether there is any substantial evidence justifying application of the doctrine of last clear chance is a question of law and in the absence of such evidence, trial court properly refused to instruct the jury with respect thereto.

3. Negligence ⚭141(9)

An instruction on the "last clear chance" doctrine is proper where the plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by ordinary care, defendant has knowledge thereof and the last clear chance to avoid the accident by ordinary care and fails to exercise the same, and accident results thereby, and plaintiff is injured as proximate result of such failure.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

4. Negligence ⚭83.1

If any one of the elements for the application of the doctrine of last clear chance is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence.

5. Automobiles ⚭244(59)

In action for injuries sustained by pedestrian when struck by automobile while pedestrian was crossing street between intersections, where there was no evidence that after motorist discovered the pedestrian's danger he had the last clear chance to avoid the accident by ordinary care, evidence was insufficient to justify the application of the last clear chance doctrine. West's Ann.Vehicle Code, § 562.

6. Negligence ⚭83.8

The last clear chance doctrine presupposes time for effective action and it is not applicable where the emergency is so sudden that defendant did not have time to avoid the accident.

7. Trial ⚭260(2)

Instructions on presumptions and preponderance of evidence were properly refused where adequately covered by those given.

8. Negligence ⚭121(1)

Where a party who is the subject of the presumption of due care appears in court and testifies fully as to his own con-

duct at the occurrence in question, there is no room for the presumption.

9. Trial \Rightarrow 203(1)

A court is not required to give every instruction requested even if considered by itself it may state a correct and pertinent principle of law, and all that is required is that the jury be fully and fairly instructed on all the issues presented.

10. Trial \Rightarrow 235(1)

In action for injuries sustained in an automobile accident, refusal to instruct on the power and duty of the jury in accordance with the statute, that the jury's power of judgment of the effect of evidence is not arbitrary, was not error. West's Ann.Code Civ.Proc., § 2061, subd. 1.

Robertson, Harney, Drummond & Dorsey, and David M. Harney, Los Angeles, for appellant.

Cooke & Velpmen and Howard C. Velpmen, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants entered on a jury verdict in an action to recover damages for personal injuries sustained when he came in contact with an automobile owned by defendant Chavez and operated with his permission by defendant Romero.

On May 1, 1954, about 9:45 p. m., plaintiff was walking west across Figueroa Street in the middle of the block where there was no crosswalk when he was struck by the left front side of the automobile going south on Figueroa. Figueroa is 66 feet wide and is divided in the center by double white lines. At the time of the accident no other vehicle was in the immediate vicinity. The only conflict in the evidence is as to where plaintiff was standing at the time he was injured.

Plaintiff's evidence tended to establish that he was crossing at a point approximately 200 feet south of the intersection of Washington Boulevard and Figueroa Street; he was walking at a normal gait;

as he approached the center of the street he observed the traffic signal at Washington Boulevard had changed so he decided he "couldn't get across"; he stopped "a foot to two feet" east of the double white line for five to eight seconds to allow the traffic to clear; during that period he looked to the right and to the left; he first observed defendant's automobile as he looked to the right; it was then 10 to 14 feet away and bearing down on him; he was still standing a foot to two feet from the double line; the car came over the double line at an angle directly toward him; and he had no opportunity to avoid being hit.

Defendants' evidence tended to establish that defendant Romero had stopped for the signal at Washington Boulevard; he was driving in the inside lane about one foot from the center line at a speed of 25 to 30 miles an hour when he suddenly observed plaintiff walking west about a foot or so on the west side of the center line; he was then about 5 or 8 feet away from plaintiff; he immediately applied his brakes, but he had already struck plaintiff. Romero testified, "When I first saw him—well, I had no warning at all. I mean it came all of a sudden. I didn't have any chance of doing anything to prevent it." After he struck plaintiff he swerved to his left, to a point about one foot east of the center line. Plaintiff was struck by the left front headlight and fender of the car. There were 34 feet of skid marks made by the left wheels of the car beginning one foot east of the double center line and ending at a point four feet east of the line. There was no testimony as to where the skid marks started or terminated in relation to the point of impact.

Plaintiff contends the court erred: 1) in refusing to instruct on paragraph (b) of section 525 of the Vehicle Code; 2) in refusing to instruct on the doctrine of the last clear chance; 3) in overemphasizing the rule on burden of proof and in failing to properly instruct thereon and on the subject of due care; and 4) in refusing to instruct on the power and duty of the

jury. The sufficiency of the evidence is not questioned.

The court read to the jury the following provisions of section 525 of the Vehicle Code:

"(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement."

It refused to read paragraph (b), proffered by plaintiff, which provides:

"(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a state highway where the volume of traffic or the vertical or other curvature of the roadway renders it hazardous to drive on the left side of such marking or signs and marking. When such markings or signs and markings are in place, the driver of a vehicle shall not

drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway." ¹

[1] It is apparent from section 525 in its entirety that paragraph (a) makes it unlawful to drive on any part of the left half of the roadway except under conditions noted in subdivisions (1) through (4). The deleted paragraph (b) makes no change in the law in respect to the duty to drive on the right half of the roadway, other than to make the exceptions inapplicable under certain conditions. The jury was plainly informed it was a violation of the Vehicle Code to drive other than on the right half of the roadway. There is no evidence Romero was attempting to pass another vehicle. The jury's answer to the question whether the automobile crossed over the center line and struck plaintiff while he was standing in a position of relative safety was dependent entirely on which factual situation they chose to believe and accept. The court did not err in refusing to read subdivision (b) of section 525 to the jury. Contrary to plaintiff's claim, the jury was instructed that it was a violation

1. Section 525 in toto reads: "Drive on Right Side of Roadway—Exceptions. (a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn.

"(3) When the right half of a roadway is closed to traffic while under construction or repair.

"(4) Upon a roadway designated and signposted for one-way traffic.

"(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a state highway where the volume of traffic or the vertical or other curvature of the roadway renders it haz-

ardous to drive on the left side of such marking or signs and marking. When such markings or signs and markings are in place, the driver of a vehicle shall not drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway.

"(c) It is unlawful to drive any vehicle upon any highway which has been divided into two or more roadways by means of intermittent barriers or by means of a dividing section of not less than two feet in width either unpaved or delineated by curbs, lines or other markings on the roadway except to the right of such barrier or dividing section, or to drive any vehicle over, upon, or across any such dividing section, or to make any left turn or semicircular or U-turn on any such divided highway, except through an opening in such barrier designed and intended by public authorities for the use of vehicles or through a plainly marked opening in such dividing section."

of law to cross over a center line except when overtaking and passing another vehicle.

[2-4] Whether there is any substantial evidence which would justify the application of the doctrine of the last clear chance in a given case is a question of law; and in the absence of such evidence, it is not error for the trial court to refuse to instruct the jury with respect to the doctrine. *Doran v. City & County of San Francisco*, 44 Cal.2d 477, 487, 283 P.2d 1. An instruction stating the doctrine is proper when there is evidence showing: "(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." *Daniels v. City & County of San Francisco*, 40 Cal.2d 614, 619, 255 P.2d 785, 788. If any one of the elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence. *Doran v. City & County of San Francisco*, 44 Cal.2d 477, 483, 283 P.2d 1.

[5,6] There was no evidence that after Romero discovered plaintiff's position of danger he had a last clear chance to avoid the accident by the exercise of ordinary care. He had a right to assume plaintiff would yield the right of way. Veh.Code, § 562. He observed nothing to put him on notice of danger of injury to plaintiff. None then existed. If Romero saw plaintiff approaching the center of the street walking in the manner shown by the evi-

dence, the evidence is uncontradicted that he did not have knowledge of plaintiff's position of danger until he was only 5 or 8 feet from him. He immediately applied his brakes. The accident then happened in a split second. Considering the relative time and distance factors, it is obvious there was not sufficient evidence from which it could be inferred that Romero had a last clear chance to avoid the accident. "[T]he doctrine presupposes time for effective action and that it is not applicable where the emergency is so sudden that defendant did not have time to avoid the accident; that in order to invoke the doctrine, there must be evidence that defendant had knowledge of the fact that plaintiff was in a dangerous situation from which he could not extricate himself by the exercise of ordinary care and, at that time, defendant had a clear chance to avoid injuring plaintiff by exercising ordinary care and failed to do so." *Story v. Cox*, 130 Cal.App.2d 231, 234, 278 P.2d 720, 722. See *Jefferis v. La Gore*, 131 Cal.App.2d 181, 185-186, 280 P.2d 140. The court did not err in declining to instruct on the doctrine of last clear chance.

The trial court gave four instructions on the burden of proof requested by defendants. We have examined the instructions and find no overemphasis of the subject.

[7] Plaintiff asserts the court erred in refusing to give three instructions requested by him. Two of the instructions defined "presumptions"; the third, the term "preponderance of the evidence." The text of these instructions was adequately covered by those given.

[8] It is asserted the court erred in refusing to give an instruction on the presumption of due care. Where the party who is the subject of the presumption appears in court and testifies fully, as to his own conduct at the occurrence in question, there is no room for the presumption. The instruction was properly refused since plaintiff testified fully as to his own conduct. *Gigliotti v. Nunes*, 45 Cal.2d 85, 93, 286 P.2d 809; *Elm v. McKee*, 139 Cal.App.

2d 353, 363, 293 P.2d 827; Ford v. Chesley Transportation Co., 101 Cal.App.2d 548, 552, 225 P.2d 997.

[9, 10] Plaintiff claims the court erred in refusing to instruct on the power and duty of the jury in accordance with section 2061, subdivision 1, of the Code of Civil Procedure which reads: "That their [the jury's] power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence". A court is not required to give every instruction requested even if, considered by itself, it may state a correct and pertinent principle of law; all that is required is that the jury be fully and fairly instructed on all the issues presented. *Risley v. Lenwell*, 129 Cal.App.2d 608, 655, 277 P.2d 897. It was in the present case.

No error was committed in refusing or in giving the considered instructions.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frank CORRIGAN, Defendant and
Appellant.*
Cr. 2659.

District Court of Appeal, Third District,
California.

Oct. 19, 1956.

Hearing Granted Nov. 16, 1956.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., of first degree robbery, and he appealed. The District Court of Appeal, Van Dyke, J., held that it had been improper for the trial judge to ex-

* Opinion vacated 310 P.2d 953.

press his opinion as to weight of evidence and as to credibility of witnesses while evidence was being received, but held that such impropriety did not, on the record presented, require reversal.

Affirmed.

Peek, J., dissented.

1. Robbery ☞24(1)

First degree robbery conviction was sustained by evidence.

2. Criminal Law ☞769

Notwithstanding use of permissive "may" in constitutional provision for instructing jury, it is mandatory duty of court to instruct jury regarding law applicable to facts of case. *West's Ann. Const. art. 6, § 19.*

3. Criminal Law ☞656(5, 9), 757(1), 763(1)

A court may, when it charges jury in criminal case, express its opinion as to weight of evidence and as to credibility of any witness but it must, while evidence is being received, refrain from such comments. *West's Ann. Const. art. 6, § 19; West's Ann. Pen. Code, § 1127.*

4. Witnesses ☞246(2)

Considerable latitude must be allowed trial judge in questioning of witness, and while he must not take on role of a partisan and should exercise his power to examine witness with discretion and in such way as not to prejudice rights of prosecution or accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished when a few questions asked from bench might elicit truth.

5. Criminal Law ☞785(3)

Citizen owes no general duty to go to district attorney and volunteer information as to innocence of person accused of crime; and in robbery prosecution it was improper for trial judge to tell jury, in effect, that alibi witness had been under legal duty to give such information to district attorney and the court in which charge lay, as well as to defense counsel, and that, hav-

ing failed to do so, witness was therefore suspect in matter of her credibility.

6. Criminal Law ⇨656(5)

In robbery prosecution, it was improper for trial judge to intimate that witness had not told truth by stating that he wanted witness to be "square" with court and by reminding witness that judge wanted him to tell truth.

7. Criminal Law ⇨655(1)

Even though matter of calling confessed participant in robbery had been ejected into case by prosecution, it was improper for trial judge, in robbery prosecution, to intervene, where such intervention was not for purpose of eliciting evidence from witness, nor to clear up any uncertainty in testimony, and where implicit in gratuitous offer of court, to cause confessed participant to be brought in, was a challenge to defense to call such participant to stand.

8. Criminal Law ⇨1166½(12)

On record presented in robbery prosecution it could not be said that a different result would likely have been arrived at if trial judge had not commented on evidence while it was being received and indicated disbelief of defense witnesses; and accordingly such improper conduct on part of trial judge would not require reversal.

9. Criminal Law ⇨824(1, 4)

Court is required, without request, to instruct upon general principles of law involved in criminal case, but in absence of request for instruction thereon, it is not duty of trial court to give specific charge on defense of alibi.

10. Criminal Law ⇨769

It is a matter of common knowledge that a person cannot be in two places at one time; and it is unnecessary to instruct jury upon so plain a matter.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant appeals from a judgment based upon a verdict of guilty of the crime of first degree robbery, and from an order denying him a new trial. He contends that the evidence was insufficient to support the verdict, that the trial judge was guilty of prejudicial misconduct, and that error was committed by the court in failing on its own motion to give an instruction on alibi. We shall discuss these assignments in the order in which they are made.

[1] There was evidence as follows: At approximately 1:30 A.M. on Sunday, May 1, 1955, two men, masked with silk stockings, entered the King of Clubs Bar at 28th and X Streets in Sacramento. Present at the bar were Mr. Tufts, bartender, and five patrons, Mrs. Roberts, Mr. and Mrs. Mitchell, Mr. Dodds and Mr. Trelease. One of the two robbers was Fred Ash and the People contended that appellant was the other. This second person wore a dark overcoat which was too large for him, a brown hat, carried a gun in his right hand and walked in a crouched position. The robbers ordered everyone into the women's rest room and told them to remain there until they (the robbers) left. When the bartender and the patrons returned to the bar it was discovered that the robbers had taken approximately \$300 from the cash register; that the purses of Mrs. Roberts and Mrs. Mitchell, which had been left on the bar, were missing; that the bartender's wallet, which he had been ordered to drop as he entered the rest room, was missing, and that a tray used for holding nickels had been taken. Ash, charged as appellant's codefendant, had resided for approximately a year before his arrest on May 2, 1955, in a converted garage apartment in the rear of a home owned by Mrs. Wilma Connell. On Friday, May 6th, and again on Sunday, May 8th, Mrs. Connell received telephone calls relative to Ash. The caller on May 6th

Robert Cole, Sacramento County Public Defender, and Ralph D. Drayton, Sacramento, for appellant.

identified himself as "Frank". The caller on May 8th did not identify himself, but Mrs. Connell testified his voice sounded the same as that of the man who had called on May 6th. After receiving the call on May 8th, Mrs. Connell's husband and a Mr. Hunton went to the garage apartment of Mr. Ash, where they were soon followed by Mrs. Connell. Hunton testified that upon going to the apartment he began looking for a green box and discovered one in the attic. He opened the box and after the three had taken a hasty look at the contents the police were called. At the trial the box was shown to have contained the nickel tray, a dark blue overcoat, a pair of ladies' hose, the purses of Mrs. Roberts and Mrs. Mitchell, the bartender's wallet and a gun. The gun was similar to the one used in the robbery. Shortly thereafter the officers arrested appellant along with James Duran and a juvenile girl. Appellant's fingerprints were found on the gun. When confronted with the box and its contents, appellant denied ever having seen any of the items the box contained. Duran testified that appellant had asked him to come to his home; that while there he overheard a conversation between Corrigan and one Dillon relative to the making of telephone calls; that Dillon then left the apartment for the expressed purpose of making a call; that during the conversation between appellant and Dillon much had been made of the fact that Ash was in jail. Corrigan stated that "the heat was on" and that he hoped Ash had had sense enough to do something with the box; that he wanted the box hidden; that there was something in it "stockings and stuff like that" and he expressed the hope that "you guys got sense enough to get rid of that box because in the box was the stockings and the gun and these fingerprints were all over it." Several of the patrons of the bar and the bartender testified that the coat, the hat and the stockings found in the box were similar to those worn by the robber who displayed the gun. Appellant claimed that his fingerprints were

placed on the gun after he had been arrested and while being questioned by the officers, who handed him the gun and asked him if he had seen it before. The officers, however, denied that he touched the gun at any time after it had been found in the box, and on appeal we must accept the testimony of the officers. Several witnesses to the robbery testified that appellant resembled the man who had handled the gun during the robbery, although admittedly their identification amounted to nothing more than testimony as to similarity. Appellant's defense was that of alibi. Four witnesses testified to having either been with him or having seen him under circumstances which strongly supported his claim of alibi, but in resolving the issue as to sufficiency of the evidence this testimony does no more than raise a conflict with the evidence presented by the prosecution. We hold that the verdict of the jury is sustained by the record.

The claims of misconduct revolve around several examinations of defense witnesses by the trial judge and amount to contentions that during the receipt of evidence the judge in a number of instances unreasonably and unnecessarily interfered with the examination of witnesses to the prejudice of appellant, and that while appellant's witnesses were on the stand the judge commented upon their testimony in such a way as to indicate that he disbelieved them, all with the result that appellant was denied a fair trial.

The Constitution provides in Article VI, Section 19, that:

"The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

[2] It is to be noted that the Constitution uses the permissive "may" not only in relation to comment upon evidence and upon witness credibility, but also in relation to instructing the jury regarding the law. This latter duty is, of course, considered mandatory and it is unnecessary to cite the numerous opinions which, in criminal cases, have declared that the court must instruct the jury regarding the applicable general rules of law. There seems to be a reluctance to comment on the part of trial judges not justified by the language of the Constitution. The section in its present form was enacted into the Constitution by the People in 1934 and immediately drew the attention of both trial and appellate courts. The purpose of the enactment and the evil at which it was aimed were fully discussed by the Supreme Court in *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193, 198. The court noted that the section had before the amendment prohibited judges from charging juries with respect to matters of fact, though permitting them to state the testimony and declare the law and then defined the purposes of the change to be as follows: To abolish the prior limitations which case law had placed upon the trial judge's participation in the trial with respect to comment on the evidence and on the credibility of the witnesses; to place in the trial judge's hands more power in the trial of jury cases and then to make him a real factor in the administration of justice in such cases instead of being in the position of a mere referee or automaton as to the ascertainment of the facts; to establish the rule in this state in substantial harmony with practice in other jurisdictions where like powers were exercised by trial judges. The court quoted from *Chitty (Brickwood's Sackett on Instructions to Juries*, p. 126 et seq.) as follows:

"It is the practice for the judge at nisi prius not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application

to the particular case, and to advise them as regards the verdict they should give."

The court quoted with approval from *Malaga v. United States*, 1 Cir., 57 F.2d 822, wherein that court declared:

"The right of a trial judge to aid the jury in arriving at a just verdict is a valuable and important judicial function in the administration of justice. We have no desire to limit it except within its proper sphere. It is a trite saying, but a true one, that in the interest of justice a judge should be permitted to control the conduct of the case rather than counsel for the litigants. A trial in a court of justice should not be a game over which the judge presides in the capacity of umpire to see that certain rules are observed, but a proceeding in which a just verdict is the sole aim.

"The trial judge must declare the law governing the rights of the parties and determine what evidence it is proper for the jury to consider under the established rules of evidence. He should also by reason of his training in analyzing testimony, and experience in determining the credibility of witnesses, and the influence that personal interest, bias, and prejudice have in influencing witnesses, be permitted to assist the jury in determining what evidence has a bearing on the disputed issues in the case, and aid them in weighing the evidence, taking care that the jurors clearly understand that it is their own judgment which must finally determine what the facts are. To this end a judge in the federal courts may inform the jury of the impression certain evidence makes on his mind. But having in mind the weight that jurors ordinarily give to the opinion of the presiding justice, he should take especial care that they understand that it is their independent judgment which must finally determine

the factual issues, and are not unduly influenced by the opinion of the court.”

Finally, the Supreme Court, further defining the right of comment, declared that a trial court could in a proper case express its opinion upon guilt or innocence. Said the court: “Expressions of the court’s opinion as to the guilt or innocence of the defendant have been held to be within the scope of ‘comment,’ so long as the province of the jury as defined by the constitutional section is not invaded.” 5 Cal.2d at page 729, 56 P.2d at page 200. But when, during the trial, shall the court exercise its right and duty to comment? To that question we now turn our attention. Shortly after the constitutional amendment was approved by the People the legislature amended the existing Section 1127 of the Penal Code to include the subject of comment. It read:

“* * * *In charging the jury* the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case * *. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. * * *

(Italics ours.)

This section is the legislative interpretation and implementation of the constitutional amendment, and it states that comment is to be made during the charge to the jury. It appears that no appellate decision rendered in this state since the amendment has expressly stated when comment should occur. The Model Code of Evidence of the American Law Institute states the matter in this way, under the heading of “Comment by Judge”, page 81:

“After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the wit-

nesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and are not bound by the judge’s comment thereon.”

The text then quotes from *Capital Traction Co. v. Hof*, 174 U.S. 1, 13, 14, 19 S.Ct. 580, 43 L.Ed. 873, wherein that court defined a trial by jury as follows: “Jury trial is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts.” We may here add a quotation from Sir Matthew Hale (*The History of the Common Law of England*, 6th ed., p. 346) descriptive of the jury trial of his day:

“Tenthly, another excellency of this trial is this; that the judge is always present, at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them a great light and assistance, by his weighing the evidence before them, and *observing where the question and knot of the business lies*: and by showing them his opinion even in matter of fact; which is a great advantage and light to lay-men. And thus, as the jury assists the judge in determining the matter of *fact*, so the judge assists the jury in determining points of *law*, and also very much in investigating an enlightening the matter of fact, whereof the jury are the judges.”

It was to this concept of the trial by jury, respecting comment, that it was the purpose of the People to return when they amended Article VI, Section 19, of the Constitution; and while our courts have not expressly so declared yet they have done so by implication for implicit in the cases is a rule that limits the right of the trial judge to comment, as that term is used in the Constitution, to the time when the court charges the jury. Thus in *Peo-*

ple v. O'Donnell, 11 Cal.2d 666, 671, 81 P.2d 939, 942, it was said:

"* * * A trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. This rule should be strictly adhered to."

This was said in a case where, while the evidence was coming in, the court had expressed an opinion as to credibility of a witness. And in *People v. Byrd*, 88 Cal. App.2d 188, 191, 198 P.2d 561, 562, in discussing a question asked by the trial judge of the defendant as to whether his denial of past conviction of a felony was just as true as his contention of innocence in the case at bar, the court said:

"Our courts have many times reversed convictions in criminal cases because of intimations by the trial judge during the taking of testimony that the defendant or his witnesses was not believed by the judge. See *People v. Mahoney*, supra, 201 Cal. 618, 621-627, 258 P. 607; *People v. Boggess*, 194 Cal. 212, 239-240, 228 P. 448; *People v. Bowers*, 79 Cal. 415, 417, 21 P. 752; *People v. McNeer*, 8 Cal.App.2d 676, 681, 47 P.2d 813; *People v. Singh*, 78 Cal.App. 488, 248 P. 986; *People v. Conboy*, 15 Cal.App. 97, 113 P. 703; *People v. Long*, supra, 63 Cal.App.2d 679, 682-686, 147 P.2d 659."

[3] It is impossible to harmonize our case law except upon the proposition that while a court may, when it charges the jury in a criminal case, express its opinion as to the weight of evidence and as to the credibility of any witness, it must, while the evidence is being received, refrain from such conduct. While the Constitution is not explicit on the matter we so construe the case and statute law.

The actions and conduct of the trial judge challenged on this appeal, therefore, do not come within the constitutional permission as to comment and expression of opinion, for all occurred during the re-

ceipt of evidence. We will now proceed to examine the record with the charges of misconduct in view. To do that we must make extensive references thereto.

Appellant opened his defense by calling one Nick Bakotich as an alibi witness. This witness testified that on the date of the robbery he had been with appellant Corrigan; that he met him in the Diamond Club on 8th and L Streets in Sacramento and had a drink with him there; that they left around 10 o'clock and went to a second bar at 13th and K Streets with a friend of Corrigan whose name the witness did not recall; that after staying awhile they went across the street to a third bar, arriving there around 11:30 to a quarter to 12, where they stayed a little over an hour, taking them up to about 1 o'clock; that they went back to the Sapphire again and stayed until it closed at 2 o'clock; that during that time Corrigan did not leave the group for any appreciable length of time; and that the witness had been with him all the time. The People's counsel cross examined this witness quite extensively. He asked Bakotich how he could remember the particular date he had been with Corrigan and why he could not remember the name of the third man; he had the witness describe this third man, and drew from him the admission that there was nothing in the conversation or anything that happened that would serve to identify this third man; he developed that the witness had gone to bars with Corrigan a few times before, and he took him over the route the three men had followed during their stay together. It was developed that in previous meetings the men had been together at about the same time of day as on the evening of the robbery; that their meetings had been largely accidental, and that they were not intimates; the witness was asked to tell of other people whom he had seen and recognized while with Corrigan, and he named some people who were called to the stand later as additional alibi witnesses and who corroborated the testimony of Bakotich. The length of his acquaintance with Corrigan was gone into,

and the witness admitted that he wanted to help Corrigan out by his testimony. He was closely questioned as to why he had not come forward and told the officers who were holding Corrigan that Corrigan could not have committed the crime with which he was later charged. He said he had no reason at all to give why he had not done so. He was asked as to his acquaintance with Ash, with the prosecution witnesses Dillon and Duran, and said he had none. Without going further, it is apparent from the record that the cross examination by counsel for the People, which occupies 25 pages of the transcript on appeal, was extensive and detailed. At that point counsel for the People asked the witness if he habitually associated with ex-convicts and received a negative answer. The court then interrupted and embarked upon a further examination of the witness which embraces the next 15 pages of the transcript. It began as follows:

"The Court: Wait a minute. Where did he work?

"The Witness: Who?

"The Court: Corrigan?

"The Witness: I don't know. I didn't know whether he was working or not.

"The Court: How many times did you see him?

"The Witness: I guess about six or seven times.

"The Court: Spend the evening with him?

"The Witness: That would be night there at April the 30th I was with him, yes.

"The Court: What other nights did you spend with him?

"The Witness: Oh, a couple of other occasions I met him uptown.

"The Court: Tell me the last night before the 30th.

"The Witness: I guess it might have been around three, four days before.

"The Court: Might have been three or four days. Tell me the last time

you were with him before the 30th. You ought to know. You say you were there. Where were you with him the last time before the 30th? And tell me how long you were with him that time and what you talked about?

"The Witness: I don't recall.

"The Court: You don't know. You don't know, is that it? Do you know or don't you know?

"The Witness: No.

"The Court: You don't know, is that right?

"The Witness: (Nodded affirmatively.)

"The Court: All right, that's one time. You said you were with him how many, five or six times? When was the last time before that that you were with him, and what did you talk about?

"The Witness: Well, I—

"The Court: Didn't you ever talk about where he worked?

"The Witness: With him?

"The Court: With him, yes.

"The Witness: Oh, I asked him. Yeh, I asked him.

"The Court: What did he tell you?

"The Witness: He wasn't working at the time I asked him.

"The Court: Did you ever ask him where he ever worked?

"The Witness: I don't understand. He told me he came from out of town.

"The Court: That's all you knew about him, is that it?

"The Witness: That's right.

"The Court: All right. Now then this party that was with you from, was it 9:00 o'clock until 2:00 o'clock in the morning, what did you talk about that night from 9:00 until 2:00? Tell us?

"The Witness: Oh, we talked about sports.

"The Court: What sports.

"The Witness: Baseball."

Without going further, enough has been quoted to indicate that the court was endeavoring to test the witness' memory more thoroughly than had been done by the prosecuting attorney. In large part the questions went on with the same evident purpose. The witness was asked where he got the money that he spent for drinks and said that he borrowed it from his brother. He was asked as to the amount of the loan and as to where his brother worked. We quote further:

"The Court: All right. Now how much money did Corrigan have?

"The Witness: Jeez, I have no idea.

"The Court: Let's get the brother. Is one of the boys here?

"Mr. De Cristoforo [the prosecuting attorney]: Yes, Your Honor.

"The Court: Bring him in this afternoon. Find out before this man leaves the Courthouse. We want that man brought in.

"All right. Now you have got fifteen dollars from your brother. Did you spend all of that that night?"

[4] We cannot agree to appellant's criticism of this detailed examination by the court of the most important alibi witness presented during the trial. It is true that the district attorney had cross examined the witness; that the court took over before that cross examination had been completed, and that counsel for the People then resumed. Nevertheless, considerable latitude must be allowed the trial judge as to the court's questioning of a witness. The law on the subject is well stated in *People v. Golsh*, 63 Cal.App. 609, 614-615, 219 P. 456, 458, from which we quote:

"* * * The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the ac-

cused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished, when a few questions asked from the bench might elicit the truth. It is his primary duty to see that justice is done both to the accused and to the people. He is, moreover, in a better position than the reviewing court to know when the circumstances warrant or require the interrogation of witnesses from the bench."

But, as said by Judge Learned Hand, speaking for the court in *United States v. Marzano*, 2 Cir., 149 F.2d 923, 926:

"* * * Despite every allowance he [the judge] must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

The next assignment of misconduct relates to the following incident. The witness Rheba Boyd, who had testified as an alibi witness for Corrigan, was asked by the prosecuting attorney why, when she had read a newspaper article concerning the arrest of Corrigan, it had not occurred to her that she should go and tell the police what she knew about his whereabouts on that night. The following occurred:

"Q. Well then, why didn't you tell the police about it? A. Well, why should I?

"Q. Well— A. A lot of people had seen him there that night, and should they all come up to the Police Department and tell them?

"Q. You knew that Mr. Corrigan had been in the Sapphire Club on that evening; is that right? A. Yes.

"Q. All right. And you knew that the information that you had would tend to clear Mr. Corrigan of these charges at that time, didn't you? A.

Yes, but I didn't think of it that way. I just knew he couldn't have done it because he was—

"Q. You knew he couldn't have done it but you didn't do anything about it; is that right? A. That's right.

"Q. But you are here today to tell the jury that he couldn't have done; is that correct? A. I was subpoenaed.

"Q. You are here in response to a subpoena, aren't you? A. Yes.

"Q. Now there is no doubt that you consider yourself to be Mr. Corrigan's friend? A. Yes.

"Q. You would like to help him out if you could? A. Yes.

"Q. Is that right?"

At this point, the court interrupted:

"The Court: Let me ask you this. You became quite concerned there when you were asked why you didn't go to the authorities and tell them. Why didn't you go to the authorities and tell them that you knew where Corrigan was that night? I don't want anything that a lot of other people saw him. They haven't come up and testified to it, but you have. Tell us why you didn't go. If you knew this man was innocent, why did you wait until today to tell this Court where he was charged or to tell the District Attorney or the Chief of Police? Why did you wait until today? A. Well, actually this Jack Travis, this bartender I was going with, he didn't want me to get involved anyway or anything.

"The Court: You mean that the bartender was the one? Who is Jack Travis? A. The fellow I was going with.

"The Court: Where is he? Does he know anything about this?

"Witness: No.

"The Court: Well, all right. Now tell me, why, if you knew that this man

was innocent, if you knew he was innocent, why did you wait until today? Give me your answer? You say it was your friend?

"Witness: Well I thought if he needed me he would certainly get in touch with me.

"The Court: Did anybody ever get in touch with you?

"Witness: Mr. Cayocca is the only one.

"The Court: All right, then what happened? Why didn't you go after you talked to Mr. Cayocca?

"Witness: He didn't suggest it.

"The Court: Did he suggest that you don't go.

"Witness: No, he did not.

"The Court: Well, then what stopped you from going?

"Witness: Actually, I don't—I don't know why I didn't go. Just never occurred to me.

"The Court: You are here today. Aren't you?

Witness: Yes.

"The Court: And you are here under a subpoena; isn't that right?

"Witness: Yes.

"The Court: When did you get that subpoena?

"Witness: About a week and a half ago.

"The Court: All right. At that time you knew that you were going to be brought into Court, didn't you?

"Witness: Yes.

"The Court: Why didn't you then go to the District Attorney and tell him that you knew this man was innocent?

"Witness: Well, I don't know why, I just figured that I would have to be here today and that's all there was to it; I mean I just didn't think any more about it.

"The Court: You never thought any more about it?"

"Witness: No.

"The Court: Is that it?"

"Witness: Yes.

"The Court: Is that what you want to tell me?"

"Witness: Yes.

"The Court: All right. Now then, who was this you said told you not to become involved in it?"

"Witness: This Jack Travis I was going with him, and he was just a little jealous of Frank, that's all.

"The Court: All right. And for that reason Jack Travis told you not to go and tell about it; is that it?"

"Witness: Well, he didn't say not to, but he said if you are not careful, he said, you may get a subpoena; that's all.

"The Court: You told me he was jealous of Frank?"

"Witness: He was.

"The Court: And is that the reason you mean to tell me that because he was jealous of Frank, that you would let a man be convicted of a crime of robbery because this bartender told you not to go to the police?"

"Witness: He didn't tell me not to go.

"The Court: Well, why didn't you go?"

"Witness: Judge, I don't know why I didn't go.

"The Court: All right. All right."

[5] We know of no general duty of a citizen upon learning that someone has been accused of crime and is about to be tried under that accusation to go to the district attorney and volunteer information as to that person's innocence. This witness had done what the ordinary citizen would have thought was adequate in giving the information she had to counsel for the defendant and she was not obliged either in law or in morals to also go to the dis-

trict attorney and give him the same information. It may have been proper enough for the prosecuting attorney to cross question her as to why she had not given the information to him as well as to counsel for the defense, but it was not proper for the trial judge, this having been done, to take over the cross examination and tell the jury in effect that the witness was under the legal duty to give the information to the district attorney and to the court in which the charge lay, as well as to the defense counsel, and, having failed to do that, was therefore suspect in the matter of her credibility, was such a person as "would let a man be convicted of a crime of robbery." Though not done expressly, this was the expression of an opinion as to credibility made during that part of the trial where such expressions are not within the proper function of a trial judge. This was error.

The next assignment of misconduct has to do with the recall to the stand for further cross examination of the witness Bakotich. He stated that he wanted to change his testimony theretofore given to the effect that he was positive of the date and of the hours he had been with appellant. He said that he now was not sure that he had the right date. The following occurred:

"[By the prosecuting attorney]:

Q. Is it correct, Mr. Bakotich, that you are not sure that you were with Mr. Corrigan on the specific date of the 30th of April as you have previously testified? A. It's possible.

"Q. All right. But you did testify originally positively that you were sure; is that right? A. That's right.

"Q. All right sir. Now do you now realize that if you lie under oath you are committing perjury? A. Yes sir.

"Q. All right. You understand that now; is that correct? A. Yes.

"Q. All right. Now why was it then that at the time you were testifying earlier this afternoon you said that

you were positive that you were with Mr. Corrigan on the 30th? A. Well, I figured—I said I was, but then again I thought I might—possibly I was with him at the time, I thought, because quite a few times like I said I have been out with Frank five or six times, and it might have been a chance that I might have been with him on that night.

"Q. But you are not sure? A. No sir.

"Q. All right. Why was it that you told the jury originally that you were sure? A. Excuse me?

"Q. Well, let me ask you this. Weren't you just trying to help Frank out when you first told your story to the jury? A. Yes, the first one, yes.

"Q. That is correct, isn't it? You were trying to help— A. Yes sir.

"Q. —out Mr. Corrigan, and the truth of the matter is that you could not know and you are not sure that you were with Mr. Corrigan on the 30th; it could just as easily have been another date; is that correct? A. It's possible.

"Q. Well, possible or is it correct? A. Yes sir, it's possible, yah; yes sir.

"Q. All right sir. I have no further questions."

Counsel for defendant then took the witness on redirect and established that after he had left the courtroom under reservation by the People of the right to further cross examine and under the order of the court to wait in the corridor he had been in a room talking to five or six detectives. On recross counsel for the People asked him the following questions:

"Q. Did anyone use any force on you? A. No sir.

"The Court: He doesn't say that. They didn't—you were taken in there in regard to the fact that your brother was supposed to come down here, was that it?

"Witness: Well—

"The Court: They took you in there? A. Yes, I was taken in there."

"Witness: Yes.

"The Court: And you saw the District Attorney, did you?

"Witness: Well, I don't know who he was.

"The Court: Do you know the District Attorney? A. Yes, I do."

"Witness: No, sir, I don't.

"The Court: Well, let's see if you know this man here, Mr. J. Francis O'Shea, the District Attorney of this County?

"Witness: No, he wasn't in there.

"The Court: All right. He wasn't there?

"Witness: No, I don't think so.

"The Court: Well, this man here was there, was he?

"Witness: He was in there, yes.

"The Court: And did anybody at that time tell you you had to change your story or anything?

"Witness: No, they were talking to me in there. They had questioned me about this here that occurred with Frank on this here testimony of mine.

"The Court: And then you told them that; is that right?

"Witness: Yes, I was talking to them.

"The Court: All right, they didn't—did Mr. De Cristoforo ask you if they made any threat, did they make any threat?

"Witness: Well, they were talking about perjury and all that stuff.

"The Court: Well, they told you—did somebody tell you that if you told a lie on the witness stand it would be perjury?

"Witness: That's right.

"The Court: Is that the first time you knew that?

"Witness: Yes, I just found out.

"The Court: And up to that time, as I understand your testimony to Mr. De Cristoforo was that up to that time you thought you could help Frank out; is that it?"

"Witness: That's right.

"The Court: All right, that's all."

Here again the charge is that of undue interference by the trial judge with the conduct of the case and we think again the charge is unjustified. The witness had under the described conditions made a material change in his testimony. He was the principal alibi witness. There had been an intimation that the change had been unlawfully compelled by officers. We think the court was well within its power in taking up the questioning and advancing it as was done.

In connection with this same occurrence and at the close of the testimony of the next alibi witness the court again ordered the witness to remain in the corridor as it had theretofore ordered Bakotich to do. The following occurred:

"Mr. Cayocca [defense counsel]: Your Honor, I would like to make an objection at this time as to the witnesses who testified here, to have them in the corridor is all right, but as to taking them into the District Attorney's Office and two or three people accuse them of perjury, and jumping all over them—

"The Court: Well now, wait, there is no evidence before this Court of anybody accusing anybody of perjury.

"Mr. Cayocca: What I call a—

"The Court: All right, there is no evidence before this Court that anybody accused anybody of perjury. There is testimony that this boy was told that if he didn't tell the truth it would be perjury, and then your witness changed his story. That's what you wanted to know?"

"Mr. Cayocca: All right, your Honor.

"The Court: Call the next witness."

There was no misconduct here. The defense counsel had strongly intimated that the officers were intimidating his witnesses and that the court was affording them the opportunity to do so because it was requiring them to wait and not excusing them from further attendance on the court. The intimation is not borne out by the record and the court merely stated the fact to be so and then said that Bakotich had been told that if he didn't tell the truth it would be perjury, whereupon he changed his story. There was no misstatement of the record by the court and the court was acting properly in setting the matter straight.

The next assignment of misconduct has to do with examination by the court of the fourth alibi witness. The witness had testified that Corrigan left the bar which he tended at 1:15 in the morning, saying as he went out, "I will see you later"; that he came back into the bar at 25 minutes to 2 and remained there until 2 o'clock; that no one left with him when he first left at 1:15; that there were about 25 customers in the place while Corrigan was there. People's counsel then asked questions, testing the accuracy of the witness' observation by inquiring as to what he knew about the time others came and went. At this point the court interposed the following:

"The Court: Let me ask you this, whenever anybody goes out, says, 'I will see you later,' do you always look at the time to see what time they leave?"

"Witness: Well, not exactly, but thirty-four years as a bartender is a little experience, your Honor."

"The Court: Well now, let me get that answer. Read that answer to me. (Reporter read the pending answer.)

"The Court: All right. Now what do you mean by that?"

"Witness: Well, its—you just seem to sense it in a way.

"The Court: Sense what?"

"Witness: As a person comes and has a drink, at times you can sense

it, he can have one drink, you can almost sense if he has two, the type of a person that's in front of you.

"The Court: Yes. Now then you are testifying in some regard here from your observation as a man behind the bar for thirty-four years; is that right?

"Witness: Yes.

"The Court: All right. Now let me ask you this. How many other people left that night that you could tell us left at 1:00 o'clock, that you looked at the clock when they left?

"Witness: I didn't look at the clock but I could tell you a few.

"The Court: All right. But you did look at the clock when Corrigan left; is that it?

"Witness: No, I didn't look at the clock.

"The Court: Didn't you tell us you looked at the clock?

"Witness: But at 1:00 o'clock I did look at the clock and I spaced the time as fifteen minutes.

"The Court: I see. As the time that he left?

"Witness: Yes, I would say that at the time he left I spaced it at fifteen minutes.

"The Court: How did you happen to do that? Why did you do that with him any different than anyone else?

"Witness: Well, I don't do it any different with anyone else, your Honor, it's just that I know the time some come in and some go out is all.

"The Court: Now isn't it a fact, let me ask you this and let's you and I be on the square with each other.

"Witness: Yes.

"The Court: Do you definitely know what time Corrigan left there that night? Don't forget I want you to tell me the truth.

"Witness: Well, I am telling you the truth to the best of my knowledge.

"The Court: All right, and you say at 1:15.

"Witness: Yes, I would say."

[6] We cannot approve the latter part of this questioning. The witness had just stated that Corrigan left at a certain time. The court then proposed to ask again if he really knew when Corrigan left and intimated that the witness had not told the truth, or as the court put it, "Let's you and I be square with each other". The question was then repeated in this way: "Do you definitely know what time Corrigan left that night? Don't forget, I want you to tell me the truth." We think the jury could not fail to get the strong impression that the court disbelieved the witness and thought the witness had not told the truth and so had not been "square" with the court. We believe that the questions asked and the comments made cannot receive any other reasonable construction. We think it undoubtedly true that the court did not believe the witness, but the error lay in expressing that distrust at that point in the case.

During the course of the trial, Ash was brought into the courtroom in the custody of deputy sheriffs for the purpose of identification. Thereafter, when the defendant was being cross examined, the following occurred:

"Q. The fact that he pleaded guilty was of course, good news to you, wasn't it? A. Not necessarily, sir. Why should it be good news to me?

"Q. So that he wouldn't testify.

"Mr. Cayocca: Why wouldn't he testify?

"Witness: The man is in the County Jail.

"Mr. Cayocca: He is over in the County Jail. They can call him any time.

"The Court: Wait a minute, one at a time. Have you got some objection to make?

"Mr. Cayocca: I mean making a statement he pleaded guilty.

"The Court: Is there any objection?

"Mr. Cayocca: This is an objection.

"The Court: What is your objection?

"Mr. Cayocca: Objection to the question, your Honor.

"The Court: What is the ground?

"Mr. Cayocca: The ground is that it is an improper question the way it is phrased.

"The Court: Read the question. (The reporter read from lines 18 to 22, page 421.)

"The Court: He said why and that is the answer."

Upon redirect examination, the record discloses the following:

"By Kenneth B. Cayocca, Esq., of counsel on behalf of defendant:

"Q. Now you mentioned Mr. Ash. As far as Ash testifying in this case, do you have any fear of Ash coming in here and testifying? A. Not at all, sir.

"Q. You feel if he came in here and told the truth it would have any effect upon your charge? A. If he could come in here and tell the truth, yes, sir, it wouldn't hurt me a bit."

On recross examination, the record discloses the following:

"By Joseph De Cristoforo, Esq., Deputy District Attorney in and for the County of Sacramento, State of California:

"Q. You said, Mr. Corrigan, that you have no fear of Mr. Ash testifying; is that right? A. Well, I have no fear of what his testimony would be.

"Q. That's right, you are not afraid of that, are you? A. No, sir, not at all.

"Q. And isn't it a fact, Mr. Corrigan, that the reason you are not afraid is that you know that Mr. Ash will get up there and say that you

were not the man with him? A. Why if he tells the truth, he will, sir.

"Q. That wasn't my question."

"Mr. Cayocca: That's just the answer to your question.

"The Court: Ask the next question.

"Mr. De Cristoforo: No further questions.

"The Court: It's already been asked and answered.

"Mr. De Cristoforo: I have no further questions.

"Mr. Cayocca: May I have the question read and answered again for my own benefit? I didn't get clear on it.

"The Court: He asked him—don't you remember it?

"Mr. Cayocca: No, I don't.

"The Court: All right, I will repeat it to you. He asked him, 'Isn't it a fact that you know that if Ash is called here as a witness he will get on the witness stand and testify that you weren't with him?' That's the answer.

"Mr. Cayocca: That's what I wanted. All right, thank you, Mr. Corrigan.

"The Court: Do you want him called as a witness?

"The Witness: That's up to my attorney, sir.

"The Court: Well it's up to you, too, I am asking you now, do you want him? I will order him here.

"The Witness: I don't care, sir, either way.

"The Court: If you want him, he is available. I will bring him here from prison if you want.

"Mr. Cayocca: Well, your Honor—

"The Court: If you want him, he is available for you.

"Mr. Cayocca: Your Honor, from what has gone on before with some of these other fellows that testified, I have already advised Mr. Corrigan that I would not call Ash.

"The Court: I don't understand what you mean by that. If you want him, I will order him here so he is available for you."

[7] The matter of calling Mr. Ash, who should do so and why, was injected into the case by the prosecution. It could be said that the defense had rather the better of the exchange. But appellant criticises the intervention of the court, and we cannot approve it. It was not to elicit evidence from the witness, nor to clear up any uncertainty in testimony. Implicit in the gratuitous offer of the court to cause Ash to be brought in was a challenge to the defense to call Ash to the stand. However, on the whole record of this incident we think no prejudice was suffered.

[8] Although with regard to the incidents noted we cannot approve what was done and think the court fell into error, it remains to apply the test of the Constitution as to whether the errors merit reversal of the judgment. *People v. Ottey*, supra, 5 Cal.2d at page 726, 56 P.2d at page 199. We do not view the case as one of those so close as to merit reversal. The case against appellant was strong and this is particularly true with regard to the testimony as to his extrajudicial statements, and as to the existence of his fingerprints upon the gun which he himself by extrajudicial statements identified as that used in the robbery. We do not think it probable that a different result would have been arrived at if the trial court had not commented as it did and indicated its disbelief of the defense witnesses when it did. No miscarriage of justice in our opinion occurred and reversal of the judgment and order appealed from is not warranted.

[9, 10] Appellant further contends that the court erred in failing to instruct the jury upon the defense of alibi. This contention cannot be sustained. No instruction was requested. While it is clearly established that the court is required without request to instruct upon the general principles of law involved in a criminal case, it is equally well established as to

the defense of alibi, that in the absence of any request for an instruction thereon, it is not the duty of the trial court to give a specific charge on the subject. *People v. Whitson*, 25 Cal.2d 593, 603, 154 P.2d 867, and cases cited. It can be well observed, also, that in such a case as this, where the defense of alibi is made out if the defendant was not personally present at the time the crime was committed, the jury do not need to be told that proof he was absent from the scene would constitute a defense. It is a matter of common knowledge that a person cannot be in two places at one time. It is unnecessary to instruct a jury upon so plain a matter.

The judgment and the order appealed from are affirmed.

SCHOTTKY, J., concurs.

PEEK, Justice (dissenting).

I am entirely in agreement with the conclusion of the majority on the question of comment, that, " * * * while a court may, when it charges the jury in a criminal case, express its opinion as to the weight of evidence and as to the credibility of any witness, it must, while the evidence is being received, refrain from such conduct." However, I cannot agree with the final conclusion that the conceded misconduct of the trial judge was not prejudicial. As the majority notes, "A trial judge is rigorously prohibited from actions or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. This rule should be strictly adhered to." *People v. O'Donnell*, 11 Cal.2d 666, 81 P.2d 939, 942. But is this rule being *strictly adhered to* in the present case? I am not convinced that it is.

From my reading of the transcript I cannot escape the conclusion that from the outset of the trial, by the persistent, aggressive and lengthy cross examination of the witnesses, the context of the questions asked, the innuendoes contained therein, as well as the inferences to be drawn therefrom, and what amounted to voluntary

comments contained in such questions, the trial judge definitely stepped out of his character as a judge and took over the role of the prosecutor. And, by such actions and words, he very forcefully conveyed to the jury his personal opinion as to the truth or falsity of the evidence and the credibility of the witnesses. Although the majority opinion has quoted much of the extensive and repetitious examination of the witnesses by the court, it seems to me that only by a reading of the entire transcript can the true effect on the jury of such questioning be evaluated. However, I hesitate to unduly burden the opinion with further quotations. Suffice it to say that the interrogation by the court, in addition to the portions quoted in the majority opinion, is replete with such comments and questions as:

"* * * You ought to know. You say you were there * * *. You don't know. You don't know, is that it? Do you or don't you know? What joint were you in * * * you say. * * * You guess * * *. Now you are telling us. Is that right? And you don't—didn't even know his name * * *? Might have been Freddy but you don't know whether it was Freddy or not, is that right? You just guess it was during April; is that right? You are not sure are you? Are you sure it was in April or you just say it must have been, you guess? * * * All right, now let me ask you this. * * * You don't remember that very well? You don't know the date. Was it Saturday night, Sunday night, or do you know? Have you any idea? * * * Who said? They said? Who are they?"

The majority opinion, while holding that such interrogation and comment by the trial court was error, concludes that it was not prejudicial error, because as it is there stated the case against the defendant was strong, first by reason of his extrajudicial statements, and second by reason of his fingerprints which were found on

the gun which he, by extrajudicial statements, identified as that used in the robbery; and therefore this case comes within the saving provisions of Article VI, section 4½, of the Constitution.

I cannot agree that the case was strong. The evidence concerning the identification of the two persons who participated in the robbery was entirely circumstantial. The testimony of the bartender and the four bar patrons, some of whom had been at the bar for quite some time, was in complete confusion. Their only agreement was as to what clothing was worn by the two men; that is, the nylon stockings worn as masks, the overcoat, hat and gloves, and the similarity of the gun used with the one introduced at the trial. The defendant herein was never directly identified. His only connection with the robbery was established by reason of the fingerprints being found on the gun and certain conflicting statements made by two of the State's witnesses concerning comments said to have been made by defendant following two telephone calls to Ash's landlady. The landlady testified to one version and one of the paroled ex-convicts testified to another, and one which was different from his testimony at the preliminary hearing. Durand, the other ex-convict parolee who was called by the prosecution gave still another version. Again there was conflict as to whether it was Dillon or Corrigan who made statements such as: that the "heat was on" when he was informed that Ash was in jail; that he hoped that Ash had enough sense to do something with the box the police were said to have found; that there were stockings, gloves and other stuff in the box and fingerprints all over it. Corrigan denied that it was he who made such statements. But even assuming that he did, I do not consider such comment can be interpreted either as an admission on his part of participation in the robbery or as an identification of the gun. No incriminating evidence was found in the possession of Corrigan. The box was found in the attic of Ash's apartment.

The fingerprints found on the gun were not so placed as they would have been had the gun been held in a normal position. It was Corrigan's testimony that his fingerprints were left on the gun when he was asked to examine it at the police station. All of the witnesses testified that the robber who held the gun wore gloves at the time of the robbery. Thus the fingerprints must have been placed on the gun either before or after the robbery. The most that was said concerning the gun, by any of the witnesses, was merely that it was similar to the gun used at the time of the robbery.

It is true, as the majority notes, a trial is not a game in which the judge can only act as an umpire, and "sit quietly by and see one wrongfully acquitted or unjustly punished". *People v. Golsh*, 63 Cal. App. 609, 614-615, 219 P. 456, 458. But it is equally true that he must not become a partisan advocate. Therefore when, during the examination of the witnesses, a court by words or actions departs from the role of an impartial judge and conveys to the jury "his personal opinion as to the truth or falsity of any evidence", *People v. O'Donnell*, 11 Cal.2d 666, 671, 81 P. 2d 939, 942, and it could well be added, of the credibility of any witness, he has by so doing placed himself without the bounds of Article VI, section 19.

No one will deny that jurors are most sensitive to and rely with great confidence on the fairness of judges and the correctness of their views expressed during the course of a trial. "For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant." *People v. Mahoney*, 201 Cal. 618, 627, 258 P. 607, 610; *People v. O'Donnell*, 11 Cal.2d 666, 81 P.2d 939.

Conviction or acquittal may equally be the result of a miscarriage of justice. In either event a fundamental right of the people or of the defendant has been dis-

regarded or denied. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging both to the people and the defendant shall be respected. *People v. Long*, 63 Cal.App.2d 679, 147 P.2d 659.

The situation as presented by the record before this court, when viewed in light of the rules noted by the majority as well as this dissent, convinces me that to approve the conceded error in this case is to deny a fair, impartial trial to the defendant and to extend the saving grace of section 4½ just a bit too far.



145 Cal.App.2d 304

Truman C. DRIVER and Tena B. Driver, his wife, Plaintiffs, Cross-Defendants and Respondents,

v.

A. A. ACQUISTO, Individually and A. A. Acquist, transacting business under the fictitious name of Anthony Motors, Defendant, Cross-Complainant and Appellant.
Civ. 21359.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Action by conditional buyers for conversion of automobile by seller. The Superior Court, Ventura County, Walter J. Fourt, J., entered judgment for buyers and seller appealed. The District Court of Appeal, Parker Wood, J., held that under the circumstances the buyers could not recover the full value of automobile but merely that amount less the balance due on contract at time of conversion.

Judgment affirmed as modified.

1. Sales ⇨481

In action by conditional buyers against seller for conversion of automobile, evidence relating to seller's provocation and buyers' anger and statements made at time of the taking raised question of fact as to whether buyers consented to the repossessing of automobile by seller.

2. Sales ⇨481

In action by conditional buyers against seller for conversion of automobile, evidence relating to seller's assignment of contract to bank and to bank's subsequent dealings with seller and buyers in respect to contract supported findings that seller had no interest in automobile or contract of sale when he repossessed automobile.

3. Sales ⇨481

Where converter of property subject to conditional sales contract is a stranger and has no interest in property and purchaser is under obligation to pay balance of contract price to the owner of the contract, purchaser may recover full value of property converted.

4. Sales ⇨481

Where conditional buyers of automobile brought action against seller for conversion and it was admitted that after seller repossessed automobile he repurchased previously assigned conditional sales contract, assessment of buyers' damages for conversion should not have included the unpaid balance on such contract.

5. Trial ⇨397(3, 4)

In action by conditional buyers for conversion of automobile by seller who counterclaimed for unpaid balance due on said contract, where buyer did not plead that such contract was in violation of statute limiting percentage of time price differential and there was no evidence introduced in support of such contention, trial judge in hearing case without jury committed no error in refusing to make finding that such contract was in violation of statute. West's Ann.Civ.Code, § 2982.

John R. Danch and Wallace Hatcher, Ventura, for appellant.

William Leeker, Carpenteria, for respondents.

PARKER WOOD, Justice.

Plaintiffs sought damages for conversion of an automobile. Defendant filed an answer, denying the alleged conversion; and he filed a cross-complaint, seeking \$55.75 allegedly due as a deficiency, under a conditional sale contract, after the automobile had been repossessed and resold by defendant. Judgment was for plaintiffs for \$1,093, and that cross-complainant take nothing. Defendant appeals from the judgment. (The action was commenced in the Municipal Court at Santa Barbara, and upon a motion for change of venue was transferred to the Superior Court of Ventura County.)

Appellant contends that the evidence was insufficient to support the judgment.

About September 10, 1953, defendant Acquistio and plaintiffs entered into a written conditional contract of sale whereby defendant sold to plaintiffs a 1950 Mercury automobile. The contract stated, in part, that the cash price was \$1,425.13; the down payment was \$475.13 which was an equity in a Pontiac and trailer; the unpaid balance of the cash price was \$950; the time-price differential was \$237.28; the contract balance was \$1,187.28, which was to be paid in 24 monthly instalments of \$49.47 beginning October 11, 1953. The contract was signed as follows: Anthony Motors, by A. A. Acquistio, owner. Truman C. Driver. Mrs. Tena B. Driver. J. W. Glover, Co-maker.

Prior to the making of the contract, the Mercury automobile was owned by J. W. Glover who had an equity of approximately \$400 in it, and he owed the Bank of America \$900 on the automobile. Glover and plaintiff Mr. Driver entered into an arrangement whereby it was contemplated that plaintiffs would buy the automobile by paying Glover the amount of his equity

and by financing the balance on an installment plan through Acquisto. Glover conferred with Acquisto relative to the financing, and thereafter the conditional contract of sale, above referred to, was executed. No automobile or trailer was transferred (as indicated by the contract) to Acquisto by plaintiffs as a down payment or at all. Plaintiffs paid Glover, for his equity, \$379 cash and transferred a Ford automobile to him for the agreed amount of \$75, making the total payment of \$454 to Glover. Acquisto paid to the Bank of America the \$900 indebtedness of Glover.

On September 21, 1953, Acquisto sold and assigned the contract to Citizens Bank of Santa Paula. The bank notified plaintiffs by letter that the contract had been assigned to it, and that in making the payments to the bank the plaintiffs should use a payment book which was enclosed in the letter. Mr. Driver's salary was paid to him on the 15th of each month and he requested the bank to change the due date of the automobile payments from the 11th to the 15th of each month. The bank changed the due date to the 15th. Plaintiffs made payments to the bank as follows: October 19, 1953, \$49.47; November 17, 1953, \$49.47; December 31, 1953, \$98.94. In other words, the payments due prior to February, 1954 were paid.

The conditional contract of sale provided that Acquisto may insure the automobile and that the plaintiffs would pay the premium. Also, the plaintiffs agreed in writing that within 10 days after September 10, 1953, they would furnish an insurance policy covering the automobile. They furnished such a policy but it was canceled on December 18, 1953, because plaintiffs did not pay the balance due on the premium.

About February 10, 1954, Acquisto told plaintiff Mr. Driver that Acquisto would get another insurance policy on the automobile if Driver would pay the premium on February 15. Driver testified that he told Acquisto that he would pay the premium and also pay the February payment of \$49.47 on February 15, 1954, between

6:30 p. m. and 8:30 p. m. at Acquisto's office. Another policy was issued on February 11 and the premium was \$53. Driver testified that he and his wife went to Acquisto's office on February 15 at 7:15 p. m. to pay said amounts, but Acquisto was not at his office; they returned to his office about 7:45 p. m. and about 10:30 p. m. but Acquisto was not there.

On the following morning, February 16, Acquisto telephoned Driver at his place of employment and asked him why he had not paid the money on February 15. Driver testified that he replied that he had been to the office (at the times above stated) and that Acquisto was not there; that Acquisto then said that perhaps he had stepped out for a sandwich and coffee; that Acquisto also said that he had been to the home of the Drivers on the night of February 15; that he told Acquisto that Mrs. Driver would be at Acquisto's office that afternoon (February 16) to make the payment; that Acquisto "got rather nasty" and said that if Driver did not pay the money by 10:30 a. m. of that day (February 16) he would take the car; then Mr. Driver was "rather mad" and he said, "Well, if you think you have the right to take my car, you go ahead and take it then." At that time the automobile was at the home of plaintiffs—Mrs. Driver had used it in taking Mr. Driver to his place of employment and she returned it to their home.

On February 16, about 1:30 p. m., Acquisto went to plaintiffs' home and took the automobile and drove it to his office. Acquisto testified that when he arrived at plaintiffs' home he told Mrs. Driver that he could store the car if they would take care of the insurance; that she replied that they could not pay; he asked her for the keys and she handed them to him; he asked for the registration certificate (white slip) and she gave it to him.

On February 16, after taking the automobile, Acquisto sent a letter to plaintiffs wherein he demanded payment of the balance of \$1,010.73 not later than February 22. The bank had not made any

demand upon plaintiffs for the February payment, and the bank did not instruct Acquisto to repossess the automobile.

On January 17, 1952 (prior to the transaction herein between Acquisto and the Citizens Bank of Santa Paula), Acquisto and the bank had entered into a "Dealers Repurchase Agreement" which provided that the bank would purchase conditional sales contracts from Acquisto and that a sale of such a contract by Acquisto to the bank would be without recourse except as to any contract which may become 60 days delinquent, and as to such a contract Acquisto would repurchase it from the bank on demand.

On February 26, 1954, (after taking the automobile) Acquisto paid \$868.40 to the bank, and the contract was transferred to him. On April 30, 1954, Acquisto sold the automobile to Mr. Hamelin for \$1,095.

Plaintiff Mr. Driver testified that he did not consent to the taking of the automobile by Acquisto. Mrs. Driver was in Oklahoma at the time of the trial.

The court found that on February 16, 1954, plaintiffs were the owners and entitled to the possession of said automobile, and on said date defendant took the automobile and converted it to his own use; on said date the value of the automobile was \$1,093, and defendant had no interest in the automobile or in said conditional contract of sale; on said date the Citizens Bank of Santa Paula was the owner and holder of said contract, and plaintiffs were not in default in the performance of any of the provisions of the contract; the defendant, in taking the automobile on said date, was not the agent, representative or employee of said bank and had not been authorized by the bank to take possession of the automobile on behalf of the bank at any time; on said February 16 there was insurance on the automobile as required by said contract and by a certain other agreement to furnish an insurance policy, and that said insurance was in effect on said date; the payment due by plaintiffs under the contract of sale for the month of February

1954, and the payment due on the insurance premium were due on February 15, 1954; on said February 15 plaintiffs were ready to pay all payments due under the contract of sale and the agreement to furnish insurance, and they presented themselves at defendant's place of business for the purpose of making the payments but the place was closed and no one was there to receive the payments; plaintiffs did not, nor did either of them, consent to the taking of the automobile by defendant on said February 16 or at any time; about April 30, 1954, defendant resold the automobile for \$1,095, and said resale was made without notice to either plaintiff and without the knowledge or consent of either of them; the value of the interest of plaintiffs in the automobile on said February 16 was \$1,093.

[1] Appellant argues that there was no conversion because plaintiffs consented to the taking of the automobile. As above stated, the court found that the plaintiffs did not consent. Appellant, in presenting the argument that plaintiffs consented to the taking, quotes his own testimony which was, in substance, that Mr. Driver got mad and told him to pick up the car, that he (Driver) did not have a driver's license and could not drive; and that, when he (Acquisto) arrived at plaintiffs' home, Mrs. Driver said that she knew what he wanted, that her husband had told her, and that they could not pay for the insurance; and that when he asked Mrs. Driver for the keys and the white slip she handed them to him. Of course, the trial judge was not required to accept the testimony of Acquisto as to what was said and done when he took the automobile from plaintiffs. Apparently the judge accepted Driver's testimony which was to the effect that he had gone to Acquisto's office on the night of February 15 for the purpose of paying Acquisto; that on the morning of February 16, in response to Acquisto's telephone call, he told Acquisto that he had tried to pay him the night before and that Mrs. Driver would be at Acquisto's office in the afternoon of that day to make the payment;

and that when Acquisto got nasty and made him mad he (Driver) said, "Well, if you think you have the right to take my car, you go ahead and take it then." In view of the circumstances under which that quoted statement of Driver was made it cannot be said, as a matter of law, that the statement amounted to consent that the car be taken. Under the circumstances, particularly the circumstances as to provocation and anger, the statement might be regarded as a warning or threat on the part of Driver that if Acquisto did take the car his right to take it would be challenged and he would be held accountable for taking it. Whether the plaintiffs consented to the taking was a question of fact for the trial judge. The finding that they did not consent is supported by the evidence.

[2] Appellant also argues that he had a sufficient interest in the automobile and contract of sale to entitle him to repossess the automobile. The appellant had assigned the contract to the bank without recourse. Although he had a written agreement with the bank whereby, under certain circumstances, he would repurchase the contract on demand, no such demand had been made upon him and he had not repurchased the contract at the time he repossessed the automobile. Although there was evidence that he had an oral arrangement with the bank whereby he "works" his delinquent accounts, there was also evidence that the bank had extended the due date of the monthly payments to the 15th day of each month; that the bank's policy was to send a demand or delinquent notice on the 5th day of delinquency; that the bank had not demanded payment by plaintiff on February 16; and the bank had not instructed appellant to repossess the automobile. The findings that appellant had no interest in the automobile or contract of sale when he took the automobile and that he converted the automobile to his own use are supported by the evidence.

[3,4] Appellant contends further that, even if plaintiffs were entitled to judgment by reason of conversion, they were not

entitled to recover more than the value of their limited interest in the automobile, that is, the value of the automobile less the unpaid purchase price. The court found that the value of the automobile was \$1,093. It is to be noted that the court also found that the value of the interest of the plaintiffs in said automobile was \$1,093. Since plaintiffs were awarded \$1,093, it appears that they were awarded (as their interest in the automobile) the full value of the automobile. It appears that the balance due to the bank under the contract of sale, at the time of the conversion, was approximately \$868.40. (Acquisto testified that on February 26—ten days after he took the automobile—he purchased the contract from the bank for \$868.40.) Appellant alleged in his cross-complaint that on February 26, 1953 (1954), he paid \$868.40, the unpaid balance due to the bank on the contract, and that the bank transferred the ownership of the automobile to him. Plaintiffs, in answering the cross-complaint, denied that allegation (basing their denial upon lack of information). The court did not make a finding upon that issue. A finding should have been made thereon. If it is a fact that appellant was the owner of the contract at the time of the trial, the court in fixing the amount of damages for the conversion should not have included therein the unpaid amount of the purchase price. (Plaintiffs state in their brief that they concede that appellant, after retaking the vehicle, paid the bank \$868.40 and received from the bank a transfer of the contract.) It is true that under some circumstances a purchaser under a conditional sale contract (who has not paid the full contract price) may recover the full value of the property converted. An example of such circumstances is where the converter is a stranger and has no interest in the property and the purchaser is under an obligation to pay the balance of the contract price to the owner of the contract. In *Goldberg v. List*, 11 Cal.2d 389, at page 393, 79 P.2d 1087 at page 1090, 116 A.L.R. 900, it was said: "[A]n analysis of the

authorities which support the rule that a recovery of the full value of the property converted may be had by a person having only a limited or qualified interest therein, indicates that the underlying reason and basis for such recovery is the fact that the party having the limited or qualified interest is liable over to the owner of the remaining interest, and in order to be adequately compensated must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of such owner." It was also said in that case 11 Cal.2d at page 393, 79 P.2d at page 1090: "That this is the true basis for the permitting of the recovery of the full value of the property converted by one owning a qualified interest is demonstrated by the fact that when the action is against the owner of the general interest, the owner of a qualified interest can only recover for the value of such limited interest, in order 'avoid circuity of action'. [Citations.]" In the present case it appears that the appellant was the owner of the contract "or general interest" at the time of the trial, and that the plaintiffs were not obligated to pay the balance of the contract price to the bank but were obligated to pay it to the appellant. If appellant was the owner of the contract at the time of trial, plaintiffs were not entitled to recover the full value of the automobile, but they were entitled to recover the value of their limited interest in the automobile which is the difference between the value of the automobile and the amount of the unpaid purchase price at the time of the conversion. As above stated, the court erred in not finding upon the issue as to whether appellant had purchased the contract from the bank. Plaintiffs concede, however, as above stated, that appellant had purchased the contract from the bank for \$868.40. They also stated in their brief that the question, with respect to amount of recovery, is whether the plaintiffs are entitled to \$1,093 (the full value), or to that amount

less \$868.40, or a net of \$224.60. The amount of the judgment should have been \$224.60.

[5] Plaintiffs assert that the conditional sale contract was in violation of section 2982 of the Civil Code and may not be enforced by appellant. That section provides that the "time price differential" in a conditional sale contract for the sale of a motor vehicle shall not exceed a certain percent of the unpaid balance, which percent is to be computed in a manner specified therein. The section also provides that if the seller, except as the result of accidental error, violates the provision as to time price differential the contract shall not be enforceable. This contention of plaintiffs relates to involved computations which, according to plaintiffs, show an overcharge by appellant of \$9.50. The proposed findings, which were submitted to the judge, included a finding to the effect that defendant violated said section to the extent of such overcharge and that the overcharge was not the result of an accidental error. The judge deleted that proposed finding from the findings as made. Plaintiffs did not plead that there was a violation of said section. The computations as to the alleged error were not presented at the trial. Even if there had been such an error, this court cannot decide whether the error was accidental. Appellant asserts in his brief that if plaintiffs had not avoided, in their pleadings and proof, the question of illegality of the contract, appellant could have shown at the trial how he arrived at his calculations. The trial judge did not err in not making a finding as to the alleged violation.

The judgment is modified by reducing the amount thereof to \$224.60, and as so modified the judgment is affirmed. Each party to pay his own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

145 Cal.App.2d 163

The PEOPLE of the State of California
Plaintiff and Respondent

v.

William Coburn WILLIAMS, Defendant
and Appellant.

Cr. 5628.

District Court of Appeal, Second District,
Division 2, California.

Oct. 18, 1956.

Prosecution of six defendants for grand theft accomplished through embezzlement. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgments of conviction as to all defendants, and one of the defendants appealed from judgment and order denying his motion for new trial. The District Court of Appeal, Ashburn, J., held that evidence sustained embezzlement conviction of trustee of union welfare fund, who withdrew excessive amounts from trust fund as alleged compensation for services.

Affirmed.

1. Trusts §315(1)

A trustee under trust instrument that does not expressly provide for compensation for services is not entitled to any until the same has been approved and allowed by a court.

2. Embezzlement §11(1)

Where trustee of union welfare fund withdrew excessive amount from fund in the form of a cashier's check which he did not endorse or cash, but which check was still outstanding, there was a completed embezzlement, regardless of his alleged intention to return check to trust fund. West's Ann.Pen.Code, § 512.

3. Embezzlement §24

In prosecution of six trustees of union welfare fund for grand theft accomplished through embezzlement of funds from such trust, where evidence clearly established a conspiracy between the six trustees and a continuous course of conduct pursuant

thereto, individual trustee was responsible as a principal for everything done by his co-conspirators regardless of fact that conspiracy was not alleged in the indictment. West's Ann.Pen.Code, § 1131.

4. Criminal Law §1159(2)

In passing on sufficiency of evidence to sustain a conviction, before a reversal may be had, it must be clearly apparent that upon no hypothesis whatever is there sufficient, substantial evidence to support the conclusion reached in the court below.

5. Criminal Law §1144(13)

In support of judgment of conviction, District Court of Appeal must assume the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts justify the inference of guilt.

6. Criminal Law §1159(2)

On review of criminal conviction, if circumstances reasonably justify determination of trier of fact, opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of defendant, will not warrant a reversal.

7. Embezzlement §44(1)

In prosecution for grand theft accomplished through embezzlement, evidence sustained embezzlement conviction of defendant for his activities as a trustee of union welfare in withdrawing excessive amounts from trust funds as alleged compensation for his services.

8. Criminal Law §829(3)

In prosecution for grand theft accomplished through embezzlement by defendant, who as trustee of union welfare fund, withdrew excessive amounts therefrom for alleged compensation for services performed, any error in refusing defendant's requested instructions that trustees of the trust were entitled to compensation, was not prejudicial where the law was adequately covered by another charge concerning necessary elements in crime of theft by embezzlement.

Thomas Higgins, Jr. and Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Appellant Williams and five others (Davison, Thomas, Welker, Kidwell and Young) were convicted by a jury upon two counts of grand theft accomplished through embezzlement of funds held by them as trustees of an express trust. The court denied their motions for new trial, suspended further proceedings and granted probation. Williams appeals from the judgment (i. e. order granting probation; Pen.Code, § 1237, subd. 1) and from order denying his motion for new trial. The other defendants have not appealed.

Under a labor agreement made by Lathing Contractors Association of California and Lathers Local Union 42A, a trust known as Lathers Welfare Fund was created to administer certain "fringe benefits" conferred upon the workers, chiefly group insurance; the moneys were supplied by contributions of employers made in lieu of increase in wages. A written declaration of trust was made in July, 1952, and three trustees were appointed by the union and three by the association. Defendant Williams, a contractor, was appointed by the association. The trust instrument does not specifically provide any compensation for the trustees' services but does call for reimbursement of their expenses. Under an express grant of power to adopt necessary rules and regulations the trustees resolved that each should be paid \$20 for attendance upon a board meeting and \$3.75 per hour for other time spent on the business of the trust. The board resolution specified that each trustee "should keep a record of the time spent and the work performed" and "submit to the Board of Trustees a statement of the time and work performed." The trustees were paid at the prescribed rates for a while, but no written record or statement was ever submitted as a basis for payment. Near the

end of 1953 the trustees paid themselves \$2,500 each as compensation to date. By 1954 receipts exceeded disbursements of the trust and defendants entered into a series of abstractions which brought about the indictment.

A tax reserve of \$16,371.18 had been set up in a savings account of the trust but the government ruled in April, 1954 that the trust was exempt, whereupon the trustees drew said sum out of the bank and split it six ways, \$2,728.53 each, putting it through the books as compensation for services performed. This was the subject of count I of the indictment.

In July, 1954 trust funds in the amount of \$414.96 were expended for six automatic wrist watches, one for each trustee. It was handled on the books as compensation for services. This gave rise to count II of the indictment.

On September 16, 1954, a refund or "dividend" was received from West Coast Life Insurance Company in the sum of \$2,816.70. Defendant Kidwell took possession of the check in San Francisco, brought it home, endorsed it and purchased six cashier checks, one for each defendant, in the sum of \$469.30. The bookkeeper and accountant, whose business it was to record all transactions on the books of the trust, were told nothing and knew nothing about the receipt or expenditure of this sum. The books do not reflect the transaction in any respect, nor do the minutes of the trustees. It had been discussed by them previous to its receipt and counsel for defendant stipulated at the trial that each defendant received his check. This transaction caused count III of the indictment.

On September 24, 1954, California Physicians Service paid the trust \$7,862.47 on account of a cancelled policy. The check for same was delivered to the trustees at one of their meetings. It was not deposited as required by the trust instrument, but was cashed by Kidwell and Thomas (who had authority with the bank to endorse checks), and the proceeds were used to buy six cashier checks, one to each trustee

for \$1,310.26. No information about this matter was given to the bookkeeper or accountant; the books and the minutes contain no entries or information concerning same. Hence, count IV of the indictment.

The jury acquitted all defendants on counts I and II, and convicted all on counts III and IV.

The trust accounts disclose (after giving effect to the \$2,816.70 and \$7,862.47 items) that each of the trustees other than Welker received on and before January 14, 1955, by way of asserted fees, \$9,358.09; that Welker received \$9,418.09. The total receipts of the trust were \$244,719.14, which exceeded costs by \$121,863.38. There was a bank balance of \$47,438.11, leaving \$74,425.27 out of which the trustees took a total of \$57,840.15. This last figure exceeds 23% of the total receipts.

[1] Appellant says that the prosecution did not prove that defendants did not render services worth the amount of the money received. A trustee whose agreement does not expressly provide for compensation for services is not entitled to any until same has been approved and allowed by a court, —in an instance such as this, a court of equity. *Fernald v. Lawsten*, 26 Cal.App.2d 552, 565, 79 P.2d 742; 90 C.J.S., Trusts, § 408, p. 763; 54 Am.Jur. § 527, p. 417. When he takes without such approval large sums which on their face are disproportionate to services normally to be expected, and handles the withdrawal in a manner contrary to established practice and in stealthy secrecy, he raises an inference of guilt and consciousness of guilt on his part. Moreover, when facts raising that inference have been shown and he takes the witness stand to explain and fails as miserably as did the defendants at bar, he thereby furnishes evidence corroborative of the state's claim.

Counsel make certain contentions applicable to Williams alone. It is argued that although there is proof that Williams got a \$1,310.26 check, it was not shown that he ever endorsed or cashed it. He refunded that exact amount to the trust after he had been interviewed in the district attorney's

office. That is enough evidence that he had previously received it.

[2] It is said that, although he received the check for \$469.30 (out of the West Coast refund), he did not endorse or cash it; and the exhibit so indicates. But it is a cashier's check, which fact connotes a withdrawal of that amount from the trust fund; it is still outstanding. In other words, that sum was embezzled from the trust fund and taken into the possession of defendant Williams. What he later did with it is of no consequence. An intent to return it to the trust (if one be assumed to have existed) or a later restoration would not affect the fact of a completed embezzlement. Pen. Code, § 512; *People v. Colton*, 92 Cal.App. 2d 704, 710, 207 P.2d 890.

[3] While the evidence does not single Williams out for separate consideration except at a few points, it establishes clearly a conspiracy between the six trustees to appropriate to themselves the excess funds of the trust and a continuous course of conduct pursuant thereto. Williams therefore is responsible as a principal for everything done by his co-conspirators, and the fact that a conspiracy was not alleged in the indictment is immaterial. *People v. Bryant*, 101 Cal.App. 84, 90, 281 P. 404; *People v. Terrell*, 138 Cal.App.2d 35, 54, 291 P.2d 155. Even if it were established that the defendant Williams did not receive his share of the \$2,816.70 and \$7,862.47 abstractions and that the proof was \$1,779.56 (\$469.30 plus \$1,310.26) short of the amount charged in counts III and IV of the indictment, that variance would not impair the integrity of the verdict against all the conspirators. Pen.Code, § 1131; *People v. Gray*, 66 Cal. 271, 277, 5 P. 240.

Defendant Williams took the stand in his own behalf but confined his testimony to a denial of Mr. Gomes' testimony that he, Williams, had said he wanted to plead guilty. The defendant's testimony comprises but one page of a 706 page transcript. His failure to explain or to attempt to explain the other direct and indirect evidence against him is persuasive of the truth of

the evidence of the prosecution.' *People v. Ashley*, 42 Cal.2d 246, 268, 267 P.2d 271; *People v. Goldstein*, 136 Cal.App.2d 778, 791, 289 P.2d 581.

[4-6] "It should also be borne in mind in passing on the sufficiency of the evidence to sustain a conviction that, before a reversal may be had, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts 'justify the inference of guilt.' *People v. Deysher*, 2 Cal.2d 141, 149, 40 P.2d 259, 263. If the circumstances reasonably justify the determination of the trier of fact, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal. *People v. Newland*, supra; *People v. Gould*, 111 Cal.App.2d 1, 243 P.2d 809." *People v. Frankfort*, 114 Cal.App.2d 680, 689, 251 P.2d 401, 407.

[7] The trial judge in ruling upon the motion for new trial said: "I just can't conceive how anybody can be involved in as brazen an embezzlement as I have ever seen, and still maintain that they didn't do anything wrong. I can't understand it. Every opportunity that they had to cut a melon six ways, they did. They not only did that, but they went down and bought six wrist watches for themselves." He did not overstate the matter. One of the conditions of Williams' probation is restitution of \$4,575.89 (subject to a credit of \$1,310.26 upon a showing of that amount having been received by the trustee of the Welfare fund). This is only \$1.36 short of one-sixth of the total alleged to have been embezzled in the four counts of the indictment. It indicates a belief of the trial judge that defendants were guilty of all the charges.

Certainly the evidence sustains such a conclusion.

"It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled." *Sonkin v. Hershon*, 130 Cal.App.2d 491, 492, 279 P.2d 156, 157.

[8] It is argued that there was error in refusal of three requested instructions concerning the right of trustees to compensation for their services. Two of them are manifestly inapplicable. The other is as follows: "You Are Instructed that the trustees of a trust are entitled to compensation for services when such compensation is based upon fairness and justice, and said compensation is just and reasonable." In so far as it correctly states the law, it was adequately covered by the following portions of instructions which were given: "* * * Thus in the crime of theft by embezzlement, a necessary element is the existence in the mind of the perpetrator of the specific intent to fraudulently appropriate trust funds to a use and purpose other than that for which said funds were entrusted, and, unless such intent so exists, that crime is not committed." "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. * * *" It was doubtless on this theory that the defendants were exonerated of the charges of counts I and II. If there were error in the refusal of the proffered instruction it could not be said to have worked a miscarriage of justice.

The judgment (order granting probation) and order denying new trial are affirmed.

MOORE, P. J., and FOX, J., concur.

145 Cal.App.2d 124

Leland L. DILLS, Plaintiff and Appellant,

v.

DELIRA CORPORATION, a corporation;
David Hire Productions, a corporation;
Ira Dowd, also known as Ira E. Dowd and
David Hire, Defendants and Respondents.

Civ. 20771.

District Court of Appeal, Second District
Division 2, California.

Oct. 16, 1956.

As Modified Nov. 8, 1956.

Hearing Denied Dec. 12, 1956.

Action for declaration of partnership, plaintiff's interest therein, an accounting of profits arising therefrom and for other relief. The Superior Court, Los Angeles County, Jerold E. Weil, J., rendered judgment rejecting demand and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that the advancement of money by plaintiff to producer to finance production of 39 radio shows in return for a share of profits arising from sale of such shows, constituted a loan repayable out of profits rather than the creation of a partnership.

Affirmed.

1. Jury ☞9

A person has a right to a jury trial only in actions based upon the common law of 1850 in the event the cause of action, or one essentially similar, existed. West's Ann.Const. art. 1, § 7.

2. Trial ☞10

If an action is addressed to equity powers of the court, the matter is one for the trial court alone, or sitting with an advisory jury. West's Ann.Const. art 1, § 7.

3. Jury ☞13(1)

Whether an action sounds in equity and therefore is not required to be tried by a jury, may be determined from the relief sought as well as from the nature of facts stated.

4. Jury ☞13(5)

Even though the general gist of an action is equitable, particular significant

and separate issues which were actionable at common law must be heard by a jury if there is an appropriate demand.

5. Trial ☞4

Trial court could properly try equitable issues before legal issues especially where the equitable issues would determine the law suit and prevent a more costly jury trial.

6. Quietting Title ☞27

An action to establish title which does not include a prayer to obtain possession of property is equitable in nature. West's Ann.Code Civ.Proc. §§ 738, 1060.

7. Jury ☞14(9)

Where plaintiff sought declaration of partnership and his interest therein as well as an accounting of profits derived from the use of certain alleged partnership property and as an incident to the account when rendered demanded a share of the profits as money had and received by other alleged partners, trial court properly determined that major relief sought was equitable and ordered a non-jury trial of those issues, and having determined that plaintiff was not a partner and had no interest in alleged partnership property, plaintiff was not entitled to jury trial on common-law counts for money had and received. West's Ann.Code Civ.Proc. § 1062.

8. Declaratory Judgment ☞390

Statute providing that no declaratory judgment should preclude any party from obtaining additional relief based upon the same facts does not allow a litigant who is determined not to have any rights to relitigate his claim in quest of different relief. West's Ann.Code Civ.Proc. § 1062.

9. Partnership ☞44

Although a partnership relation is to be presumed where parties enter into a profit sharing agreement and actually share profits, such a presumption evaporates when substantial evidence is introduced showing the relationship to be one of borrower and lender with the shares of profit being paid for services rendered or money advanced.

West's Ann.Corp.Code, §§ 15006, 15007(4) (d).

10. Partnership ⇨3

One of the essential elements of a partnership is the "carrying on" of a business which means that a community of interest exists among the partners. West's Ann.Corp.Code, §§ 15006, 15007(4) (d).

11. Partnership ⇨3

Persons jointly associated may agree that the management of the enterprise be entrusted to one of the group and there still may be a community of interest among such persons since making of agreement to relinquish control is itself an exercise of the right to control which is a requisite of a partnership. West's Ann.Corp.Code, §§ 15006, 15007(4) (d).

12. Partnership ⇨53

In action for declaration of partnership and of plaintiff's interest therein as well as for an accounting of profits and declaration that certain property was owned by such partnership, evidence supported finding that no partnership arose out of transaction whereby plaintiff with another advanced certain moneys for production of radio program from which plaintiff and other were to receive a percentage of profits.

13. Joint Adventures ⇨5(2)

In action involving, among other things, determination of amounts due plaintiff from advancement of funds to producer to enable completion of 39 radio shows in return for a share of profits arising from sale of such shows to advertiser, evidence supported finding that plaintiff's share of profits was restricted to "first-runs" and did not extend to world or re-issue rights.

14. Appeal and Error ⇨931(1)

Where there is any reasonable doubt as to the sufficiency of the evidence to sustain the finding, the appellate court is in duty bound to resolve the doubt in favor of the finding.

Louis Licht, Los Angeles, for respondent Delira Corp. Paul P. Selvin, Los Angeles, for respondent Ira E. Dowd.

MOORE, Presiding Justice.

Appellant sued for a declaration that Dills, Dowd and Hire are associated as partners and that the partnership owns the idea, format and style for the Wild Bill Hickok radio shows. His demands rejected, he appeals.

In order fairly to appraise the contentions now urged for a reversal of the judgment, a glimpse into the background of the controversy is necessary.

During 1949 Dills and Dowd were merchandiser manager and buyer for a popular emporium. After a conference with other merchants, a group of them agreed that a new name and personality should be originated and advertised for the purpose of promoting sales of the products of such merchants by the use of a label bearing the imprint of the new hero. In February 1950, Dills having learned of David Hire's success as a motion picture producer invited him to join the group. Six manufacturers agreed upon the plan and furnished \$25,000 to finance a California corporation. On April 13th, the nine persons organized the Delira Corporation and distributed its 25,000 shares equally among themselves. In June 1950 Hire suggested "Wild Bill Hickok" as the promotional hero. By reason of the duties of Dills and Dowd in the emporium, neither could participate in the technical work of developing a radio and television show. Hire was entrusted with the management thereof. By August 1950, Delira's capital had been practically consumed in the production of a "television pilot film and five 15-minute recordings of radio programs." The latter had been produced by "David Hire Productions," which then meant produced by Hire for Delira. At the same time he was vice president of Delira and manager of its productions, while Dowd was its president. Although by February 8, 1951, Kellogg Company, a cereal food manufacturer, had agreed to

Robert M. Maslow, Hollywood, and N. E. Youngblood, Beverly Hills, for appellant.

sponsor the television programs, finance was needed for the production of the radio show. After learning that the mercantile stockholders were not interested in such productions, Hire told Dills that, if the radio show could not be financed through Delira, he, Dills and Dowd "could handle it".

All three of them were stockholders, officers or promoters of, and therefore in a fiduciary relationship to, Delira which relied upon the skill, ability, knowledge and honesty of each to them and for that reason entrusted them with the care and management of its property and affairs. On behalf of Delira they contributed to the conception and development of the radio show and its programs and transcriptions. All were made under the supervision of Hire on behalf of Delira. He always used the words "David Hire Productions" to designate that Delira was the producer. Its rights and interests in the radio show were a principal asset.

To produce and finance the radio show during the spring of 1951, Hire required \$12,000. Late in March, Dills and Dowd agreed with David Hire Productions to advance \$8,000 to be used to produce the radio show. For the loan of such money, Hire's company agreed to repay the loan and to pay Dills and Dowd out of the profits of the first runs of the first 39 shows to the extent of 26 $\frac{2}{3}$ per cent thereof to each for the services of Dills and Dowd. Dills insisted upon a promissory note by David Hire Productions in the amount of \$8,000 to his favor and upon notes by Hire and Dowd individually to his favor guaranteeing the \$8,000 corporate obligation in the amount of \$2,666.66 each. The court found that Hire fully performed his promises and that neither Dills nor Dowd had a claim against David Hire Productions on any other account nor any interest in or claim against the profits of the radio show.

After Hire's agreement with Dills and Dowd, a contract was executed by Delira and David Hire Productions whereby the latter was given the exclusive right "to produce the said series of electrical transcriptions" to be broadcast on the radio for 39 weeks; by its terms Delira was re-

leased from the obligation to finance the productions or to pay Hire for the transcriptions. However, the contract was never authorized or approved by Delira and none of its shareholders or directors except Hire knew of it, although, on its face, it was a transfer of a principal asset of Delira to David Hire Productions. Furthermore, Hire supplied other stockholders with misleading information calculated to convince them that the production of the radio show would be a speculative venture and not at all to be profitable, notwithstanding Kellogg had agreed to pay for all radio shows produced. As a result of the inaccurate information supplied to the stockholders by those in a fiduciary capacity to Delira, about March 1, 1951, they renounced any intention of financing such radio shows and left the matter to the attention of David Hire Productions. That event was followed by Dowd and Dills' agreement to advance the \$8,000.

Despite the conflict of the evidence as to the extent of the ownership of Dills and Dowd in the radio shows, the court determined that Hire offered them merely a share in the profits to be derived therefrom for their assistance in advancing the \$8,000. As shown above, he paid them two thirds of the net profits. They were not promised an ownership interest but only a share of the profits from the first runs of the first 39 shows produced for Kellogg. Such agreement did not grant to Dills and Dowd re-issue or world rights.

The evidence discloses that Hire, acting through an attorney who was ostensibly representing Delira, purchased from it all the rights to Wild Bill Hickok shows but Delira finally asserted its rights and resolved to produce shows for its own account after 1952. Such action was understood to have settled the issue of ownership of Wild Bill Hickok and the shows to be made until this action was filed.

Was Dills Wrongfully Denied A Jury Trial?

[1, 2] Appellant complains that the trial court unconstitutionally denied his demand for a jury trial. Calif. Const., Art. I, § 7. Whether or not appellant was en-

titled to a jury depends upon the nature of his action. The constitutional provision for a jury trial grants that right only in actions based upon the common law of 1850, in the event the cause of action, or one essentially similar, existed. *Ripling v. Superior Court*, 112 Cal.App.2d 399, 402, 247 P.2d 117; *Grossblatt v. Wright*, 108 Cal.App.2d 475, 483 et seq., 239 P.2d 19. If the action is addressed to equity powers of the court, the matter is one for the trial court alone or sitting with an advisory jury. *Bettencourt v. Bank of Italy*, 216 Cal. 174, 179, 13 P.2d 659; *Ripling v. Superior Court*, supra; *Olson v. Foster*, 42 Cal.App. 2d 493, 498, 109 P.2d 388.

[3,4] Does this action sound in equity? Since certain facts are neither legal nor equitable, what is the nature of the claim? *Pacific Indemnity Co. v. McDonald*, 9 Cir., 107 F.2d 446, 131 A.L.R. 208. This may be determined from the relief sought as well as from the nature of the facts stated. *Bettencourt v. Bank of Italy*, supra, 216 Cal. at page 179, 13 P.2d 659; *Bank of America v. Greenbach*, 98 Cal.App.2d 220, 228-229, 219 P.2d 814; *Estate of Cazaurang*, 75 Cal.App.2d 217, 225, 170 P.2d 694. However, even though the general gist of the action is equitable, particular significant and separate issues which were actionable at the common law must be heard by a jury if there is an appropriate demand. *Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430; *Crouser v. Boice*, 51 Cal.App.2d 198, 200, 124 P.2d 358. Here appellant alleged the existence of a partnership, sought a declaration of his interest therein, an accounting of profits derived from the use of partnership property, and declared that certain property was owned by that partnership. As an incident to the account when rendered, he demanded a share of the profits as money had and received by defendants. The trial court concluded that the major relief sought was equitable, ordered a non-jury trial of those issues first and following

the trial thereof determined that appellant was *not* a partner of defendants and had no interest in the Wild Bill Hickok shows. Since no such interest existed, there was no need for proceeding with a trial at law upon the common counts.

[5,6] There is no question but that the trial court properly tried equitable before legal issues. This procedure is particularly useful where, as here, a determination of the equitable issue may determine the lawsuit and prevent a more costly jury trial. *Connell v. Bowes*, 19 Cal.2d 870, 872, 123 P.2d 456; *Thomson v. Thomson*, 7 Cal.2d 671, 682, 683, 62 P.2d 358, 117 A.L.R. 1; *Alton v. Rogers*, 127 Cal.App.2d 667, 676, 274 P.2d 487. Courts have stated repeatedly that an action under Code of Civil Procedure section 1060 for declaratory relief is equitable in nature. *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 81, 142 P.2d 289; *Adams v. Cook*, 15 Cal. 2d 352, 362, 101 P.2d 484; *Bess v. Park*, 132 Cal.App.2d 49, 52, 281 P.2d 556; *Dunlop v. Hersum Lumber Co.*, 126 Cal.App.2d 815, 820, 273 P.2d 22; *Kaliterna v. Wright*, 94 Cal.App.2d 926, 933, 212 P.2d 32; *Rolapp v. Federal etc. Ass'n*, 11 Cal.App.2d 337, 342, 53 P.2d 974. However, most of the cited decisions so held in order to apply some equitable maxim. Only *Kaliterna v. Wright* dealt with the denial of a jury trial. Writers and encyclopedias have decried the line of reasoning so adopted, at least insofar as used to deny a jury trial. They suggest that declaratory relief is in itself neither legal nor equitable; they question whether a declaration is sought where legal, coercive relief would have been just as appropriate. *Borchard, Declaratory Judgments*, 2nd ed., pp. 400-401, 674-676; *Declaratory Relief*, 15 Cal.Jur.2d §§ 15 and 43, pp. 121-124, 172; 50 C.J.S., *Juries*, § 16 c, p. 732; and see *Moss v. Moss*, 20 Cal. 2d 640, 643, 128 P.2d 526, 141 A.L.R. 1422.¹ This presents a difficult problem to the trial court. Determining whether an action is

1. Other authorities suggesting that actions for declaratory relief are "*sui generis*" are *Pacific Indemnity Co. v. McDonald*,

supra, 107 F.2d 446; note, 13 So. Cal. L.Rev. 170.

legal or equitable may be a fair-sized task under ordinary circumstances, as in *Ripling v. Superior Court*, supra, 112 Cal.App.2d 399, 247 P.2d 117, but the problem is multiplied when the relief sought is a "*sui generis*" declaration in which event the court is even deprived of the advantage of considering the prayer as an indication of whether or not the claim is addressed to equity. (Declaratory Relief, 15 Cal.Jur.2d § 15, pp. 123-124.)

However, assuming, *arguendo*, that this is the proper analysis to be used in determining whether a litigant has the right to a jury trial, what then is the essential nature of the relief sought here? Appellant demands a declaration that he is a partner and that an accounting of partnership profits be made. Direct authority exists that when such a declaration is sought, the action is one in equity either for the dissolution of a going partnership and an accounting or for a declaration of a trust in partnership property. *Tobola v. Wholey*, 75 Cal.App.2d 351, 170 P.2d 952; *Lewis v. Winfield*, 48 Cal.App.2d 543, 120 P.2d 65; *Zimmer v. Gorelnik*, 42 Cal.App.2d 440, 109 P.2d 34.² As to appellant's claim of an ownership interest in "Wild Bill Hickok" against the Delira Corporation, which was not alleged to be a partner, it is well settled that an action to establish title which does not include a prayer to obtain possession of the property is equitable in nature. Code Civ.Proc. § 738; *Thomson v. Thomson*, 7 Cal.2d 671, 680, 62 P.2d 358, 117 A.L.R. 1; *Daniels v. Baldwin*, 115 Cal.App.2d 487, 489, 252 P.2d 351; *Battle v. Niece*, 43 Cal.App.2d 655, 658, 111 P.2d 455; *Santa Ana Mortg. & Inv. Co. v. Kinslow*, 30 Cal.App.2d 107, 109-110, 85 P.2d 899.

[7, 8] Regarding appellant's common counts, when it was determined that Dills had no interest in the radio show and that no additional moneys were due him, the common counts performed no office. It is true that Code of Civil Procedure, section

1062, provides that "no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." However, that language provides merely that when one obtains a declaration, he has not thereby forfeited his right to obtain coercive relief. It certainly was not intended to allow a litigant who is determined not to have any rights to re-litigate his claim in quest of different relief.

Evidence of a Partnership

Dills originally claimed that he had an ownership interest in the idea, style and format of the radio show which he, Dowd and Hire allegedly acquired from Delira in March 1951. However, the trial court found that Delira never parted with its ownership interest in the show. Any action of Delira indicating that it no longer claimed an interest was induced by misinformation supplied by those who stood in a fiduciary relation to the corporation. This finding is not attacked on appeal and is supported by the evidence.

Thus, the most that Dills can claim is that his oral transactions with Dowd and Hire in March through May of 1951 constituted the formation of a partnership between the three for the production of the radio show. In that case, all rights held by Hire are held for and on behalf of the partnership. However, the trial court found that no partnership was created. Dills merely loaned money to Hire and David Hire Productions for use in financing and producing the show. The interest for the loan and services in securing the capital was consideration for a share in the profits of the thirty-nine, 1951 shows. The principal was repaid and the profits were divided. Transactions of such nature are of frequent occurrence without a partnership's resulting.

[9] A partnership is defined as an association of two or more persons, as co-owners, to carry on a business for profit. Corp.Code, § 15006. It is true that a partnership relation is to be presumed where

2. It was the dismissal of just such a count which rendered the action "one at law pure and simple" in *Horn v. Los Angeles*

Nut House, 15 Cal.App.2d 22, 26, 58 P.2d 1299, 1301.

parties enter into a profit-sharing agreement and actually share profits, Corp.Code, § 15007, subd. 4, however, such presumption evaporates when substantial evidence is introduced, as here, showing the relationship to be one of borrower-lender with the profit share's being paid for service rendered or money advanced. Corp.Code, § 15007, subd. 4(d). Thus, appellant must show that no substantial evidence supports the finding of nonpartnership or that the admitted facts do show a partnership as a matter of law. In this he fails. The facts proved are just as consistent with the theory of a loan and interest as with a partnership.

[10-12] One of the essential elements in the code definition of a partnership is the "carrying on" of a business, meaning thereby that a "community of interest" exists among the partners. *Spier v. Lang*, 4 Cal. 2d 711, 715-717, 53 P.2d 138; *Freedman v. Industrial Accident Commission*, 67 Cal. App.2d 629, 631, 154 P.2d 922; *Smith v. Grove*, 47 Cal.App.2d 456, 461-462, 118 P.2d 324. The settled statement on appeal discloses that Dills himself testified that he never approved the scripts of the radio show; never signed any papers relating to or connected with the property or business of David Hire Productions; never looked at the books; never received copies of the bank statements; never discussed the radio show with any agency whatsoever; never exercised a function of any kind connected with the production, distribution or sale of the show; never performed a task of management, employment or agency in connection with production; never asked anyone for authority to do any of the above. Dowd's testimony disclosed no more active participation on his part. It is true that when persons jointly associated agree that management of the enterprise be entrusted to one of the group, there may nevertheless be a community of interest in view of the fact that the making of the agreement to relinquish control is itself an exercise of the requisite *right to control*. *Singleton v. Fuller*, 118 Cal.App.2d 733, 741, 259 P.2d

687; *Lyon v. McQuarrie*, 46 Cal.App.2d 119, 124-125, 115 P.2d 594; *Associated Piping & Engineering Co., Ltd., v. Jones*, 17 Cal.App.2d 107, 111, 61 P.2d 536. However, the party seeking to establish the existence of the partnership in those cases proved the existence of such an agreement. There was no such proof here, and the trial court was not obliged to imply an agreement.

Restriction to Profits from First Runs

[13,14] The trial court added to its findings the restriction that appellant's share of the profits from the thirty-nine 1951 shows was to be from only the "first-runs," thereby precluding him from any share in the profits from the sale of "world" or "re-issue" rights. Dills urges that this finding cannot be supported by the evidence since the settled statement on appeal does not include any reference whatsoever in its summarization of the testimony to "first-runs."

The court adopted the evidence of the agreement of the three men that each should contribute or procure sufficient capital to meet the Kellogg commitment for the 39 radio shows, and that the interest on the investment to Dills and Dowd was to be a profit share in the *returns from that contract*. Therefore, all that remains is to demonstrate that its provisions support the findings. A perusal of the correspondence between Hire and the advertising agency representing Kellogg reveals that the agreement was that the cereal company pay \$2,050 for each completed and approved show. Later correspondence established that this price did not include "world" or "re-issue" rights. Sale of those rights was left to subsequent bargaining between the parties. Therefore, since Dills was interested only in the profits from the first Kellogg commitment, he had no claim to profits arising from subsequent use of the electrical transcriptions of the 1951 shows. The evidence was substantial and sufficient to support the finding. Where there is any reasonable doubt as to the sufficiency of the

evidence to sustain a finding, the appellate court is in duty bound to resolve the doubt in favor of the finding. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; McGrath v. Young, 98 Cal.App.2d 415, 417, 220 P.2d 609.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.



145 Cal.App.2d 381

Lou MILLER, Plaintiff and Respondent,

v.

Jack R. STEIN and Bernice C. Stein,
Defendants and Appellants,

Russell Brown Simpson, Harry Bassett,
Thomas P. Cruce, David Welts, et al.,
Defendants and Respondents.

Civ. 21670.

District Court of Appeal, Second District,
Division 2, California.

Oct. 24, 1956.

Action for declaratory relief and judgment quieting title to certain real property in which some of the defendants moved for leave to file a belated cross-complaint. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered order denying motion to file cross-complaint and refusing to vacate prior order denying similar motion, and defendants appealed. The District Court of Appeal, Fox, J., held that an appeal does not lie from an order denying motion to file belated cross-complaint and refusing to vacate prior order denying a similar motion, and such questions were reviewable on appeal only after final judgment or its equivalent had been entered.

Appeal dismissed.

1. There has been appellate review of companion cases and incidental proceedings in Stein v. Simpson, 96 Cal.App.2d 642,

1. Pleading ⚡140

A belated cross-complaint may be filed only with permission of the court.

2. Motions ⚡55, 56(1)

Unless otherwise required by statute, an order in writing becomes legally effective at the time it is signed and filed by the judge. West's Ann.Code Civ.Proc., § 1003.

3. Motions ⚡59(2, 3)

Where trial court orally granted defendant's motion for leave to file belated cross-complaint, such court, while order was unwritten and not yet entered in official minutes of court, had jurisdiction to vacate oral order by a written order which when signed and filed immediately became effective as the formal order of the court. West's Ann.Code Civ.Proc., § 1003.

4. Appeal and Error ⚡103, 113(1), 870(5)

An appeal does not lie from an order denying a motion to file a belated cross-complaint and refusing to vacate a prior order denying a similar motion and such questions are reviewable on appeal only after entry of a final judgment or its equivalent. West's Ann.Code Civ.Proc., § 963.

B. W. Kemper, North Hollywood, for appellants.

Max Tendler, Los Angeles, amicus curiæ on behalf of certain respondents.

FOX, Justice.

This is an appeal from an order vacating a prior order granting leave to defendants Jack R. Stein and his wife (hereinafter designated the Steins) to file a supplemental cross-complaint. It is another chapter in the meandering judicial odyssey of this voluminous litigation.¹ Only the proceedings germane to the determination of this appeal will be delineated.

216 P.2d 117; Stein v. Simpson, 37 Cal.2d 79, 230 P.2d 816; Stein v. Simpson, 116 Cal.App.2d 559, 253 P.2d 1026. An-

The first pleading in the instant action was filed November 19, 1951, by one Lou Miller, who sought declaratory relief and a judgment quieting his title to certain real property regarding which a controversy existed. Among the defendants named were the Steins, David Welts, R. B. Simpson, and the Realty Title Company, Ltd. The Steins filed an answer to the Miller complaint,² but no cross-complaint.

[1] On August 16, 1955, the court, by minute order³ denied a motion by the Steins to file a "supplemental cross-complaint." [The designation of such document as a "supplemental cross-complaint" is an obvious misnomer. The Steins had filed no cross-complaint at the time they answered. The pleading must be regarded as a belated cross-complaint which may be filed only by permission of court. *Gallo v. Boyle Mfg. Co.*, 30 Cal.App.2d 653, 655-656, 86 P.2d 1067.] On September 22, 1955, the Steins filed a notice of motion under section 473, Code of Civil Procedure, accompanied by supporting affidavits, to vacate the minute order of August 16, 1955, and requesting leave to file the proposed "supplemental cross-complaint" attached thereto. This pleading was for declaratory relief, injunctive relief and damages, named among the cross-defendants Simpson, Miller, Realty Title Company, Ltd., and Cruce, and sought to bring in as new parties defendants Jack McElhose and Max Tendler. No counter-affidavits were filed in opposition.

On September 28, 1955, the Steins' motion to vacate the minute order of August 16, 1955, and for leave to file their proposed cross-pleading was heard by Judge McCoy. After hearing the motion, Judge McCoy granted the motion. This order

was not then entered in the official minutes, and obviously constituted an oral pronouncement by the court. Some time later on the same day (September 28), the court, sua sponte, signed and filed a document entitled "Memorandum." This document reads in part:

"The order heretofore made this day granting the motion of Jack R. Stein and Bernice C. Stein to file a 'Supplemental Cross-Complaint for Declaratory Relief; Injunctive Relief and Damages' is vacated and set aside.

"The court has re-examined the proposed pleading to which the notice of motion refers. [Here follows a summary of reasons which the court regards as sufficient for a denial of the motion.]

"On reconsideration of the entire record, the court is satisfied that it would be an abuse of discretion to allow the proposed pleading as submitted to be filed.

"As stated above, the court's earlier order is vacated and set aside. The motion for leave to file the proposed 'Supplemental Cross-Complaint' is denied."

On September 30, 1955, a minute order dated September 28, 1955, was entered by the clerk describing the proceedings which took place on that day. That minute order, which describes the proceeding as a motion (1) to vacate and annul the minute order of August 16, 1955, and (2) for leave to file supplemental cross-complaint, reads: "Motion granted. Proposed pleading as filed to be considered served and filed as original as of this date.

"Later the court makes the following order:

"The Court's earlier order is vacated and set aside. The motion for leave to file

other offshoot of this litigation is pending in Division One of this court sub. nom. *Cruce v. Stein*, No. 21480.

2. On October 2, 1952, defendants Simpson and Welts filed their answers to the Miller complaint, together with a cross-complaint in which the Steins, among others, were named as cross-defendants.

It was not until July 11, 1955, that the Steins were served with this cross-complaint. On July 18, 1955, the Steins filed an answer thereto, but no cross-complaint.

3. No record of the proceedings of August 16 appear in the Clerk's Transcript.

the proposed 'Supplemental cross-complaint' is denied.

"Memorandum of Ruling filed this date.

"Counsel Notified."

The basic question presented is whether, upon its own motion and without notice, the court could make a second order vacating its prior oral order before the entry of the first order in the official minutes.

[2] Section 1003 of the Code of Civil Procedure provides: "Every direction of a court judge, or justice, *made or entered in writing*, and not included in a judgment, is denominated an order." (Italics added.) Unless otherwise required by statute, an order in writing becomes legally effective at the time it is signed and filed by the judge. *Maxwell v. Perkins*, 116 Cal.App. 2d 752, 756, 255 P.2d 10. Although there exists authority to the contrary, the rule has been developed in the most recent cases that an oral order of the court is subject to change prior to its written entry in the official minutes of the court. *People v. McAllister*, 15 Cal.2d 519, 526, 102 P.2d 1072; *Ex parte Monckros Von Vetsera*, 7 Cal.App. 136, 139, 93 P. 1036; *Smith v. Ross*, 57 Cal.App. 191, 194, 207 P. 55; *Engleman v. Green*, 125 Cal.App. 2d Supp. 882, 884, 270 P.2d 127. See, also *Brownell v. Superior Court*, 157 Cal. 703, 708, 109 P. 91; *Jablon v. Henneberger*, 33 Cal.2d 773, 775, 205 P.2d 1.

In *Ex parte Monckros Von Vetsera*, supra, the petitioner was before the court on a writ of habeas corpus. On October 15 the judge announced in open court that the prisoner was illegally detained and ordered his discharge. This verbal order was not reduced to writing nor entered in the minutes. On October 17, the court, in the absence of the petitioner, made and signed a written order vacating the prior order. The petitioner asserted before the reviewing court that the order of October 15 was a final adjudication and that the court below lost jurisdiction to subsequently enter any different order. In rejecting the contention that the oral order of the court was irrevocable, the court stated 7

Cal.App. at page 138, 93 P. at page 1036: "Until the judgment had been entered in the minutes of the court, or had been in some authentic manner reduced to writing, as by the judge signing a written order, it must be held that the judgment lay in the breast of the judge, and that the court had plenary power thereover."

In *People v. McAllister*, 15 Cal.2d 519, 524, 102 P.2d 1072, 1074, the Supreme Court reaffirmed this rule, and quoted as follows from the case last cited: "In the case at bar the order relied on by petitioner for his discharge, never having been entered in the minutes of the court, was subject to be vacated and revised by the court; and, having been thus vacated, affords no warrant for his release from the imprisonment * * *" In the *McAllister* case, the court sentenced defendant to pay a fine in its morning session. Later that day, the judge ordered defendant to return, and revised his order by pronouncing the alternative sentence of time in jail upon failure to pay the fine levied. In upholding the court's action, the Supreme Court stated that, "if the sentence pronounced has not been entered by the clerk in the minutes * * * then it is proper for the court to change the sentence originally pronounced." 15 Cal. 2d at pages 526-527, 102 P.2d at page 1075. At page 527 of 15 Cal.2d, at page 1075 of 102 P.2d, the court, in pointing out that the clerk must enter his minutes within a reasonable time after orders are made, observed: "It is not necessary for us to pass upon the question as to what is a reasonable time for the clerk to perform this duty as we are satisfied that in this case when the two acts of the court occurred on the same day, no duty was imposed upon its clerk to enter the first sentence of the court before adjournment of the court for that day."

[3] Adopting these principles as controlling authority and expressive of a salutary procedural rule, it is plain that the trial court possessed the jurisdiction to vacate its earlier order. Adverting to

the record, we find that the original order made on September 28 was unwritten and not as yet entered in the official minutes of the court. It was, in the language of the cases, still "in the breast of the court" and subject to his plenary control. *Ex parte Monckros Von Vetsera*, supra; *Smith v. Ross*, 57 Cal.App. 191, 193, 207 P. 55; *People v. McAllister*, supra; *Engleman v. Green*, 125 Cal.App.2d Supp. 882, 884, 270 P.2d 127. On the very same day, the court superseded what was still an oral pronouncement by a signed written order which was filed September 28. When the written order was signed and filed, it immediately became effective as the formal order of the court. *Badella v. Miller*, 44 Cal.2d 81, 84-85, 279 P.2d 729. Nothing further was required to give vitality to the second order, its subsequent entry in the minutes serving merely to fix the running of time for appeal. Code Civ.Proc., sec. 1003; *Badella v. Miller*, supra; *Maxwell v. Perkins*, 116 Cal.App. 2d 752, 757, 255 P.2d 10. We must conclude, therefore, that when the court made and filed its written order it still retained jurisdiction because its earlier order had not been entered in the official minutes and was subject to change. Such a rule, which permits an oral decision to be changed by the judge upon more extended reflection at any time before it has been regularly entered in the court's official minutes, seems one best calculated to promote the more efficient discharge of the judicial process.

[4] Turning now to the posture of the case before us, it appears that the appeal has been taken from an order denying a motion to file a belated cross-complaint and refusing to vacate a prior order denying a similar motion. An appeal does not lie from such an order, these questions being reviewable only upon appeal after a final judgment or its equivalent. Code Civ.Proc. sec. 963; *Marx v. McKinney*, 23 Cal.2d 439, 444, 144 P.2d 353; *Litvinuk v. Litvinuk*, 27 Cal.2d 38, 43-44, 162 P.2d 8. See *Sjoberg v. Hastorf*, 33 Cal.2d 116,

118, 199 P.2d 668. The fact that the cross-complaint sought to bring in Tendler and McElhose as new cross-defendants does not make the order appealable since, leave to file said pleading having been denied, they never became parties to the action, and the order adjudicated nothing as between the Steins and Tendler and McElhose. *Evans v. Dabney*, 37 Cal.2d 758, 759, 235 P.2d 604; *Kennedy v. Owens*, 85 Cal.App.2d 517, 520, 193 P.2d 141. Since we have before us only an attempted appeal from a non-appealable order, which of itself makes no final disposition of any issues affecting the Steins, the correctness of the order can properly be determined only upon appeal from the final judgment.

For the foregoing reasons, the purported appeal is dismissed.

MOORE, P. J., and ASHBURN, J.,
concur.



145 Cal.App.2d 245

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Imogene Joy YOKUM, Defendant and
Appellant.
Cr. 2684.

District Court of Appeal, Third District,
California.

Oct. 22, 1956.

Rehearing Denied Nov. 2, 1956.

Hearing Denied Nov. 21, 1956.

Prosecution for murder of husband. The Superior Court, Mendocino County, Hale McCowen, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Schottky, J., held that it was error to exclude evidence which tended to show violent and turbulent character and reputation of husband and to exclude testimony of husband's prior threats

and violent conduct toward defendant where such evidence was relevant to issue of self-defense, and to appellant's state of mind and intent.

Reversed.

1. Criminal Law §552(1)

The terms "indirect evidence" and "circumstantial evidence" are interchangeable and synonymous. West's Ann.Code Civ.Proc., §§ 1831, 1832.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstantial Evidence" and "Indirect Evidence".

2. Criminal Law §552(1), 559

An "inference" is a conclusion as to existence of a material fact that a trier of fact may properly draw from existence of certain primary facts, and inferences drawn from physical facts amount to circumstantial evidence. West's Ann.Code Civ. Proc., § 1832.

See publication Words and Phrases, for other judicial constructions and definitions of "Inference".

3. Criminal Law §552(1)

"Circumstantial evidence" as distinguished from direct evidence is testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. West's Ann.Code Civ.Proc., § 1832.

4. Homicide §7

"Murder" is the unlawful killing of a human being with malice aforethought.

See publication Words and Phrases, for other judicial constructions and definitions of "Murder".

5. Homicide §146

When evidence shows an unlawful killing to have been committed, a presumption arises that the killing was done with malice aforethought and that the killing was murder.

6. Homicide §9, 21

To find defendant guilty of either first or second degree murder, one of the ele-

ments required to be proved was guilty intent or malice aforethought.

7. Criminal Law §784(1), 1173(2)

In prosecution for second degree murder, material element consisted of defendant's state of mind which was necessarily shown by circumstantial evidence and court committed reversible error in refusing to instruct jury that in order to justify a conviction, facts and circumstances must not only be entirely consistent with theory of guilt but must be irreconcilable with any other rational conclusion.

8. Criminal Law §784(1), 1173(2)

In prosecution for murder of husband, where evidence of intent was reasonably susceptible of interpretations that defendant did not intend to kill husband, that defendant acted without malice, and that defendant acted in self-defense, court's refusal to instruct jury that where evidence is susceptible of two constructions, each of which appeared to be reasonable, one pointing to guilt of defendant and other to innocence, it is jury's duty to adopt that interpretation which points to innocence, was prejudicial to defendant.

9. Criminal Law §789(3)

In prosecution for murder, where no instructions were given as to law necessary to proper consideration of circumstantial evidence and no instructions were given defining direct and indirect evidence, instruction that each essential chain of circumstances must be proved beyond a reasonable doubt should have been given.

10. Criminal Law §863(2)

In prosecution for murder, where court, at jury's request reread instructions and omitted some instructions which had been given previously and were substantially to same effect as others given and court was not requested by defendant's counsel to reread omitted instructions, under the circumstances, failure to reread such instructions was not error.

11. Criminal Law §656(1)

A judge may comment on the evidence, including the credibility of witnesses, but

this privilege has inherent limitations and comment not be of nature which would invade province of jury.

12. Criminal Law Ⓒ656(1)

Rule permitting judge to comment on evidence and credibility of witnesses requires that such comment be fair, temperate, judicial, dispassionate, and free from apparent contentiousness, partisanship or advocacy.

13. Criminal Law Ⓒ656(1)

In prosecution for murder, court's comments on evidence relating to self-defense did not go beyond right to comment given by constitution permitting court to make such comment on evidence and testimony and credibility of witnesses as in its opinion is necessary for proper determination of case. West's Ann.Const. art. 6, § 19.

14. Homicide Ⓒ276

In prosecution for murder of husband, evidence presented issue of self-defense.

15. Homicide Ⓒ188(1)

In prosecution for murder, where defense of self-defense is interposed, defendant may introduce evidence that reputation of deceased for peace and quiet was bad and known to defendant to be bad.

16. Homicide Ⓒ188(1)

In prosecution for murder, defendant may introduce evidence of turbulent and dangerous character of deceased when the immediate circumstances of the killing are equivocal and raise a doubt in regard to question whether defendant acted in self-defense.

17. Homicide Ⓒ163(2), 188(1)

In prosecution for murder of husband, it was error to exclude evidence which tended to show violent and turbulent character and reputation of decedent and to exclude testimony of decedent's prior threats against and violent conduct toward defendant, since such evidence was relevant to issue of self-defense and as to defendant's state of mind and intent.

18. Criminal Law Ⓒ1186(4)

Under constitution providing for reversal where error results in miscarriage of justice, a miscarriage of justice should be declared only when the court, after an examination of entire cause, including evidence, is of opinion that it is reasonably probable that a result more favorable to appealing party would have been reached in absence of the error. West's Ann.Const. art. 6, § 4½.

John J. Golden, Ukiah, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Imogene Joy Yokum was charged by indictment with the murder of her husband, Donald Alfred Yokum. The jury found her guilty of murder in the second degree and she has appealed from the judgment pronounced on said verdict and from the order denying her motion for a new trial.

Appellant does not attack the sufficiency of the evidence to support the judgment, but contends that the trial court committed the following reversible errors: (1) Refusing to give three requested instructions: CALJIC Nos. 26, 27 and 28; (2) omitting four essential instructions upon a rereading of the instructions to the jury; (3) exceeding permissible bounds when commenting on the evidence during the charge to the jury; and (4) excluding evidence. Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

On December 6, 1955, defendant, Imogene Joy Yokum, shot and killed her husband, Donald Yokum, at their residence in Willits, California. The defendant, the Yokum children and the witness Marie Lancaster were present when Donald Yokum and the witness Vernon Shuster arrived at the Yokum residence about 3:30 or 4:00 p. m. that day. Then Mrs. Yokum proceeded to prepare a meal. The two men

sat down at a table and drank several glasses of wine. Mrs. Yokum also had a glass of wine. Thereafter, defendant's mother came to the Yokum yard and defendant went out and talked with her. Then defendant returned to the house and told her husband about a suggestion made by her mother that the children attend a particular Sunday School. At this proposal Donald Yokum became very angry and stated that the children were not to attend Sunday School. Mrs. Yokum testified that Mr. Yokum referred to her parents in a derogatory manner, and then she referred to his parents in a derogatory manner. Then Mr. Yokum struck or slapped defendant several times about the head and she fell. Mr. Yokum appeared to be very violent and to be striking at her violently. He was somewhat intoxicated and while striking her made the statement that "he was going to beat the hell out of her." Mr. Shuster intervened and succeeded in pulling Mr. Yokum away from defendant. Mrs. Yokum then left the house and was next seen by Mrs. Lancaster on the service porch at the rear of the house. The defendant was crying, appeared very upset and told Marie that she was afraid of decedent and wanted to get away so there wouldn't be any more trouble and that she was going to leave. Marie then returned to the kitchen. This was the last time anyone saw defendant until after her husband was shot.

After Marie had returned to the kitchen and from five to fifteen minutes after the scuffle between defendant and her husband, the latter was sitting or standing and talking with Shuster. Shuster stated, "Well, I was just standing there talking to Don, and I just noticed him make a sudden lurch or dive, and I heard a shot, and he dropped." He did not hear either defendant or her husband say anything. Marie Lancaster heard the shot, turned and saw Yokum lying on the floor and saw defendant standing with a rifle in her hand. Neither Mrs. Lancaster nor Mr. Shuster saw defendant before Donald Yokum was shot.

Defendant testified in her own behalf that when she left the utility porch she took the gun and started out to the front of the house to get the children and leave. Her husband had told her that he would kill her if she ever left him and she took the gun because she was afraid of him, thought that if he saw the gun he wouldn't come near her and that she did not intend to shoot anybody with it. As she approached her husband, he jumped up and started toward her. She felt terribly frightened and then the gun jarred in her hand. She did not know the gun was loaded.

When Mr. Olan Greenwood, Chief of Police of Willits, arrived at the premises shortly after the shooting, defendant and Mr. Shuster were sitting on the running board of a Model T automobile. She appeared to be somewhat disturbed but in general was fairly calm and was not hysterical. She appeared to have been drinking but was not drunk. Mr. Greenwood asked her, "Who has been hit?" She answered, "Oh, it's Don, Olan, I just killed the son-of-a-bitch. He's in the house and the gun's lying over there." Mr. Greenwood entered the house, determined that Donald Yokum was dead, returned outside and she stated then, "I hit him in the cheek, didn't I? How is he?" She kept asking, "How is Don?"

An autopsy was performed by Dr. Smalley who determined the cause of death as being a bullet wound in the head and neck. The bullet entered the left side of the face about the angle of the jaw, went into the right side of the neck and broke into fragments. From the direction of the bullet, which creased decedent's shoulder, it appeared to Dr. Smalley that the decedent had thrown up his shoulder in an apparent attempt to guard against the bullet.

Appellant contends that the court erred in refusing to give three instructions offered by her. The substance of these was as follows: (a) CALJIC No. 26 states that where the evidence is susceptible of two constructions, it is the jury's duty to adopt

that construction which points to the defendant's innocence; (b) CALJIC No. 27 states that where circumstantial evidence is relied upon as proof of guilt to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion; (3) CALJIC No. 28 states that each essential fact in a chain of circumstances must be proved beyond a reasonable doubt.

Appellant contends that such instructions are required where there are issues, the proof of which depends upon circumstantial evidence, and that here defendant's intent and state of mind could not be directly perceived or proved without any inferences or presumptions, and so the proof of her intent and state of mind necessarily depended upon circumstantial evidence. Respondent contends that proof of defendant's guilt did not rest primarily or chiefly upon circumstantial evidence. Respondent summarizes this proof: The fact that defendant shot her husband was established by direct testimony; there were three eyewitnesses to the killing, which witnesses were Mr. Shuster, Marie Lancaster and defendant, each of whom testified at the trial. Respondent argues that there was no issue of self-defense presented at the trial because defendant testified that the shooting was accidental. Respondent claims that on the issue as to whether there existed sufficient provocation to reduce the crime to manslaughter, the prosecution established its case by direct evidence.

"Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." Code Civ.Proc. sec. 1831. "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence." Code Civ.Proc. sec. 1832.

[1-3] The terms "indirect evidence" and "circumstantial evidence" are inter-

changeable and synonymous. As is well stated in *People v. Goldstein*, 139 Cal.App. 2d 146, at page 152, 293 P.2d 495, at page 500:

"Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth. (*Burrill on Circumstantial Evidence*, 4, 5.) An inference is a conclusion as to the existence of a material fact that a trier of fact may properly draw from the existence of certain primary facts. *Blank v. Coffin*, 20 Cal.2d 457, 460, 126 P.2d 868. Inferences drawn from physical facts amount to circumstantial evidence. *McCready v. Atlantic Coast Line R. Co.*, 212 S.C. 449, 48 S.E.2d 193, 196. It has been said that circumstantial evidence, as distinguished from direct evidence, is testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. *Aday v. State*, 28 Okl.Crim. 201, 230 P. 280, 281."

[4-7] In the instant case appellant was charged with the murder of her husband. Murder is the unlawful killing of a human being with malice aforethought. It is true that when the evidence shows an unlawful killing to have been committed a presumption arises that the killing was done with malice aforethought and that the killing was murder. To find appellant guilty of either first or second degree murder one of the elements required to be proved was guilty intent or malice aforethought. The only direct testimony disclosed by the

record upon the question of defendant's intent or state of mind at the time of the shooting was given by her. She testified that she did not intend to shoot anybody with the gun, that the gun jarred in her hand and that she did not know that the gun was loaded. Here a material and essential element consisted of defendant's state of mind at the time of the shooting, which element was necessarily shown by circumstantial evidence.

In *People v. Yrigoyen*, 45 Cal.2d 46, 286 P.2d 1, the Supreme Court found reversible error in the court's failure to give on its own motion an instruction embodying the principle (CALJIC No. 27) that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. In that case proof of guilt was not entirely circumstantial as in *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8, cited by respondent. The court said, 45 Cal.2d at page 49, 286 P.2d at page 3:

"* * * It is true that in the *Bender* case proof of guilt was entirely circumstantial, whereas in the present case there was direct evidence that defendant issued the check without sufficient funds in or credit with the bank, and circumstantial evidence was relied upon to show his criminal knowledge and intent. However, in the *Bender* case, it is stated that where circumstantial evidence is substantially relied upon for proof of guilt, adequate instructions on the rules governing the application of such evidence must be given. 27 Cal.2d at page 175, 163 P.2d at page 15. And it has been held that the instruction must be given where criminal knowledge is shown only by circumstantial evidence. *People v. Candiott*, 128 Cal.App.2d 347, 355-356, 275 P.2d 500. Cases holding that the instruction need not be given, even upon request, where circumstantial evidence is only incidental or

corroborative are not, of course, applicable here. See *People v. Jerman*, 29 Cal.2d 189, 197, 173 P.2d 805; *People v. Alexander*, 92 Cal.App.2d 230, 235, 206 P.2d 657."

And in *People v. Candiott*, 128 Cal. App.2d 347, at page 357, 275 P.2d at page 506, cited in *People v. Yrigoyen*, *supra*, the court said:

"Plaintiff contends that when the evidence is primarily direct and the circumstantial evidence is merely incidental or corroborative, the jury need not be instructed that the evidence must be irreconcilable with the theory of innocence. That is true within the meaning of such statements as made in *People v. Jerman*, 29 Cal.2d 189, 173 P.2d 805, and *People v. Harmon*, 89 Cal.App.2d 55, 200 P.2d 32. In the *Jerman* case, the defendant's own testimony gave evidence of every element of the charge. Hence, every element of the charge was covered by direct evidence, none thereof depended upon circumstantial evidence. Obviously, in such a case, the circumstantial evidence was 'incidental' or 'corroborative'; the evidence relied upon was 'primarily' direct; and by definition the rule under discussion did not apply. Similarly, in the *Harmon* case, the reviewing court, having found that the accused 'admitted the possession of narcotics', at page 61 of 89 Cal.App.2d, at page 36 of 200 P.2d, presumably an admission made on the witness stand, concluded that this and other direct evidence relegated the circumstantial evidence to a secondary position; no element of the charge depended primarily or solely upon circumstantial evidence. If proof of a significant element of the charge depends upon circumstantial evidence, the instruction should be given. Thus, in *People v. Hatchett*, *supra*, 63 Cal.App.2d 144, 146 P.2d 469, the defendant, under prosecution for murder, admitted the shooting but claimed it was

done in self-defense. The state's evidence bearing upon that issue was almost wholly circumstantial. Failure to give the instruction was cause for reversal of the judgment. In *People v. Rayol*, 65 Cal.App.2d 462, 150 P.2d 812, there was direct evidence (testimony of witnesses) of the physical acts committed but the question whether or not the defendant was a knowing participant rested entirely upon circumstantial evidence. Judgment was reversed for failure to give the instruction. Similarly, in the instant case, proof of defendant's knowledge wholly depended upon circumstantial evidence.

"In the instant case, the failure to include in the instructions given a direct statement of the precise principle under discussion was error."

We conclude that under the rule laid down in *People v. Yrigoyen*, *supra*, the court committed reversible error in refusing to instruct the jury that in order to justify a conviction the facts and circumstances must not only be entirely consistent with the theory of guilt but must be irreconcilable with any other rational conclusion. For it is clear that criminal intent and malice aforethought could only be shown by evidence as to facts and circumstances surrounding the homicide in the instant case, and that circumstantial evidence must be relied on to prove the criminal intent or state of mind of appellant. The following statement in *People v. Yrigoyen*, *supra*, 45 Cal. 2d at page 50, 286 P.2d at page 3, is quite applicable to the instant case:

"Had the instruction in question been given, the jury might have concluded that the circumstantial evidence, while entirely consistent with defendant's guilt, was also consistent with a rational conclusion that he was innocent."

[8] Appellant contends also that the court erred in refusing to instruct the jury that where the evidence is susceptible of two constructions, each of which appears to be reasonable, one pointing to the guilt of

the defendant and the other to her innocence, it is the jury's duty to adopt that interpretation which points to her innocence. In *People v. Merkouris*, 46 Cal.2d 540, 297 P.2d 999, where the evidence was entirely circumstantial, one of the four grounds upon which the court found reversible error was the trial court's failure to give the requested two reasonable theories instruction. In *People v. Goldstein*, *supra*, it was held error, but not prejudicial, to refuse to give requested instructions embodying the principles in CALJIC Nos. 26 and 27 where the court held that the evidence of defendant's guilt was clear. In *People v. De Voe*, 123 Cal.App. 233, 11 P.2d 26, the court held that the court did not err in refusing such instruction where the circumstantial evidence was merely incidental to and corroborative of the direct.

We believe that the instruction should have been given in the instant case because the proof of appellant's criminal intent was based substantially upon circumstantial evidence, and the evidence was reasonably susceptible of several interpretations: (1) That appellant did not intend to kill her husband; (2) that she acted without malice; and (3) that she acted in self-defense. We are unable to agree with respondent's contention that the court's failure to give it was not prejudicial to appellant.

[9] Appellant contends further that the court erred in refusing to give CALJIC instruction No. 28 which states that each essential fact in a chain of circumstances must be proved beyond a reasonable doubt. In *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243, a case based wholly upon circumstantial evidence, cited by respondent, the Supreme Court held that in a case which rests entirely on circumstantial evidence it was error to refuse an instruction that each fact which is essential to complete a chain of circumstances that will establish defendant's guilt must be proved beyond a reasonable doubt. Such error was not prejudicial where the jury was correctly instructed on the doctrine of reasonable doubt (CALJIC No. 21), the prin-

ciples embodied in CALJIC Nos. 26 and 27 and other related matters. Respondent quotes in great detail from the Watson case where the Supreme Court reviews various decisions including *People v. Mansour*, 103 Cal.App.2d 592, 230 P.2d 52, also cited by respondent. The Supreme Court said, 46 Cal.2d at page 831, 299 P.2d at page 251:

"Properly interpreted, CALJIC No. 28 applies the doctrine of reasonable doubt not to proof of miscellaneous collateral or incidental facts, but only to proof of 'each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt.' Although the import of the opening phrase in CALJIC No. 28 may be somewhat confusing because of the reference to its applicability when the People's case rests 'chiefly' on circumstantial evidence, it is clearly applicable to cases such as the present one, which rests entirely upon circumstantial evidence. Accordingly, the trial court erred in refusing to give defendant's instruction which substantially embodied CALJIC No. 28. See cases collected: Stout on 'Appellate Review of Criminal Convictions on Appeal,' 43 Cal.L.Rev. 381, 446-447.

"However, the jury here was correctly instructed on the doctrine of reasonable doubt (CALJIC No. 21; Penal Code, §§ 1906, 1096a), the law applicable where evidence is susceptible of different constructions (CALJIC No. 26), the principle that circumstantial evidence of defendant's guilt must be inconsistent with any other rational hypothesis (CALJIC No. 27), and other related matters as above noted. Under the circumstances, it does not appear here that the court's failure to give a further instruction substantially in the language of CALJIC No. 28 has 'resulted in a miscarriage of justice' within the meaning of the constitutional provision as hereinafter discussed. Const., art. VI, § 4½."

As we have hereinbefore pointed out, the case against appellant rested substantially upon circumstantial evidence and we believe that an instruction substantially in the form of CALJIC No. 28 should have been given. If CALJIC Nos. 26 and 27 had been given, as they were in *People v. Watson*, supra, the error probably would not have been prejudicial, but in the instant case the jury were given no instructions whatever as to the law necessary to a proper consideration of circumstantial evidence nor were the usual instructions given defining direct and indirect evidence.

[10] Appellant next contends that the court committed prejudicial error in omitting several essential instructions upon a rereading of the instructions to the jury. After the jury had retired to deliberate, it returned to the court and requested the rereading of instructions defining the various offenses included in the charge. Thereupon, the court read the instructions previously given defining first degree and second degree murder, premeditation and deliberation, the presumption that one intends the consequences of his voluntary acts and manslaughter. Then the jury made a further request that the court "read the other side; for the innocence." The court then stated it would read all instructions previously given. Instructions given to the jury when it was first charged and omitted on the rereading were CALJIC instructions Nos. 305-A, 305-B, 320 and 309-A. Appellant urges that because the jury were expecting a rereading of all instructions, the court's omission of these four instructions may have conveyed to the jury the impression that the court believed such instructions not applicable to this case. No. 305-A is to the effect that when the jury is in doubt as to whether the crime is murder of the first or second degree they must convict of second degree. However, as pointed out by respondent, the court did reread No. 115-A which states that if the jury entertains a reasonable doubt as to the degree of the crime it must convict the defendant of the lesser offense. No.

305-B is to the effect that the jury must agree unanimously before they can convict, but as pointed out by respondent, the court did reread No. 115-B which is substantially to the same effect. No. 309-A ("due caution and circumspection" is a relative term) is repetitious of CALJIC No. 309 (definition of term "due caution and circumspection"). This omission was no doubt inadvertent as the court did reread a number of instructions relating to self-defense.

The record shows that when the court completed its rereading of the instructions, juror No. 2, who evidently was the foreman of the jury and who had made the request for further instructions, stated: "I think that covers it," and no request for the rereading of the above mentioned instructions was made by appellant's counsel. Under the circumstances we do not believe that it can be held that the failure of the court to reread said instructions was error.

[11-13] Appellant's next contention is that the court's comments on the evidence relating to the defense of self-defense made during the charge to the jury exceeded permissible bounds and invaded the province of the jury. The record shows that after instructing the jury fully and correctly on the law relating to self-defense the court then stated to the jury that the Constitution of the State of California permits the trial judge to comment to the jury on the credibility of any witness and on any other phase of the evidence, and that he proposed to make certain comments concerning the evidence, but that the jurors were to use their own judgment as to the weight and effect of the evidence and draw their own ultimate conclusions. He further stated that the comments he was about to make were offered solely for the purpose of assisting the members of the jury in their deliberations. He then stated:

"One of the necessary elements to justify a killing in self-defense is that it must appear to the defendant as a

reasonable person that the infliction of death or great bodily injury is both present and imminent and that the killing must be done under a well founded belief that the killing is necessary to save one's self from death or great bodily harm.

"From the evidence in this case it appears that shortly before the decedent was killed he made an unprovoked assault upon the defendant during which she suffered no serious injury, that she had withdrawn from the scene and that whatever danger to the defendant there might have been in that encounter had subsided. When a few minutes later she reappeared on the scene armed with a rifle, the decedent was seated, or standing in the living room talking to the witness Shuster. Was the defendant then in any present or imminent danger either actual or apparent of suffering great bodily injury? Were the circumstances then such as to warrant a well founded belief in the mind of a reasonable person that to save herself from death or great bodily injury that it was necessary to kill?

"After a review of the evidence, it is my conclusion that the answer to each of these questions is no and that the fatal shooting was not discharged in self-defense. If your answers to either of these questions is no, the killing was not justifiable and self-defense is not available to the defendant."

The court again repeated its admonition to the jury that they were to exercise their own judgment upon the evidence and to weigh the testimony of the witnesses. He told them that they were the exclusive judges of the credibility of the witnesses and all of the questions of fact, and the court's comments regarding the evidence were made for the sole purpose of aiding them in arriving at a verdict and could not be used by the jury for the purpose of imposing the court's will of compelling a particular verdict.

Appellant argues that the court in this case exceeded the bounds of propriety and invaded the province of the jury by telling them that the defendant was not in present danger of actual or apparent bodily injury, that a reasonable person would not have believed it necessary to kill to escape death or bodily injury, that the killing was not justifiable, and that self-defense was not available to the defendant.

Respondent in reply contends that there was no element of self-defense established by the evidence and that, therefore, no error could have resulted if the court had completely removed the defense of self-defense from the jury's consideration.

We are unable to agree with respondent that there was no element of self-defense established by the evidence and it is clear that the court considered that self-defense was an issue because immediately prior to making the comment complained of, the court gave full instructions as to self-defense.

Section 19 of Article VI of the California Constitution, adopted in 1934, provides that the court "may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case." This section has been considered by appellate courts in many decisions, the effect of which is well summarized in *People v. Huff*, 134 Cal. App.2d 182, at page 187, 285 P.2d 17, at page 20, as follows:

"While a judge may comment on the evidence, including the credibility of witnesses, Art. VI, § 19, Const.; Penal Code, § 1127, this privilege has its inherent limitations and must not be of a nature which would invade the province of the jury. *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193. Even an expression of opinion concerning the guilt or innocence of a defendant may not be fatal provided the province of the jury is not invaded. *People v. Eudy*, 12 Cal.2d 41, 82 P.2d 359. How-

ever, such comments should be temperately and fairly made and trial courts should be cautious in exercising this power of comment with a view to protecting the rights of the defendant. *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828; *People v. DeMoss*, 4 Cal.2d 469, 50 P.2d 1031. It has been held that it is improper to commend a witness in the presence of the jury because of the undue weight which would thus be given to the testimony of this witness. *People v. Frank*, 71 Cal.App. 575, 236 P. 189. A judge should be careful not to throw the weight of his judicial position in a case, either for or against the defendant. *People v. Mahoney*, 201 Cal. 618, 258 P. 607. The rule is well established that such comments on the evidence 'must be fair, temperate, judicial, dispassionate, and free from apparent contentiousness, partisanship or advocacy.' *People v. Hooper*, 92 Cal.App.2d 524, 207 P.2d 117, 121. Such comment must be fair and temperate and not argumentative to a degree that makes it characteristically an act of advocacy. *People v. Robinson*, 73 Cal.App.2d 233, 166 P.2d 17; *People v. DeMoss*, 4 Cal.2d 469, 50 P.2d 1031."

In the light of these authorities we cannot say that the court went beyond the right to comment given it by the said provision of the Constitution. The court's comment was temperately and fairly made and was not argumentative or contentious to a degree which made it characteristically an act of advocacy. In cases relied upon by appellant the court's statements were argumentative and partisan or intemperate.

Appellant next contends that the trial court erred in rejecting evidence of prior threats and acts of violence by decedent toward appellant, which evidence was offered on the issue of self-defense and to show appellant's state of mind. Appellant argues that the excluded evidence was

admissible on the issue of self-defense to show who was the probable aggressor and to assist the jury to determine, in the light of the prior relations between the parties, whether her husband's lurching or diving gesture toward the defendant would naturally cause a reasonable person in her position to act in self-defense. Appellant argues further that such evidence was admissible for the purpose of showing provocation sufficient to reduce the killing to manslaughter.

[14] Respondent argues that appellant testified that the gun discharged accidentally and that therefore the record presented no issues of self-defense or of provocation sufficient to make the killing manslaughter. However, we are convinced that the evidence in the instant case was such that it presented an issue of self-defense and it is to be noted that the court gave full and complete instructions to the jury on self-defense.

[15] In California in a prosecution for murder where the defense of self-defense is interposed, the defendant may introduce evidence that the reputation of the deceased for peace and quiet was bad and known to him to be bad. *People v. Brophy*, 122 Cal.App.2d 638, 647-648, 265 P.2d 593, 46 A.L.R.2d 1410, and *People v. Keys*, 62 Cal.App.2d 903, 912, 145 P.2d 589, citing names. The general rule is well expressed in 64 A.L.R. at pages 1029, 1030, as follows:

"The rule is supported by many authorities that on a trial for homicide, or for an assault and battery, the defendant, after laying a proper foundation by evidence tending to show that, in committing the homicide or assault, he acted in self-defense, may introduce evidence of the turbulent and dangerous character of the deceased or party assaulted. While the deliberate, unprovoked killing of a human being cannot in any measure be justified by the fact that he bore the reputation of a turbulent and violent person, the law recognizes the well-established fact in

human experience that the known reputation or character of an assailant as to violence and turbulence has a very material bearing on the degree and nature of the apprehension of danger on the part of a person assaulted; also that one who is turbulent and violent may the more readily provoke or assume the aggressive in an encounter. Hence, as bearing on these issues, where a proper foundation has been laid, it is conclusively established in almost all jurisdictions that evidence of the turbulent and dangerous character of the victim of an assault or homicide is admissible."

[16] A defendant may introduce evidence for the trait in question when the immediate circumstances of the killing are equivocal and raise a doubt in regard to the question whether defendant acted in self-defense. *People v. Lombard*, 17 Cal. 316; *People v. Murray*, 10 Cal. 309; *People v. Edwards*, 41 Cal. 640; and *People v. Lamar*, 148 Cal. 564, 83 P. 993. In the instant case witness Shuster testified, "Well, I was just standing there talking to Don, and I just noticed him make a sudden lurch or dive, and I heard a shot, and he dropped." It could be said that the immediate circumstances of the killing render it doubtful whether the act was justifiable or not. Therefore, the evidence that decedent had a reputation for violence was admissible on the issue of self-defense. Testimony that decedent had made prior threats against defendant is admissible if there is evidence tending to show any act of aggression committed by decedent at the time of the homicide indicating that he intended to attack defendant. Assuming that the act of decedent when he made a lurch or dive forward was such as would have aroused in defendant sufficient apprehension to obscure reason and render the average man liable to act rashly and defendant in fact did so act, the testimony of prior threats was admissible. *People v. Gonzales*, 33 Cal.App. 340, 342, 164 P. 1131; *People v. Scoggins*, 37 Cal. 676, 683; and

People v. Lombard, 17 Cal. 316, 320; People v. Logan, 175 Cal. 45, 164 P. 1121. See also 2 Wigmore (3d Ed.) 44-65, sections 246-248.

[17] We believe that it was error to exclude evidence which tended to show violent and turbulent character and reputation of decedent and that it was also error to exclude testimony of decedent's prior threats against and violent conduct toward appellant. This evidence was relevant to the issue of self-defense and was also extremely relevant as to appellant's state of mind and intent. If such evidence had been admitted the jury might well have either acquitted appellant or have found her guilty only of manslaughter.

[18] In view of the foregoing we are convinced that the court erred in refusing to instruct the jury on circumstantial evidence and also that the court erred in excluding evidence as to the violent and turbulent character of decedent and of his prior threats against and violent conduct toward appellant. We are mindful of the most recent expression of our Supreme Court as to what constitutes reversible error under section 4½ of Article VI of our state constitution, as stated in People v. Watson, 46 Cal.2d 818, at page 836, 299 P.2d at page 254, as follows: "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." With this statement in mind we have made a careful study of the entire record and are of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

The judgment and the order are reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

Alan OSBOURNE, Plaintiff and Appellant,
v.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA BARBARA, a national banking association, as special administrator with general powers of the Estate of Isobel Field, deceased, Defendant and Respondent.

Civ. 21200.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Hearing Denied Dec. 19, 1956.

Action by remainderman after termination of life estate to recover portion of subject matter of life estate not consumed by life tenant. Judgment for defendant in the Superior Court, Santa Barbara County, Walter J. Fourt, J., and the plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that the evidence supported finding that proceeds of sale of property of the life estate were consumed and that there was nothing left to distribute to the remainderman.

Judgment affirmed.

1. Trusts ⇨358(1)

Even though mingling of trust fund with his funds is improper the trustee can properly unscramble the funds and after such unscrambling the beneficiaries can look only to the funds apportioned to them.

2. Remainders ⇨17(4)

In action by remaindermen after termination of life estate to recover portion of subject matter of life estate not consumed by the life tenant, evidence supported finding that proceeds of sale of property of the life estate had been consumed by the life tenant and that there was no remainder to be distributed to the remainderman.

3. Pleading ⇨318(1)

In action by a remainderman after termination of life estate to recover portion of subject matter of life estate not consumed by the life tenant, where de-

fendant's answer was a denial of allegation with respect to amount of net proceeds of sale of property of the estate and answers set forth an alleged defense to complaint and defendant did not allege an account, plaintiff was not entitled to a bill of particulars. West's Ann.Code Civ.Proc., § 454.

4. Appeal and Error ⇐1039(10)

Denial of plaintiff's motion for a bill of particulars was not prejudicial in view of written stipulation between the parties. West's Ann.Code Civ.Proc., § 454.

W. P. Butcher, Pier Gherini and Frank R. Crandall, Santa Barbara, for appellant.

Price, Postel & Parma, J. F. Goux and Carleton B. Wood, Santa Barbara, for respondent.

PARKER WOOD, Justice.

Action by remainderman after termination of life estate to recover the portion of the subject-matter of the life estate that was not consumed by the life tenant. Judgment was in favor of defendant, the special administrator of the estate of the life tenant.

Edward S. Field died in 1936, leaving a will in which he devised real property known as the Serena property to his wife, Isobel Field, for her life with power to do certain things with the property during her lifetime, and upon her death he directed that the remainder of that property be distributed to Lloyd Osbourne, his wife's brother. Under the decree of distribution in the Estate of Edward S. Field, the Serena property was distributed in accordance with the provisions of the will.

A few years thereafter, Lloyd Osbourne died, and his son, Alan Osbourne, plaintiff herein, succeeded to Lloyd's rights with respect to the Serena property.

One of the contentions of plaintiff (appellant) is that the court erred in finding to the effect that there was no remainder to be distributed to him.

In August, 1947, Mrs. Field sold the Serena property, and she moved therefrom to the El Mirasol Hotel in Santa Barbara. At that time she was over ninety years of age, confined to a wheel chair, and required the care of physicians and nurses.

While the escrow in the matter of the sale of the Serena property was pending, Mrs. Field employed Harold S. Chase as her agent to manage her properties, collect rents, pay bills, and in general to attend to her financial affairs. Her property included three business buildings in Santa Barbara, money and stocks and bonds. Her net worth at the time of appointing Mr. Chase as her agent was approximately \$260,000. On August 26, 1947, a few days after his appointment as agent, Mr. Chase opened an account at the First National Bank of Santa Barbara, which account was known as the *Isobel Field Properties Account*. That account was opened with a deposit of \$18,856.67 which he received from Mrs. Field's account at the County National Bank of Santa Barbara. The selling price of the Serena property, including furniture, was \$65,000. On September 5, 1947, Mr. Chase deposited the proceeds of the sale, \$61,461 (after commission and other charges had been deducted), in the properties account. (The check received from escrow was for \$61,724.45 but \$263.45 was a rebate for taxes and insurance—leaving net deposit of \$61,461 for Serena.) Thereafter, various deposits and disbursements, involving several thousands of dollars, were made in connection with that account. Until April 7, 1950, that was the only account used by Mr. Chase in matters pertaining to her property and in paying her bills for hotel, physicians, nurses, income taxes, and other similar bills. One of the disbursements made from that account was \$50,000, in 1948, for the purchase of United States Savings Bonds. Another disbursement from that account was \$10,000, in 1950, for the purchase of United States Treasury notes. A deposit made in that account, on March 4, 1950, was \$73,174, the amount

received from the sale of the Hutton Building in Santa Barbara.

On April 7, 1950, Mr. Chase opened another account at the First National Bank of Santa Barbara, which account was known as the Isobel Field *Investment Account*. On April 10, 1950, he transferred \$73,174 (amount received for the Hutton Building) from the properties account to the investment account.

In December 1949, Alan Osbourne, plaintiff herein, commenced a declaratory relief action in the United States District Court for the Southern District of California wherein he sought a declaration of his rights and the rights of Mrs. Field with respect to the Serena property. On April 25, 1952, that court rendered a judgment declaring that under the decree of distribution in Edward S. Field's estate Mrs. Field had a life estate in the Serena property with power to convey, and since the sale of that property she has had a life estate in the proceeds of the sale "with full and unrestricted power to use and consume so much of the proceeds as she desires during her lifetime, but she is prohibited from giving away or disposing of these proceeds by way of testamentary disposition; that unused or unconsumed proceeds of sale or property, whether real or personal, acquired from these proceeds remaining at her death become the property of the remainderman, Alan Osbourne, plaintiff herein; that plaintiff is now not entitled to any other or further relief." (*Italics added.*) That judgment became final.

Mr. Francis Price, Sr., counsel for Mrs. Field in the federal case, contended in that case that Mrs. Field was the owner of the fee title to the Serena property. About January 2, 1952, a memorandum of the decision in the federal case was received by Mr. Price. Mr. Price testified to the effect that although he believed that the proceeds of the sale of the Serena property had been consumed prior to that decision, he advised Mr. Chase, out of an abundance of precaution in the matter of showing that the proceeds were consumed,

to open another account and put into it the amount of the net proceeds of the sale, as determined by Mr. Chase and the accountants employed by him, so that they could be sure that during the lifetime of Mrs. Field the proceeds would be used.

On January 12, 1952, Mr. Chase opened an account at the Security-First National Bank (of Los Angeles) at Santa Barbara, which account was known as the Isobel Field *Special Account*. The first deposit therein (on January 12) was \$10,107.58, which was withdrawn from the investment account. This amount was the proceeds of a sale of the United States Treasury notes (purchased in 1950 with money from the properties account), which notes were sold on January 12, 1952—the date that the special account was opened. The only other deposit in the special account (made on March 8, 1952) was \$42,970.83, which was withdrawn from the investment account. This amount was a part of the proceeds of a sale of the United States Savings Bonds (purchased in 1948 with \$50,000 from the properties account), which bonds were sold on March 8, 1952, for \$47,400 and that amount had been deposited in the investment account. The total of the two deposits in the special account (\$10,107.58 and \$42,970.83) was \$53,078.41, which amount was the amount of the net proceeds of the Serena property as determined by the accountants employed by Mr. Chase. (That amount was determined by deducting \$8,382.59, the amount paid as income taxes on the Serena sale, from \$61,461, the net amount deposited after close of escrow.)

When Mr. Chase became the agent of Mrs. Field he employed Scholefield and Company, public accountants, to keep the books of account and the records pertaining to Mrs. Field's financial matters. The books kept by those accountants cover the period beginning January 1, 1947, and show that the net worth of Mrs. Field as of that date was \$257,010.61.

After January 12, 1952 (when the special account was opened), there were dis-

bursements from the special account which reduced the account, as of September 10, 1952, to \$4.06, which amount (\$4.06) was then transferred to the investment account. Those disbursements included payments for hotel and personal expenses of Mrs. Field (not including gifts), her medical, accounting, and legal fees, agent's fees, income taxes, and miscellaneous expenses, totaling \$27,141.49. Other disbursements from that account were: \$564.40 for a television; \$35.52 for a coffee table; \$337 for a new roof on part of a theater building; and \$25,000 in payment of a promissory note, made by Mrs. Field and payable to Metropolitan Trust Company, which note was secured by a trust deed on Mrs. Field's real property at 1018 State Street, Santa Barbara.

Mr. Price (counsel for Mrs. Field) testified to the effect that he advised Mr. Chase to open another account because he (Mr. Price) thought a question might arise as to whether payment of the \$25,000 note from the *special* account was a proper use of the \$25,000; and that in order to obviate such a question he advised Mr. Chase to open the account and use it for ordinary expenses of Mrs. Field.

On September 8, 1952, Mr. Chase opened another account in the Security-First National Bank, which account was known as the Isobel Field *Agent's Account*. He sold shares of stock and bonds in various companies for \$28,708.93 and deposited that amount in the account. (It was his intention to deposit only \$25,000 in the account, but the proceeds of the sale of stocks and bonds exceeded that amount and the excess was inadvertently included in the deposit.) An additional amount of \$128.92 was deposited therein, making a total deposit of \$28,837.85. Disbursements from that account were for the living expenses and other expenses of Mrs. Field, except that \$500 was transferred to a bank in New York. Mrs. Field died June 26, 1953. All the funds in the agent's account had been expended before her death.

It thus appears that there were three periods of time to be considered in deter-

mining whether the proceeds of the Serena property had been consumed. The first period (covering about 4½ years) was from the time the proceeds were received by Mrs. Field on September 5, 1947 (and deposited in the properties account), to the opening of the special account on January 12, 1952 (about 2 weeks after notice of the federal decision). The second period (covering about 8 months) was from the opening of the special account on January 12, 1952, to the time when all the funds in the special account had been spent—September 10, 1952. The third period (covering about 9 months) was from the opening of the agent's account on September 8, 1952, to the time when all the funds in the agent's account had been spent—before the death of Mrs. Field on June 26, 1953.

With reference to the first period of time (after the sale in 1947 to the opening of the special account in January, 1952), appellant asserts that the proceeds from the sale of Serena (\$61,461) when deposited in the properties account on September 5, 1947, became commingled with other money of Mrs. Field and it would be impossible to determine whether the Serena proceeds were used to buy property or were consumed in paying taxes and for services rendered to Mrs. Field. The other money of Mrs. Field on deposit in the properties account at that time was \$18,856.67, the opening deposit, \$1,400 which was also deposited on September 5, and \$263.45 the rebate which was included in the Serena check—making a total of \$81,981.12, as commingled money. Appellant asserts further that in view of other deposits, exceeding \$50,000, made in the properties account before \$50,000 was withdrawn from that account (in 1948) to buy United States Savings Bonds, it would be impossible to determine that the \$50,000 used for buying bonds was money from the Serena sale. It appears that the other deposits made in the properties account, prior to the opening of the investment account (deposits other than said \$81,981.12 and the \$73,174 received for the Hutton Building), were approximately \$161,000. It appears that

the deposits in the investment account, from the opening of the investment account (April 7, 1950) to the date of death of Mrs. Field (June 26, 1953), were approximately \$204,000.

With reference to the second period of time (during the existence of the special account—from January 12 to September 8, 1952—which account was opened and depleted for the purpose of proving the expenditure of the Serena proceeds), appellant asserts in effect that, as a result of the commingling, the \$53,078.41 deposit in the special account could not be determined to be Serena money. He argues further to the effect that, even if it be assumed that the \$53,078.41 was Serena money, the said amount was not the correct amount of the net proceeds of the Serena sale, in that, the \$8,382.59 paid as income taxes on the sale (and deducted from the \$61,461 received, leaving \$53,078.41) was not a proper computation of the taxes for the reason there was no capital gain on the sale but there was a capital loss; that the \$8,382.59 was not due as income taxes but was in effect a gift to the United States and California—a gift that could not lawfully be made, even if it be assumed that the \$8,382.59 was “unmingled” Serena money—and plaintiff should have had judgment at least for that amount. Appellant argues further to the effect that since the special account is apparently the basis for the judgment, and since the special account shows payments of \$564.40 for a television, \$35.52 for a coffee table, and \$337 for a new roof on a part of the theater building, the plaintiff should have had judgment for those amounts. Appellant also argues that the \$25,000 paid from the special account to satisfy the note, secured by trust deed on the 1018 State Street building, should have been found to be a part of the remainder of the Serena proceeds, or if \$25,000 (in money) was not a part of such remainder then a portion of said real property (covered by the trust deed), in the amount that \$25,000 bears to the whole value of said real property, should have been found to be a part of the remainder.

With reference to the third period of time (covering the existence of the agent's account—from September 8, 1952, to a time prior to Mrs. Field's death—which account was opened and depleted for the purpose of proving the expenditure of the \$25,000 for ordinary expenses), appellant argues to the effect that the evidence regarding the agent's account does not support the judgment; that by paying the \$25,000 note from the *special* account and thereby releasing the trust deed, Mrs. Field acquired the unencumbered complete ownership in the 1018 State Street building and increased her interest in that real property; that, even if it be assumed that the *special* account from which the \$25,000 note was paid represented Serena money, the additional interest acquired in the real property by payment of the \$25,000 from the *special* account, remained after her death; and that the expenditure of the money which was in the *agent's* account (\$28,708.93) did not amount to using and consuming the additional interest that was acquired in the real property.

The court found that from the date, August 22, 1947, that Mrs. Field received the net proceeds of \$61,461 from the sale of the Serena property and prior to her death on June 26, 1953, she used and consumed all of said proceeds from said sale; that at the date of her death there were no unused or unconsumed proceeds of said sale, and there was no real or personal property, acquired from such proceeds, remaining at the time of her death; that the entire amount of the proceeds from said Serena sale had been used and consumed by Mrs. Field during her lifetime in accordance with the federal decree; that at the time of her death Mrs. Field neither owned nor possessed any portion of the proceeds of the sale of the Serena property in cash or in real or personal property; that she did not give away any portion of such proceeds nor did she dispose of any portion thereof by testamentary disposition.

Appellant contends, as above indicated, that those findings were not supported by the evidence.

[1] The net amount received from the Serena sale (after deducting commission and other charges) was \$61,461. That amount was commingled with other money of Mrs. Field. When the money was received, and thereafter for approximately 4½ years, Mrs. Field and her attorney believed that the money belonged to her. During that time her medical and hotel expenses were high—averaging approximately \$7,500 a year for medical expenses, and \$11,000 a year for hotel expenses. Also, during that time her federal income taxes averaged approximately \$9,000 a year. There were other expenses in substantial amounts. There was evidence that, at the time of the Serena sale, Mrs. Field needed additional cash for her living expenses and medical expenses. After the federal decision, wherein it was decided that Mrs. Field had a life estate in the Serena proceeds with the right to consume the proceeds, Mrs. Field's attorney was of the opinion that the Serena proceeds had already been consumed; nevertheless, he deemed it advisable, in view of the problem of proving the use of the proceeds, to open a bank account and deposit therein the net proceeds of the Serena sale. Mrs. Field's agent opened the special account and deposited therein \$53,078.41, the amount which Mrs. Field's accountants determined to be the net proceeds of the Serena sale after deducting the commission, other charges, and income taxes paid in connection with the sale. Although the attorney for Mrs. Field believed that the proceeds of the sale had been consumed prior to the opening of the special account, the special account was opened for the purpose of separating or "unmingling" the funds and establishing a record as to use of the separated funds. Appellant asserts that Mrs. Field was in the nature of a trustee toward the remainderman (appellant) and she had the legal duty, when she received the Serena money, to keep it separate from her other money so that she could account to the remainderman; and that when she commingled the money it lost its identity as the Serena money

and it was impossible for her to account for the use of the money. It is not necessary to decide whether she was a trustee; but, even if she be regarded as a trustee, she could properly, after it was decided that she had a life estate only, set aside the net amount of the Serena sale and then proceed with the separate account as she could have proceeded if she had made a separate account when she first received the Serena money. In *Scott on Trusts*, vol. 3, p. 2481, § 517.3, it was said: "Even though the mingling of trust funds with his own funds is improper, the trustee can properly unscramble the funds in some cases." It was also said therein on the same page: "After such unscrambling, it seems clear, the beneficiaries can look only to the funds apportioned to them." In the present case, it was not improper to deposit the Serena money as it was originally deposited. The question involved with respect to depositing the money in that manner pertained to proving the use that was made of the money. Whether or not the Serena proceeds were consumed was a question of fact for the trial judge. Scholefield and Company, public accountants, kept the books of account and records for Mrs. Field from the time the Serena property was sold. Mr. Knapp, an accountant for that company, testified regarding the real and personal property, income and expenses of Mrs. Field as shown by their books and records. Several written summarizations of the various accounts and records were prepared by those accountants and were received in evidence. The summarization as to the special account shows that \$53,078.41 was deposited in the account. It also shows expenses as follows: hotel and miscellaneous personal expenses, \$10,606.09; medical expenses, \$6,452.17; accounting, \$600; legal, \$1,250; agent's fees, \$600; income taxes, \$5,784.34; rental property expenses, \$2,224.40; rental property repairs and maintenance, \$381.98; miscellaneous expenses, \$175.37; trust deed note to Metropolitan Trust Company, \$25,000; transferred to investment account, \$4.06. Those payments depleted the special account.

Then the agent's account was opened for the purpose of establishing a record as to the use of \$25,000, in the event that a question arose as to whether the payment of the \$25,000 trust deed note from the special account was a proper payment. The summarization as to the agent's account shows that \$28,837.85 was deposited in that account. Some of the expenses shown therein are as follows: personal expenses, \$8,740.99; medical expenses, \$8,213.66; rental property expenses, \$6,228.48; property taxes, \$1,394.55; architect's fees, \$3,328. Other expenses shown therein (including \$500 transferred to a New York bank) amounted to \$931.67. Those payments depleted the agent's account.

Appellant asserts, as above shown, that \$53,078.41, deposited in the special account, was not the correct amount of the net proceeds of the sale, in that \$8,382.59 paid as income taxes on the sale (and deducted from the \$61,461 received) was not a proper computation of the taxes. Mr. Knapp, the accountant, testified that in his opinion there was a capital gain on the sale and the income return was correct. The \$8,382.59 was paid as income taxes on the sale. The evidence was sufficient to support a finding that said amount was properly expended as income taxes.

The amount deposited in the agent's account exceeded \$25,000 by \$3,837.85. Even if the amounts paid from the special account for a television, coffee table, and new roof (totaling \$936.92), and the \$500 transferred from the agent's account to a New York bank, should not be regarded as proper payments from those accounts, the total amounts thereof were more than covered by the excess deposit of \$3,837.85.

[2] The evidence was sufficient to support the above-stated findings of the court to the effect that the proceeds of the Serena property were consumed.

[3,4] Appellant also contends that the court erred in granting defendant's motion to strike appellant's demand for a bill of particulars. Plaintiff alleged in his complaint that Mrs. Field received, as consid-

eration for the Serena property, \$65,000 less five percent commission and the costs of sale; that after paying such commission and costs she had about \$61,750 which she was entitled to consume; that the entire amount of the proceeds was unconsumed. Defendant alleged in its answer that the consideration for the property was \$65,000, less five percent commission amounting to \$3,250 and costs of sale amounting to an additional sum of \$8,671.59; and that Mrs. Field received \$53,078.41 as proceeds of the sale. Defendant denied, in its answer, the allegation that she did not consume the proceeds, and it alleged that she did consume the proceeds. Appellant argues to the effect that he was entitled to a bill of particulars because defendant alleged an account in its answer. Section 454 of the Code of Civil Procedure provides in part: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. * * *" The defendant's answer was in effect a denial of the allegation of the complaint with respect to the amount of the net proceeds of the sale; and the answer set forth an alleged defense to the complaint. Defendant did not allege an account. The court did not err in granting defendant's motion to strike the demand for a bill of particulars. In any event, pursuant to a written stipulation between the parties, appellant was permitted before the trial to examine the records and accounts of Scholefield and Company pertaining to Mrs. Field's financial transactions. Also, the stipulation provided that appellant had the right to make copies of the records or accounts. Appellant's accountant examined the records and accounts, and Scholefield and Company assisted him in making the examination.

Respondent asserts that the plaintiff (appellant) was not entitled to maintain the action against the bank, as administrator of Mrs. Field's estate, for the reason that

if any portion of the Serena proceeds remained unconsumed that portion would not be a part of her estate; that if the bank took possession of any unconsumed portion of the proceeds the bank would be liable in its individual capacity and not as administrator. In view of the above conclusion that the evidence supports the findings that the proceeds were consumed, it is not necessary to determine this contention of respondent.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



145 Cal.App.2d 326

Henry O. BRAGG, Plaintiff and Respondent,
v.

MOBILHOME CO. OF LOS ANGELES et al.,
Defendants and Appellants.
Civ. 21608.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Hearing Denied Dec. 19, 1956.

Action for injuries to a roofing contractor falling through a tarpaper covered chimney hole cut by defendants in roof of house being constructed by them. From a judgment of the Superior Court of Los Angeles County, Victor R. Hansen, J., for plaintiff, defendants appealed. The District Court of Appeal, Shinn, P. J., held that instruction that plaintiff had right to rely on presumption that defendants complied with law requiring that all roof openings be covered with planks and was not contributorily negligent in failing to anticipate injury resulting from violation of such law was error, prejudicial to defendants, as directing jury to determine issue of plaintiff's contributory negligence in his favor.

Judgment reversed.

1. Negligence ☞31

A roofing contractor, injured as result of falling through tarpaper covered chimney hole cut in roof of house by parties constructing it, was within intended protection of Industrial Safety Division's safety order, requiring that roof openings in buildings under construction be covered with planks or fenced in by standard railings after holes are framed, as such contractor, though not builders' employee in narrow sense, was doing work of one of his own employees entitled to benefit of order. West's Ann.Labor Code, §§ 6303-6305, 6312, 6500.

2. Negligence ☞31

The purpose of Industrial Safety Division's safety orders for protection of building construction workmen should be given effect so as to make them applicable to all persons properly engaged as ordinary workmen in construction work for benefit of those engaging their services. West's Ann.Labor Code §§ 6312, 6500.

3. Trial ☞194(16)

In action for injuries to roofing contractor, falling through tarpaper covered chimney hole cut by defendants in roof of house being constructed by them, instruction that plaintiff had right to rely on presumption that defendants complied with law requiring that all roof openings be covered with planks and was not contributorily negligent in failing to anticipate injury resulting from violation of such law was erroneous as directing jury to determine issue of plaintiff's contributory negligence in his favor. West's Ann.Labor Code, §§ 6312, 6500.

4. Negligence ☞135(4)

In action for injuries to roofing contractor, falling through tarpaper covered chimney hole cut by defendants in roof of house being constructed by them, evidence was sufficient to justify jury's findings of plaintiff's contributory negligence in failing to look at defendants' building plans, inspect roof, or make any inquiry as to where chimney was to be installed or whether an opening was left therefor.

5. Negligence ⇨141(3)

An instruction to jury on doctrine that one may assume that others will obey law and exercise due care must clearly state proviso that he must himself be free from negligence and use ordinary care to learn whether those on whose conduct he relies are complying with their duties.

6. Appeal and Error ⇨1031(6)

A grave doubt as to whether jury's verdict would have been the same but for grievous error in instructions must be resolved in favor of party whose right to fair trial has been invaded thereby.

7. Trial ⇨191(1), 296(9)

The jury's province is invaded by instruction assuming existence of fact not in evidence or respecting which evidence is conflicting, and such error is not cured by charges submitting to jury question whether such fact exists.

8. Appeal and Error ⇨1064(2)

In action for injuries to roofing contractor, falling through tarpaper covered chimney hole cut by defendants in roof of house being constructed by them, error in instructing jury that plaintiff had right to rely on presumption that defendants complied with law requiring that all roof openings be covered with planks and was not contributorily negligent in failing to anticipate injury resulting from violation of such law was prejudicial to defendant, in view of grave doubt as to whether jury's verdict for plaintiff would have been the same but for such error.

9. Negligence ⇨138(1)

In action for injuries to roofing contractor, falling through tarpaper covered chimney hole cut by defendants in roof of house being constructed by them, defendant's requested instruction to jury that one invited to enter on uncompleted building accepts invitation to enter thereon in its then existing condition and assumes risk of whatever he may encounter was properly refused as imposing on plaintiff duty to anticipate, not only dangerous conditions

involving no violation of law by defendants, but any and all conditions that might exist because of their violations of law.

10. Negligence ⇨6

Safety regulations and other legislation of like import are matters of public policy.

11. Negligence ⇨105

The rule that one need not, in exercise of ordinary care, anticipate violations of law by others, should not be overridden by rule that one entering uncompleted building assumes risks inherent therein.

12. Negligence ⇨105

The rule that one accepting invitation to enter uncompleted building assumes inherent risk of whatever he may encounter is inapplicable in cases of violations of statutory law, such as Industrial Safety Division's building safety orders. West's Ann.Labor Code, §§ 6312, 6500.

13. Negligence ⇨136(22)

A roofing contractor, going on roof of uncompleted house which he had contracted to roof, did not as matter of law assume risk of builders' failure to comply with Industrial Safety Division's safety order requiring that roof openings in buildings under construction be covered with planks or fenced in by standard railings. West's Ann.Labor Code, §§ 6312, 6500.

14. Negligence ⇨138(2)

In action for injuries to roofing contractor, falling through tarpaper covered chimney hole cut by defendants in roof of house being constructed by them, defendants' requested instruction to jury that plaintiff was conclusively presumed to have knowledge of all that estimator employed by him learned or could have learned from examination of defendants' building plans, seen by him before accident, was properly refused as charging plaintiff with actual knowledge of location of such hole, which estimator was not charged with duty to locate for plaintiff's information.

15. Appeal and Error \Rightarrow 843(2)

Where judgment for plaintiff on jury's verdict in personal injury suit was reversed by District Court of Appeal because of prejudicial error in instruction to jury, question whether new trial should have been granted defendants on ground of newly discovered evidence was moot.

Spray, Gould & Bowers, Los Angeles, for appellants.

Earl Malmrose, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendants appeal from a judgment for \$25,000 damages for personal injuries entered on a jury verdict. They contend that as a matter of law they were not negligent, that the court erred in instructing the jury, and that a new trial should have been granted because of newly discovered evidence.

There was evidence of the following facts: Plaintiff, a roofing contractor, agreed to roof fourteen prefabricated houses which defendants were constructing and assembling on their premises. Twelve of the roofs were to be shingled and the others were to be built-up or rock roofs. Plaintiff testified that his estimator checked over the job but he (plaintiff) never saw the house plans, although he admitted having seen a plot plan which one of defendants' workmen drew for him at the job site. Defendants were to supply the tin fittings and chimney saddles for the roofs; plaintiff admitted that he knew each house would be provided with a fireplace and chimney, to be installed after the buildings were transported to their permanent location. He knew that unfinished roofs would be tarpapered to protect the eaves from weather damage.

Plaintiff had from eight to fourteen employees. Prior to the accident, he had himself worked on only one of the other houses, which had a rock roof and an opening

for a chimney cut out near the top of the roof. He went to work on the unfinished house where the accident occurred on the afternoon of November 9, 1953. He climbed a ladder which was leaning against the front of the house and removed the tarpaper covering the edge of the roof on the west side of the building. He then shingled the west side of the roof.

The next morning plaintiff returned to work but did not ask defendants' workmen whether there were any holes under the tarpaper. He testified that he saw no plumbing holes or chimney saddles on the roof. He began removing more of the tarpaper, which was very smoothly rolled and was fastened onto the roofing boards with strips of lumber nailed down at the top and bottom. The rolls of tarpaper were three feet wide, and the roofing boards were 1 x 6 inches, nailed parallel with the edge of the roof and spaced about 4½ inches apart. Plaintiff walked in a stooped position for about 25 or 30 feet down the center of the tarpaper, pulling the nails out of the slats which held the tarpaper in place. He then stepped into a tarpaper covered hole in the roof and fell to the pavement below, sustaining severe injuries. (The hole had been cut by defendants to accommodate the fireplace and chimney which were to be installed at a later date.) He stated that his eyes were on the tarpaper ahead of him and that he noticed no sag in the paper at the spot where he fell through. There was no planking or railing surrounding the hole and he did not know the hole was there.

Two of defendants' workmen, James Mosely and Elmer Johnson, testified for plaintiff. They had covered the roof with tarpaper four days before the accident. Mosely testified that the paper over the hole was as smooth as the rest of the paper even though he had stepped on the hole while laying the tarpaper. He stated that he placed no markings or railings around the hole, that it was impossible to see the hole unless one were practically underneath it, and that he talked to plaintiff just

before the accident, but did not warn him of the concealed hole although he knew plaintiff was the roofing man.

Johnson testified that he and Mosely were told to paper the roof to protect the masonite under the eaves against rainfall but that they received no instruction to fence the hole. This was confirmed by Robert Nelson, defendants' construction superintendent, who testified on behalf of defendants. Nelson stated that the house was in a rough frame state of construction at the time of the accident, i. e., the roof was braced, the sheathing applied, the plumbing and heating pipes were installed, and the only opening in the roof was for the fireplace and chimney. According to Nelson, the fourteen houses were of four different models, some having the chimney in front, some on the side and some in a gable.

[1] The first assignment of error to be considered is that the court erroneously instructed the jury that section 1571(a) of Title 8 to the Administrative Code, being a construction safety order applying to buildings prescribed by the Division of Industrial Safety, pursuant to authority granted by sections 6312 and 6500 of the Labor Code, was applicable to the case. The order reads as set out in the margin.¹ The court instructed that defendants had a duty to comply with said order. Defendants argue that the construction safety orders are for the exclusive benefit of employees and that since plaintiff was an independent contractor and not their em-

ployee he was not a member of the class intended to be protected by such safety orders.

Plaintiff contends that section 1571(a) operates protectively not only as to employees but also as to the general public. He cites *Pierson v. Holly Sugar Co.*, 107 Cal.App.2d 298, 237 P.2d 28, which he says is controlling authority. In that case it was held that certain safety orders, not identified in the opinion by number, which regulated the maintenance and operation of elevators were for the benefit of the public at large. Undoubtedly, the court gave effect to the precise wording of the safety orders relating to elevators. Plaintiff has not compared the wording of those sections with the wording of section 1571(a) and, of course, the case does not hold that all safety orders are applicable to the general public. However, it is unnecessary to consider the implications of the holding in the *Pierson* case. Our question is not whether section 1571(a) is applicable to the general public but whether it was applicable to plaintiff under the circumstances and at the time of his injury.

The orders of the Division of Industrial Safety relate to many different subjects arranged alphabetically from "Air Pressure Tank Orders" to "Window Cleaning" orders. Subchapter 4 deals with "Construction Safety Orders." The authority of the division is derived from sections 6312 and 6500 of the Labor Code which are set out in the margin.² These sections are found in division 5, part 1 of the Labor

1. "1571. (a). As soon as the hole is framed all floor or roof openings within a building or other structure during the course of construction, alteration or repairing, shall be covered with planks so as to carry safely any load which may be required to be supported thereon or it shall be fenced in on all sides by a standard railing. Note: 'As soon as the hole is framed' means when the header beams are nailed to the joist and before the sheathing is laid."

2. § 6312. "The division has the power, jurisdiction, and supervision over every employment and place of employment in Cal.Rep. 301-302 P.2d—53

this State, which is necessary adequately to enforce and administer all laws and lawful orders requiring such employment and place of employment to be safe, and requiring the protection of the life and safety of every employee in such employment or place of employment."

§ 6500. "The division, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise may:

"(a) [Safety devices, etc.] Declare and prescribe what safety devices, safeguards, or other means or methods of protection are well adapted to render the employees of every employment and

Code entitled "Safety in Employment"; "Workmen's Safety." They relate to all places of employment, impose duties on employers to comply with stated requirements for the protection of life and safety of employees and forbid the construction of any unsafe place of employment by any employer, owner or lessee of real property. The clear purpose of the labor code sections is to provide for the safety of employees. The purpose of the "Construction Safety Orders" is the same. The words "employment," "employer" and "employee" are defined in sections 6303, 6304 and 6305 of the Labor Code.³ While the definition of "employee" brings in all workmen who are required or directed by an employer to go to work or be in a place of employment, it is not to be understood as excluding workmen who may not precisely fit into the definition but are clearly of a class for whose protection the safety measures are required.

Defendants point out that plaintiff was roofing the building under contract; that he was therefore an independent contractor and was excluded from protection of the safety order in question. We agree that plaintiff was an independent contractor but are nevertheless of the opinion that under the circumstances of the accident he was

within the intended protection of the safety order. In many situations there are significant distinctions between independent contractors and employees, but we think there is no occasion to recognize any distinction under the facts of the present case.

[2] The safety orders are intended to provide protection for workmen engaged in construction work. Effect should be given to the purpose of the orders so as to make them applicable to all persons who are properly engaged as ordinary workmen in construction work for the benefit of those who have engaged their services. While in a narrow sense plaintiff was not an employee of defendants, he was doing the work of one of his own employees who themselves would have been entitled to the benefit of the safety order. *Mula v. Meyer*, 132 Cal.App.2d 279, 284, 282 P.2d 107; *Slovick v. James I. Barnes Const. Co.*, 142 Cal.App.2d 618, 298 P.2d 923. Plaintiff for the time being, was of the class of his employees. While he was shingling the roof he was exposed to the same dangers as other workmen, needed the same protection, and, we think, was entitled to it. It was the duty of defendants to comply with the safety order as a protection to men who would be working on the roof under engagement by and for the benefit of

place of employment safe as required by law or lawful order.

"(b) [Standards: Uniform safety devices, etc.] Fix reasonable standards and prescribe, modify, and enforce reasonable orders for the adoption, installation, use, maintenance, and operation of reasonably uniform safety devices, safeguards, and other means or methods of protection, which are necessary to carry out all laws and lawful orders relative to the protection of the life and safety of employees in employments and places of employment.

"(c) [Construction, repair and maintenance standards] Fix and order reasonable standards for the construction, repair and maintenance of places of employment necessary to make them safe.

"(d) [Other acts.] Require the performance of any other act which the protection of the life and safety of the employees in employments and places of employment reasonably demands.

"[Signing general orders.] General orders issued under this section must be signed by three members of the board."

3. " 'Employment' includes the carrying on of any trade, enterprise, project, industry, business, occupation or work, including all excavation, demolition and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire except household domestic service."

" 'Employer' shall have the same meaning as in section 3300 and shall also include every person having direction, management, control, or custody of any employment, place of employment, or any employee."

" 'Employee' means every person who is required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment."

defendants. We think that duty was extended to plaintiff when he took his place beside or in the place of one of his workmen. This definition of the duty of defendants seems to us just and reasonable and an application of section 1571 (a) in accordance with its clear purpose.

Our views have support in the statement of learned counsel for defendants, found in their closing brief, "The requirements are clearly not meant for the benefit of all persons on the premises during construction, but for workmen only."

We have not overlooked the claim of defendants that there was no direct evidence that the hole had been "framed" which was a condition to the duty to cover it or fence it. We think the evidence left no doubt that the hole was framed; otherwise defendants would not have had plaintiff putting on the roof.

We, therefore, hold that it was not error to give the instruction on the applicability of section 1571(a).

[3] But, although the foregoing instruction was not erroneous, we are of the opinion that prejudicial error was committed in the giving of another of plaintiff's instructions. At the request of the plaintiff the court gave an instruction as set out in the margin.⁴ Defendants say that the concluding sentence of the instruction was not only erroneous but that the effect of it was to direct the jury to determine the issue of contributory negligence in favor of the plaintiff. We are obliged to agree that such is the case. Except for the concluding sentence the instruction was a correct statement of the law.

4. "A person who, himself, in exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: The rights just defined do not exist when it is reasonably apparent to one, or in the exer-

[4] There was ample evidence to justify a finding that plaintiff was guilty of contributory negligence. He was an experienced roofer. He knew the houses were to have chimneys. On the day preceding the accident he had been working on the roof for several hours. It was the practice to cover holes left in a roof with tarpaper to protect the material underneath. Plaintiff had knowledge of this practice. He did not look at the plans nor did he make an inspection of the roof nor any inquiry to learn where a chimney was to go or whether an opening had been left for a chimney. These facts of themselves would have supported a finding that plaintiff was guilty of contributory negligence. Although he had a right to assume that if an opening had been left in the roof for a chimney it would have been planked over or fenced as required by the safety order, the right to act upon the assumption was dependent upon his exercising ordinary care to learn whether there were any holes in the roof. The fact that there was no fence around the hole did not relieve him from that duty of care. The question of his contributory negligence was the one upon which the case would naturally turn. In view of the evidence the only reasonable conclusion was that defendants had not complied with the safety order and were therefore guilty of negligence. If plaintiff was free from contributory negligence the negligence of the defendants would have been the sole proximate cause of the accident. There was no evidence that defendants were negligent except with respect to their failure to comply with the safety order. The issue was narrowed down to the question whether plaintiff, through re-

cise of ordinary care would be apparent to him that another is not going to perform his duty. *Thus in the instant case, the plaintiff has a right to rely on the presumption that defendants complied with the law requiring that all roof openings be covered with planks and it was not contributory negligence in failing to anticipate injury which resulted from a violation of this law.*"

liance upon the assumption that since there was no railing there was no hole, was guilty of negligence in failing to discover whether a hole had been left for a chimney either by inspection or by making inquiry.

[5] The doctrine that one may assume that others will obey the law and exercise due care is a dangerous one. Any one who places too great reliance upon it is likely not to be long for this world. When a jury is instructed upon the doctrine of reliance, nothing could be more important than a clear statement of the proviso that in order to rely upon the assumption one must himself be free from negligence and that he must use ordinary care to learn whether those upon whose conduct he relies are complying with their duties. The rule was sufficiently stated in the part of the instruction which preceded the last sentence. In other instructions the court had defined contributory negligence as a failure to exercise ordinary care under the circumstances. Except for the italicized portion of the instruction the court's statements of the law were in the abstract. The questioned statement made direct application of the law to the facts of the case. The clause commencing "*Thus in the instant case,*" would convey the same meaning as if it had read "*In view of the evidence and the rules just stated the plaintiff had a right to rely on the presumption that defendants complied with the law*" etc. He did not have that right unless he was free from negligence. Again the court said "*it was not contributory negligence in failing to anticipate injury which resulted from a violation of this law.*" That was the precise question the jury had to decide. Plaintiff says that the jury would have read into the instruction the exception previously stated. We do not believe so. The exception was stated as an abstract proposition. It was left out of the concluding sentence undoubtedly by design. If the court had intended to state that in view of all of the evidence in the case it appeared as a matter of law that plaintiff was not guilty of negligence in failing to discover the hole in the roof it could scarcely have composed

a more appropriate statement for that purpose. "*Thus in the instant case,*" encompasses all the evidence and the legal principles which had a bearing upon the question of plaintiff's contributory negligence. The statement took from the jury the question of plaintiff's contributory negligence.

[6] We cannot say that but for the error the verdict would have been the same. Where grievous error has been committed in the instructions, and there is grave doubt whether but for the error the verdict would have been the same, justice would seem to require that the doubt be resolved in favor of the party whose right to a fair trial has been invaded.

[7, 8] The rule is stated in 24 California Jurisprudence § 101, page 841 et seq., as follows: "The province of the jury is invaded where an instruction assumes the existence of a fact which is not in evidence, or with respect to which there is a conflict of evidence, and any error in this respect is not, it has been held, cured by other charges which submit to the jury the question whether such fact exists." An imposing array of authorities supporting the rule will be found on page 663, 44 Cal.2d 649, 284 P.2d 487, at page 495 (Pauly v. King). The failure to apply the rule in the present case would be to ignore it. We are firmly persuaded that the error was seriously prejudicial to defendants.

[9-13] One other claim of error merits some consideration. Defendants requested and the court refused instructions to the effect that one who is invited to enter upon an uncompleted building accepts an invitation to enter upon it in its existing condition and assumes the risk of whatever he may encounter, citing *Ambrose v. Allen*, 113 Cal.App. 107, 298 P. 169; *Kolburn v. P. J. Walker Co.*, 38 Cal.App.2d 545, 101 P.2d 747; *Irvine v. J. F. Shea Company, Inc.*, 41 Cal.App.2d 458, 107 P.2d 80; *Mitchell v. A. J. Bayer Co.*, 126 Cal.App.2d 501, 272 P.2d 870. We do not believe the court was in error in refusing this instruction. It was an incorrect statement of the law because it would have imposed upon plain-

tiff not only the duty to anticipate dangerous conditions existing in the building which involved no violation of law on the part of defendants but also a duty to anticipate any and all conditions that might exist by reason of violations of law by them. Safety regulations and other legislation of like import are matters of public policy. It would be against that policy to penalize persons who are innocently injured through violations of law. The rule that one need not in the exercise of ordinary care anticipate violations of law by others should not be overridden by the rule relied upon by defendants, namely, that one who enters an uncompleted building assumes the risk inherent therein. In the present case it is sufficient to say that the rule of assumption of risk is not to be applied in cases of violations of statutory law such as the safety orders we are considering. We therefore hold that when plaintiff went upon the roof of defendants' building he did not as a matter of law assume the risk involved in defendants' failure to comply with the safety order.

[14] We do not believe the court was in error in refusing defendants' instruction to the effect that plaintiff was conclusively presumed to have knowledge of all that his employee learned or could have learned from an examination of the building plans. The instruction would have charged plaintiff with actual knowledge of the location of the hole that was left for a chimney. Defendants have cited no case which carries the rule of imputed knowledge to such an extent, and it could not reasonably be extended so as to charge plaintiff with knowledge of the location of holes on the roof for the sole reason that his estimator had seen the plans. He was not charged with the duty of locating holes in the roof for plaintiff's information.

[15] The question whether a new trial should have been granted on the ground of newly discovered evidence is moot.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.

Lester SAMPLE, Plaintiff and Appellant,

v.

Alvah M. EATON, doing business under the firm name and style of Olympic Wrestling Club; Alvah M. Eaton; Aileen LeBell, doing business as Olympic Auditorium Concessions; Aileen LeBell; Mrs. Alvah M. Eaton et al., Defendants,

Alvah M. Eaton, individually, and Alvah M. Eaton, d/b/a Olympic Wrestling Club, and Mrs. Alvah M. Eaton, a/k/a Aileen LeBell, Respondents.

Civ. 21476.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1956.

Rehearing Denied Nov. 14, 1956.

Hearing Denied Dec. 19, 1956.

Action against proprietor of wrestling club and operator of a refreshment concession for damages for injuries sustained by spectator at a wrestling exhibition when he was struck by a bottle of soft drink thrown by another spectator. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment of nonsuit and spectator appealed. The District Court of Appeal, Parker Wood, J., held, inter alia, that question of whether proprietor of wrestling club used reasonable care to protect spectator from injury from a glass beverage bottle thrown by another spectator was for the jury.

Judgment reversed in part and affirmed in part.

1. Trial \S 139(1)

A motion for nonsuit may properly be granted when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.

2. Negligence \S 48, 50

The owner of a place of business must use reasonable care to protect his invitees

against injury through the negligent or wrongful acts of other invitees on the premises where he has reasonable cause to anticipate such acts and the probability of injury resulting therefrom, and he is under a duty to protect his invitees by taking appropriate measures to restrain conduct by third persons which he should be aware of and which he should realize is dangerous.

3. Theaters and Shows ☞6(33)

In action against proprietor of a wrestling club for personal injuries sustained by a spectator at wrestling exhibition when he was struck by a bottle of beverage thrown by another spectator, question of whether proprietor had used reasonable care to protect spectator from injury from the thrown beverage bottle was for the jury.

4. Theaters and Shows ☞6(14)

An operator of a refreshment stand at a wrestling exhibition did not owe a duty to a spectator to protect him from injury resulting from the act of another spectator in throwing a bottled beverage, since the operator of the concession neither owned nor controlled the wrestling exhibition.

Betts, Ely & Loomis, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for defendants.

PARKER WOOD, Justice.

Action for damages for personal injuries sustained by a spectator at a wrestling exhibition, when he was struck by a bottle of Coca-Cola that was thrown by another spectator. The defendants were: the proprietor of the wrestling club that conducted the exhibition; and one of the operators of the refreshment concession at the exhibition. In a jury trial, a nonsuit was granted. Plaintiff appeals from the judgment of nonsuit.

On June 4, 1952, plaintiff attended a wrestling exhibition at the Olympic Auditorium in Los Angeles. He had attended

wrestling matches regularly at that place for approximately four years. On said June 4 he paid the required admission fee and sat in the end seat of the press row, apparently the row next to the wrestling ring. The wrestlers in the main event were one Romero and Dangerous Danny McShane.

Plaintiff testified that for approximately five minutes before the first fall in the main event, McShane was very rough, was pulling hair, pulling trunks and jumping outside the ring; for two or three minutes before and two or three minutes after the first fall, the spectators on the opposite side of the ring from plaintiff were jumping up, fighting, booing and throwing paper cups, peanut sacks and "stuff like that" into the ring, and several persons were standing in the aisle shouting and throwing various articles; after the first fall McShane "strutted" around the ring, shouted at the customers on the opposite side of the ring (opposite plaintiff) and shook his fist at them; plaintiff stopped looking at the customers in order to talk to defendant Mr. Eaton, who had come to the place where plaintiff was sitting (plaintiff and Mr. Eaton were acquaintances); then plaintiff heard a commotion and turned, "and all of a sudden a terrific force hit me [him] in the mouth"; he looked down and saw that a full bottle of "coke" had fallen on his foot. He testified further that one of his teeth had cut through his upper lip, several of his teeth were loosened, and his jaw was broken.

On cross-examination he testified that about three or four minutes elapsed between the first fall and the time that he was struck in the mouth by the Coca-Cola bottle; he did not know where the bottle came from; on previous occasions when he had purchased liquid refreshment at the auditorium, the vendor put the refreshment in a paper cup; while he was in the dressing room receiving treatment for his injuries, the man who threw the bottle was brought into the room; the man said that he "lost his head" and threw the bottle.

Defendant Alvah M. Eaton testified that he was the sole proprietor of the Olympic Boxing and Wrestling Club; he conducted the activities of the club at the Olympic Auditorium in Los Angeles; there was a 20-foot-square wrestling ring in the center of the auditorium; the ring was enclosed by ropes and was surrounded by a ledge that was 2 to 4 feet wide; the seating capacity of the auditorium was 10,400; he employed ushers, private police and Los Angeles police officers to maintain order—the number employed at any event depended on the number of spectators expected; he estimated that about 5,000 spectators were present the night that plaintiff was injured; he did not know how many employees were on duty that night; at any wrestling or boxing match the spectators become excited, and sometimes they are more excited than at other times; Romero and McShane were known in the wrestling profession to be good drawing attractions; McShane was considered to be a rougher type of wrestler than the usual wrestler. Mr. Eaton also testified that he had a rule that a bottle should not be given to a spectator; he had instructed his employees not to permit a spectator to obtain possession of a bottle under any circumstance; he had not instructed the ushers, vendors, private guards or police officers, who were employed by him, to quell a disturbance that might arise; he had seen spectators at the auditorium throw paper cups, popcorn wrappers, cigar butts and articles of that kind on occasions previous to the night that plaintiff was injured; it was very seldom that he had seen such throwing; he had instructed his employees to stop spectators from throwing things. Mr. Eaton testified further that he was in the immediate presence of plaintiff at the time plaintiff was injured; he saw plaintiff immediately after plaintiff was struck; plaintiff was bleeding slightly at the mouth at that time.

Mrs. Lopez testified that she attended a wrestling match at the Olympic Auditorium in Los Angeles when Romero and McShane

were the contestants; she sat next to the aisle in the 10th or 12th row from the ring; for four or five minutes before the first fall, McShane pulled Romero's trunks and hair; everyone was excited and very angry, especially the man who sat across the aisle from her to her left (later identified as the man who threw the bottle); the man used bad language before the match began and became angry when McShane bit Romero; the man used very bad language and threw cups during the four or five minutes before the first fall; McShane went outside the ropes, onto the ledge surrounding the ring, and then (upon returning to the ring) gave Romero the "atomic bomb" or "drop"; the referee raised McShane's hand (indicating that McShane had won the fall); at that time, a boy about 17 years of age, who was carrying a tray containing Coca-Cola bottles, stood in the aisle close to the man who sat across the aisle from her; the boy was looking at the wrestling ring; the man took a Coca-Cola bottle from the tray with his right hand and threw the bottle at McShane who was in the ring; the boy "didn't do anything" when the man took the bottle; she saw the bottle strike plaintiff who was seated in the first row on the opposite side of the ring from where she was seated.

Defendant Mrs. Eaton testified that there was an arrangement with her husband, Alvah M. Eaton, whereby she and her husband's father, Edwin Eaton, had and operated the concessions at the Olympic Auditorium; she and Edwin Eaton operated the concessions under the name of Olympic Auditorium Concessions; all the "cokes" dispensed at the auditorium from the cases carried by the vendors were dispensed by employees of Olympic Auditorium Concessions; the vendors were instructed to retain all full and all empty Coca-Cola bottles, not to release the bottles, and to watch the bottles to the extent that they would not get out of the vendors' possession.

[1] "A motion for nonsuit may properly be granted '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' [Citations.] 'Unless it can be said as a matter of law, that * * * no other reasonable conclusion is legally deducible from the evidence * * * the trial court is not justified in taking the case from the jury.' [Citations.]" *Palmquist v. Mercer*, 43 Cal.2d 92, 95, 272 P.2d 26, 28.

[2, 3] The owner of a place of business must use reasonable care to protect his invitees "against injury through the negligent or wrongful acts of other invitees on the premises where he has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." *Winn v. Holmes*, 143 Cal.App.2d 501, 299 P.2d 994, 996. He is under a duty to protect his invitees "by taking appropriate measures to restrain conduct by third persons which he should be aware of and which he should realize is dangerous." *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 810, 167 P.2d 729, 733. In the present case the evidence showed that for six or seven minutes before plaintiff was struck by the bottle, the spectators on the opposite side of the ring from plaintiff were fighting and throwing various articles. There was no evidence that the ushers, private police, police officers or anyone made any attempt to stop the fighting among the spectators or to stop the throwing of things by the spectators. At the time the spectators were fighting and throwing various articles, the boy, who was carrying the tray of Coca-Cola bottles and was looking at the ring, stood close to the man, who threw the bottle—the man who for several minutes had been angry and had been using bad language and throwing paper cups. No one made any

attempt to stop the man from taking or throwing the bottle. Mr. Eaton testified that he did not know how many ushers, private police or police officers were present at the auditorium the night plaintiff was injured; he had not instructed the vendors, or the ushers, private police or officers employed by him, to quell a disturbance; he had instructed his employees not to permit a spectator to obtain possession of a bottle under any circumstances; on previous occasions he had seen spectators throw paper cups, cigar butts and articles of that kind; he had instructed his employees to stop spectators from throwing things.

It cannot be said as a matter of law that defendant Mr. Eaton used reasonable care to protect plaintiff from injury. Whether he used reasonable care to protect plaintiff was a question of fact for the jury. See *Stockwell v. Board of Trustees*, 64 Cal.App.2d 197, 204-205, 148 P.2d 405; *Thomas v. Studio Amusements, Inc.*, 50 Cal.App.2d 538, 123 P.2d 552; *Philpot v. Brooklyn Baseball Club*, 1951, 303 N.Y. 116, 100 N.E.2d 164. In *Philpot v. Brooklyn Baseball Club*, supra, plaintiff, a spectator at a ball game, was in a seat in a lower stand (of the grandstand) and a part of a broken Coca-Cola bottle fell or was thrown from an upper stand (of the grandstand) and struck plaintiff. The court said therein 303 N.Y. at page 121, 100 N.E. 2d at page 167: "Upon this record we cannot say as a matter of law that the means adopted by the defendant Baseball Club were sufficient to protect the plaintiff as a spectator at Ebbets Field from risk of bodily harm reasonably to be foreseen from the misuse or mishandling of empty glass beverage bottles." In the present case the motion for nonsuit as to Mr. Eaton should not have been granted.

[4] It does not appear that defendant Mrs. Eaton, as an operator of the refreshment concession, owed a duty to spectators to protect them from injury resulting from wrongful acts of other spectators. In *Philpot v. Brooklyn Baseball*

Club, supra, the person who operated the bottled beverages concession at the ball park was also a defendant. The court therein said 303 N.Y. at page 121, 100 N.E.2d at page 167 that the concessionaire neither owned nor controlled the baseball park (Ebbets Field), "nor was responsible for collecting spectators for profit" and there was "no proof of breach of duty owing to the plaintiff by that defendant." A motion for a nonsuit as to Mrs. Eaton was properly granted.

The judgment is reversed as to defendant Alvah M. Eaton; and is affirmed as to defendant Mrs. Alvah M. Eaton.

SHINN, P. J., and VALLÉE, J., concur.



145 Cal.App.2d 268

John C. O'STEEN and Leland Blair, Plaintiffs and Appellants,

v.

Alys S. CRAIG and Charles C. Breckenridge, Defendants,

Alys S. Craig, Respondent.

Civ. 21555.

District Court of Appeal, Second District,
Division 1, California.

Oct. 23, 1956.

Rehearing Denied Nov. 13, 1956.

Hearing Denied Dec. 19, 1956.

Action on note executed in State of Nevada, wherein maker made motion for order to vacate an attachment levied upon certain of her real property located in California to satisfy unpaid note. The Superior Court of Los Angeles County, LeRoy Dawson, J., dissolved writ of attachment and payees appealed. The District Court of Appeal, Fourth, J., held that where note executed in Nevada as payment of part of purchase price of hotel in Nevada recited that payment thereof could be demanded by holder within or without State of Nevada, par-

ties contemplated that payment might well be demanded in California and consequently property of maker of note located in California could be attached in satisfaction of unpaid note under statute providing for such attachment in an action upon an unsecured claim based on a contract payable in the state.

Reversed and remanded with directions.

1. Attachment ⇐5

Bills and Notes ⇐123

Where note, which was executed by purchaser in Nevada as payment on purchase price of hotel in Nevada, recited that maker promised to make payment wherever demanded by holder thereof, parties to the note contemplated that demand could be in California and consequently property of maker located in California could be properly attached to satisfy note under California statute providing for such attachment in an action on an unsecured claim based on a contract payable in the state. West's Ann. Code Civ.Proc., § 537, subd. 1.

2. Payment ⇐6

In absence of any agreement or stipulation to contrary, a debt is payable at place where creditor resides, or at his place of business, if he has one, or wherever else he may be found, and ordinarily it is duty of debtor to seek creditor for purpose of making payment, provided that creditor is within state of his residence when payment is due, unless provided otherwise by statute.

3. Payment ⇐6

When place of payment is fixed by agreement express or implied, payment must be made at place agreed on unless both parties consent that it be made elsewhere and creditor should be present in person or by agent to receive it, and also where a debt is payable at either of two or more places, payment must be made wholly in one place or another and not in part at each place.

Culver Van Buren, Burbank, for appellants.

John J. Bradley, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the plaintiffs from an order granting the motion of defendant Alys S. Craig to vacate an attachment levied upon certain of her real property. The motion was made upon the ground that the note sued upon was neither made nor was it payable in the state of California.

It appears from the record that on or about July 31, 1954, plaintiffs and defendants entered into a contract of sale wherein plaintiffs agreed to sell and defendants agreed to buy the Farris Hotel and Casino in Winnemucca, Nevada, for a consideration of \$85,000. The agreement, made and entered into in Winnemucca, set forth that "Charles C. Breckenridge, of the County of Los Angeles State of California, and Alys Craig, of the County of Los Angeles State of California," would be referred to as the buyers, and further provided for the execution of certain promissory notes to evidence the payments to be made. On July 31, 1954, a promissory note in the sum of \$20,000 was executed by Alys Craig, the respondent herein, in favor of O'Steen and Blair, as a part of the transaction and apparently pursuant to the agreement, which note reads in part as follows:

"* * * As hereinafter agreed, after date, for value received, I promise to pay to John C. O'Steen and Leland B. Blair, or order at Winnemucca, Nevada, or wherever payment may be demanded by the holder hereof, within or without the State of Nevada, the sum of Twenty Thousand (\$20,000.00), in lawful money of the United States of America, at five (5) per cent rate of interest from date until paid. * * *"

The note was not paid on the due date and demand was made of the maker that she pay the same at the office of the attorney for the plaintiffs in Burbank, California.

Affidavits were filed by the appellants and respondent. Appellants stated in substance in their affidavits that the defendants

were at all times residents of the county of Los Angeles; that respondent Alys Craig did, on or about September 1, 1954, in her home in Van Nuys, California, give to O'Steen her check in the sum of \$5,000 drawn on a California bank, pursuant to the terms of the agreement. These statements were not denied by the respondent.

The sole question involved is whether the trial court was correct in discharging that portion of the attachment which was based upon the promissory note referred to.

Section 537, Code of Civil Procedure, provides in part as follows:

"The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

"1. [*Unsecured claims on contract.*] In an action upon a contract, express or implied, for the direct payment of money, *where the contract is made or is payable in this State*, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; provided, that an action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for the support, maintenance, care or necessities furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section." (Emphasis added.)

We are of the opinion that, under the facts of this case, an attachment should be permitted.

The respondent has placed strong reliance on the cases of *Dulton v. Shelton*, 3 Cal. 206; *Eck v. Hoffman*, 55 Cal. 501; *Drake v. De Witt*, 1 Cal.App. 617, 82 P. 982

and *Atwood v. Little Bonanza, etc., Co.*, 13 Cal.App. 594, 110 P. 344, each of which are factually dissimilar to the instant case. In the *Dulton* case, decided in 1853, the action was brought by the plaintiff, a resident of Boston, Massachusetts, to recover of the defendants, residents of San Francisco, money for goods sold by the plaintiff to the defendants. The evidence was that the defendants had purchased, on several occasions, goods from plaintiff in Boston and had remitted payment to Boston; that no payment had been made to plaintiff in San Francisco, nor demanded of defendants, and the letters of the plaintiff to defendants accompanying the invoices of goods forwarded stated, "funds in payment of the same to be in Boston two-and-a-half months after arrival of vessel." "In future I should prefer remittances, if convenient, being made direct to me." "Cash to be in Boston two-and-a-half months after arrival of vessel." "In no case omit remitting." There was also evidence that one of the partners, defendants, resided in Boston for some time during the relations between the plaintiff and defendants. The plaintiff contended that although the contract was not, by its terms, payable in this state, yet because the defendants resided here, the action was transitory and therefore payable here, and he was entitled to the attachment. The court said, 3 Cal. at page 208: "We can only follow the rule in this case by denying the right of attachment, except where the contract is made within this State, or if made without it, then accompanied by a stipulation between the parties to it, that the money is to be paid here."

The *Eck* case was one on several dishonored bills of exchange drawn by one of the defendants upon the other in favor of the plaintiff. At that time all of the parties resided in Germany and the bills were drawn and payable there. After the acceptance and before the maturity of the bills, both defendants left Germany and came to the United States under an assumed name. They then came to California. The affidavit for the attachment did

not state that there was any express stipulation that the bills should be paid in this state. The theory of the plaintiff was that although the bills were drawn at one place in Germany, and payable in the same country, on their dishonor they became payable wherever the defendants might be found. The court, in deciding the case, said 55 Cal. at page 502: "That is true in a general sense, but that is not the sense in which the phrase 'is made or is payable in this State' is used in the statute. If a contract is not made in this State, there must be an express stipulation that it shall be paid in this State to authorize the issuance of an attachment in an action upon it."

In *Drake v. De Witt*, supra, the plaintiff brought an action to recover commissions earned under a written contract made in Minnesota. Under the contract Drake took the Saint Paul agency for the sale of certain California lands. As the court said, 1 Cal.App. at page 618, 82 P. at page 982: "The contract before us shows on its face that it was made, and was to be performed by Drake, in the state of Minnesota. There is nothing to indicate that commissions earned were to be paid in California. The stipulations touching monthly reports, and commissions on sales influenced by Drake, but consummated here, evince a contrary intention, and the presumption is that payment was due where the contract was made and the services were rendered." The stipulations touching the monthly reports evinced a contrary intention. The court, in deciding the case said, 1 Cal.App. at page 619, 82 P. at page 982: "Her right to an attachment in any event depends upon the view that this was a contract for the direct payment of money, and it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state."

In the *Atwood* case the action was upon certain negotiable instruments executed by the defendant corporation at Boston, Massachusetts, without definite place of payment therein stated. An attachment issued and a motion was made to dissolve the same

upon the ground that the instruments were made in another state and were not payable in this state. Affidavits were presented by the defendant at the hearing of the motion to the effect that the corporation was a foreign company, that the members of the board of directors were all non-residents of California, and that the notes were executed in Massachusetts. The plaintiffs filed affidavits to the effect that notwithstanding the omission to specify the place of payment, it was understood and agreed, when the notes were delivered, that the same were payable either in Massachusetts or California. The trial court denied the motion to dissolve. The appellate court reversed the order and said in determining the case, 13 Cal.App. at pages 596-597, 110 P. at pages 344, 345: "But we are confronted with the construction of such section as applied to attachment proceedings in *Tuller v. Arnold*, 93 Cal. [166], 168, 28 P. [863], 864, where it is said: 'The contract, having been made in Illinois, was presumptively to be performed there, and an attachment could not be taken out here, even although it is true in a general sense that the money was payable wherever the defendants could be found. To authorize the issuance of an attachment, the money must have been made payable in this state by the contract itself'—citing authorities. The right to an attachment in any event depends upon the contract being for the direct payment of money, 'and it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state.' *Drake v. De Witt*, 1 Cal.App. 618, 82 P. 982; citing in support, *Dulton v. Shelton*, 3 Cal. 208; *Eck v. Hoffman*, 55 Cal. 502. Accepting this as the rule, and the terms of the note being admitted, it follows that no evidence was competent which undertook to change or modify the language of the instrument. Whatever may have been the understanding of the parties as to the place of payment, they are concluded by the terms of their written contract and the legal presumptions attaching thereto, whenever they invoke

the attachment laws of this state. No conflict arising, therefore, from competent evidence, we are constrained to hold that as a question of law the writ of attachment should have been dissolved, and that the court erred in denying such motion."

In *American Industrial Sales Corp. v. Airscope, Inc.*, 44 Cal.2d 393, at page 400, 282 P.2d 504, at page 508, the court said: "It is apparent from the above analysis that the rule of the *Atwood* case, on which defendant relies, rests upon the misapplication of certain general language in the earlier cases. Neither reason nor settled general principals sustain such rule, and its declaration in the *Atwood* case, along with any language in the preceding cases which would lend support thereto, must be disapproved. See, also, *Snapp v. Kidder*, 200 Cal. 724, 725, 255 P. 183. Adherence to such rule would place an illogical restriction upon the use of parol evidence for the purpose of establishing attachment rights, which restriction does not prevail in fixing the terms of the contract for other purposes. See *Love v. Gulyas*, 87 Cal.App.2d 608, 614, 197 P.2d 405. The presumption that a contract, silent as to the place of payment, is payable at the place where the creditor resides is not conclusive, but is rebuttable by competent evidence. Such evidence may relate to a contemporaneous oral agreement which accompanies the execution of the written contract and is wholly consistent with the terms thereof."

[1] In the case before us, there is clear language that the money is payable (1) in Winnemucca, Nevada, or (2) wherever the holder might demand payment. It is undisputed in the record that a proper demand for payment was made in Los Angeles county that the money be paid to the plaintiffs in Los Angeles county at a specified address. It seems inescapable that the parties contemplated, at the time of the agreement and the execution of the note in question, that payment might well be demanded in California. The respondent was a resident of Los Angeles county, and

plaintiffs stated in their affidavits that they too were residents of Los Angeles county. It is further undisputed that the respondent did make some payment on the obligation, brought into being by the agreement, to the plaintiffs in California. This conduct would seem to bear out the contention that the parties contemplated the obligation being paid in California.

[2, 3] In 70 C.J.S., under the topic Payment, § 6, on pages 217-218, it is set forth:

"As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business, if he has one, or wherever else he may be found; and ordinarily it is the duty of the debtor to seek the creditor for the purpose of making payment, provided the creditor is within the state of his residence when the payment is due, unless provided otherwise by statute. * * *

"When the place of payment is fixed by agreement, express or implied, payment must be made at the place agreed on unless both parties consent that it be made elsewhere, and the creditor should be present in person or by agent to receive it. Where a debt is payable at either of two or more places, payment must be made wholly in one place or another and not in part at each place."

In *American Industrial Sales Corp. v. Aircscope, Inc.*, supra, after quoting a part of the above statement, the court said, 44 Cal.2d at page 398, 282 P.2d at page 507: "But such presumption is rebuttable, not conclusive; and plaintiff produced evidence of the contemporaneous oral agreement to rebut the presumption as to the place of payment which would otherwise prevail in view of the contract's silence on the subject. There is nothing in the attachment law, Code Civ.Proc., § 537, which would qualify the application of the parol evidence rule in this state for the purpose of establishing the prerequisites for using the attachment process. While the attachment statute must be strictly construed and one seeking to enforce any right there-

under must affirmatively show that the contract agreed upon falls within its terms (5 Cal.Jur.2d § 4, p. 598), still the statute 'must be reasonably and fairly interpreted so as to give [it] an efficient operation, and so as to give effect, if possible, to the expressed intent of the Legislature. A statute should never be construed so strictly as to render it absurd or nugatory.' *Walters v. Bank of America*, 9 Cal.2d 46, 52, 69 P.2d 839, 842, 110 A.L.R. 1259. One of the purposes of attachment is to afford the creditor security for the payment of unsecured debts and to prevent the debtor's sequestration of funds or fraudulent transfer of assets in an attempt to hinder or defeat the payment of just claims. (5 Cal. Jur.2d § 3, p. 597.)"

True it is that the parties did not provide that the note was payable exclusively in Los Angeles county, California, and nowhere else. However, they did stipulate that the note would be payable "wherever payment may be demanded by the holder hereof, within or without the state of Nevada." It appears to us that California is a place "without the state of Nevada", that a proper demand was made in the state of California, and that an attachment should be granted. Surely, the legislature did not intend to provide that a contract had to be paid exclusively and only in this state before the creditor could have the benefit of the attachment laws of the state of California.

In *Tuller v. Arnold*, 93 Cal. 166, 168-169, 28 P. 863, 864, the court said:

"The rule that this court will not pass upon the evidence, when conflicting, does not apply where the evidence is all documentary. It is true this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of such discretion; but where, in a matter in reference to which this court has equal advantages with the lower court, it is beyond doubt that error has been committed to the prejudice of the appellant, it is the duty of the court to correct the error. Such error must be held

to be an abuse of discretion. Every reversal goes upon this theory, and it should make no difference whether the mistake be as to a conclusion from the evidence, or in construing the law, provided it be made equally clear that error has occurred."

The order appealed from is reversed with directions that the cause be remanded for further proceedings in keeping with the views expressed herein.

WHITE, P. J., and DORAN, J., concur.



145 Cal.App.2d 346

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Richard George WANG and Grace Elizabeth Wang, Defendants and Appellants.

Cr. 1123.

District Court of Appeal, Fourth District,
California.

Oct. 23, 1956.

Defendants were convicted of robbery in the first degree and of assault by means of force likely to produce great bodily injury. The Superior Court, San Bernardino County, R. Bruce Findlay, J., entered judgments on verdicts of guilty and orders denying motions for new trial, and from such judgments and orders, defendants appealed. The District Court of Appeal, Barnard, P. J., held that the circumstantial evidence and the inferences that could reasonably be drawn therefrom were sufficient to support convictions.

Judgments and orders affirmed.

I. Assault and Battery ☞92
Robbery ☞24(1)

Circumstantial evidence and the inferences that could reasonably be drawn

therefrom were sufficient to support convictions for robbery in the first degree, and assault by means of force likely to produce great bodily injury.

2. Criminal Law ☞379

Ordinarily, character witnesses called by the defense may testify only to general reputation as limited to the neighborhood where accused resides.

3. Criminal Law ☞1170(2)

In prosecution for robbery and assault by means of force likely to produce great bodily injury, accused's certificate of honorable discharge from the army and his service record could not have affected the verdict, and regardless of whether such papers were admissible in evidence as uniform business records to prove the reputation of accused, any error of trial court in removing such papers from evidence and instructing jury to disregard them was not prejudicial to accused. West's Ann.Code Civ.Proc., §§ 1953e, 1953f.

Thomas M. Eckhardt, San Bernardino, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Lowell E. Lathrop, Dist. Atty., J. Steve Williams, Chief Deputy Dist. Atty., San Bernardino, for respondent.

BARNARD, Presiding Justice.

The defendants were charged with robbery, it being charged that on August 7, 1955, they took \$526 from one Mimms. In a second count they were charged with assault by means of force likely to produce great bodily injury, alleging an assault on Mimms on the same day. A jury found them guilty of robbery in the first degree on the first count, and guilty as charged in Count II. A motion for new trial was denied and they were sentenced to imprisonment, the sentences on Count II to run concurrently with those imposed as to Count I. They have appealed from the judgments and from the orders denying their motions for a new trial.

It appears that the defendants stayed at a cafe and motel at Searchlight, Nevada, known as the El Rey Club, from August 5 to August 7, 1955, having registered under the name of Wayne. Mr. Mimms, a prospector and dealer in used automobiles, was in a bar at the El Rey Club during the evening of August 7. While he was discussing mining with another patron, Mrs. Wang joined in the conversation. A little later she and Mr. Wang had a conversation with Mimms about mining, during which she showed Mimms a "hunk of tungsten" in which he expressed great interest. About 9 o'clock that evening they left the El Rey and got into the Wangs' car. Mr. Wang was driving, Mrs. Wang sat on the right-hand side, and Mimms sat in the middle. Mrs. Wang testified that she had on a bathing suit, a white beach jacket, and that she did not think she was wearing any shoes.

Mr. Mimms testified that the next thing he remembered after getting in the car with the Wangs was coming to on the desert at about 5 o'clock the next morning. He was then seriously injured and his money was gone. When he recovered consciousness he crawled to the edge of U. S. Highway 66, where he was picked up by a passerby. This passerby testified that Mimms was in a "very bad condition" and had blood all over him; that he asked Mimms if he had been hit by a car and Mimms replied "No", that a man and woman had beaten him up and robbed him of over \$500. The passerby took him to a hospital in Needles.

The point where Mimms was picked up was approximately seven or eight miles west of Needles, fifty miles from Searchlight, and a mile or so east of the point where the road from Searchlight joins Highway 66. Officers who went to the scene early that morning found a blood-stained depression in the sand 161 feet from the highway, where the assault had apparently taken place. Near the depression there were "scuffle marks", and a good sized rock which is largely covered by bloodstains.

Some blood was found on nearby twigs, there were spatters of blood on a paper found in a bush at the scene, and blood on a pink kleenex which was of the same fabrication and color as that of a box of kleenex found in the car of the defendants at the time of their arrest. All of this blood was human blood of the same type as that of Mimms. There were tire marks near the highway where a vehicle had driven in and backed out again, apparently for the purpose of turning around. There were three sets of footprints going from the highway to the depression, and two sets of footprints returning to the highway, one of them a set of bare footprints. The soil was such that plaster casts could not be taken of the footprints.

A doctor who examined Mimms at the hospital, testified that he was in a state of severe shock and partially conscious; that he had been brutally injured on the left side and front of his head, including the left eye; that both upper and lower jaws were fractured and the bones around the left eye were also broken; and that two of his teeth were gone and the gums brutally lacerated. The doctor also testified that in his opinion two instruments had been used in inflicting the wounds on the victim, one a heavy blunt instrument of some kind and the other could have been a bullet since he found a round wound of entrance on the left side of the skull with the point of exit some three inches away which he thought could have been caused by a .22 bullet.

The defendants were arrested on the afternoon of August 8, in Ontario where they were living in a trailer. Their automobile had just been washed and the rubber floor mat in front had just been washed and a portion was still wet. The seat covers on the front seat had been torn off, leaving shreds of fabric around the fastenings. A .22 rifle was found in the car, and a .25 automatic pistol was found at the head of their bed in the trailer. Cartridges for the pistol and the rifle were also found. Mr. Wang testified that he did not re-

member whether or not he had this pistol with him on the trip to Searchlight. The white jacket which Mrs. Wang had been wearing and the khaki shorts which Mr. Wang had been wearing when they left the El Rey Club had been washed and were still wet. When he was arrested Mr. Wang told the officers that he had been wearing blue shorts that night, but it was later established that he had been wearing khaki shorts. When an officer asked him why he had removed the seat covers he said that "they had gotten dirty." An expert witness testified that he found traces on the white jacket and khaki shorts which indicated that they had been contaminated with blood, but the blood had been removed to the point where no other tests were available. He also found spots on the washed rubber floor mat which he identified as human blood. Mr. Wang's right hand was swollen and pictures of it were introduced into evidence. He testified that he had fallen and injured his hand on August 6, but a dealer in the El Rey Club testified that she observed nothing unusual about his hand when he was playing 21 on Sunday evening. The defendants did not check out from their motel room at the El Rey, and they had mailed the key to the room and payment therefor on the morning of August 8.

While in the bar at Searchlight Mimms had displayed considerable money, talked of his recent good luck in Las Vegas, and had been buying drinks for others very freely. There was evidence that just before these parties left the El Rey that night the defendants offered to show Mimms their claim near Needles where they said the tungsten which Mrs. Wang had shown him had come from, and he expressed a desire to see where it came from. Mrs. Wang testified she could not remember whether her husband talked about owning a claim. Mr. Wang testified that they left Searchlight about 9:00 P.M.; that they had been talking to Mimms, and it was about time for them to eat; that Mimms said he would buy their dinners if they would go

to Needles with him, and that he knew a good place to eat in Needles; that he asked Mimms "Why go that far? (about 40 miles) We have a good place to eat right here"; that Mimms insisted and they agreed to go to Needles; that they went out and got in the car; that he backed out or drove out onto the highway and "we no more than got started when Mimms opened the right door"; that Mrs. Wang shut the door and Mimms repeatedly opened it so he drove slowly and then stopped; that before he got fully stopped Mimms got out and started walking back to the El Rey Club; that he called to Mimms to wait but Mimms, who was walking fast, waived and said "Go on", so they "went right straight home"; that they had not checked out and he had forgotten to pay and had the key with him; that the next morning he mailed the key and pay for the room to the motel; that when they reached Highway 66 they turned west and went to Amboy, and then turned south and went through Twentynine Palms; that they stopped to rest between Amboy and Twentynine Palms, "It is quite a winding road there, not too easy to drive"; that they got home about 2:30 A.M., unloaded part of their things, and then went to bed; that about 10:30 the next morning he washed the car and tore off the seat covers which were on the back of the front seat; that he then burned the seat covers; that he could not explain what appeared to be blood on the right-hand side of the floor mat, but explained that his shorts and the white jacket had been washed with a handkerchief on which he had gotten some blood from a blood blister on his hand; that when they left Searchlight none of them was intoxicated; and that when they left to go to Needles to eat dinner he planned to return to the motel. Mrs. Wang testified largely to the same effect. There were some discrepancies between her testimony and that of her husband, and some discrepancies between their statements to the officers and their testimony at the trial.

Appellants' main contention is that the evidence is insufficient to support the verdict. It is argued that in view of the evidence it is physically impossible that they could have committed this assault on Mr. Mimms. It is argued that the doctor who treated Mimms on the early morning of the 8th testified that he tied up the arteries on his face that were bleeding, that there had been a considerable amount of blood and "everything was a massive blood clot", and that the injuries to the victim's face must have resulted from a number of blows; that since it thus appears that the victim must have bled profusely, that blood must have splattered over a considerable distance during the succession of blows with a heavy rock; that this is confirmed by the fact that blood was found on twigs and on the paper in the bush near the depression; that an expert witness testified as to the difficulty in removing all evidence of blood from hands or clothing in a short time; that if appellants had been present it would have been impossible for them to remove all evidence of blood from their hands, and some residue would have been left on the steering wheel and gearshift knob of their automobile, where none was found; and that it would have been impossible for them to have removed all evidence of blood from their clothing which must have been there if they had been present.

This argument was one for the jury, and it does not necessarily follow that the evidence establishes the physical impossibility relied on. Most of the blood indications found were in the depression referred to, and on the rock that was apparently used. This depression was about the size that would have been made by Mimms' head, and it could reasonably be inferred that most, if not all, of the blows to his head were made while he was lying on the ground and that the depression in the sand resulted from these multiple blows. The rock itself was large enough to afford the assailant considerable protection from any spurting blood. Also, the blood on the twigs and the paper may have gotten there

when the victim tried to get up after he became conscious. Moreover, the evidence indicates that there had been some blood on appellants' clothing. If any blood did get on their hands, it may reasonably be inferred that they could be sufficiently and quickly cleaned so that they would leave no "residue" on the steering wheel or other hard surfaces of the car, regardless of whether they could be sufficiently cleaned to have immediately foiled a full scientific examination. The entire question was one of fact for the jury, and the evidence is far from sufficient to establish that the only inference, or the most reasonable inference, to be drawn from the evidence in this connection is the one relied on by the appellants.

At the oral argument the appellants also argued that the evidence showed that the bullets for the .22 rifle were lead bullets and that if that rifle had been used the course of the bullet from the point of entrance to the point of exit would necessarily have shown lead tracings. While the doctor who examined the victim the next morning testified that from the size of this entrance hole he thought it might have been made by a .22 bullet it is equally possible that it was caused by a .25 caliber bullet, which would make a hole so nearly the same size as not to be easily distinguished. There was evidence that the .25 caliber pistol found in appellants' trailer had in it copper-jacketed bullets, and that such a bullet would not leave lead tracings. Moreover, the expert testified that a lead bullet will not leave tracings "if it passes through soft tissue parts"; that there was about a quarter of an inch of soft tissue between the bone and outer surface of the scalp where this bullet went through; and that there was no evidence here that "a bullet had at any time impinged itself upon the bone."

[1] The contention that it is physically impossible that the appellants could have committed this assault cannot be sustained, and the evidence is otherwise sufficient. In addition to the other circumstances point-

ing to their guilt, portions of the story told by the appellants would naturally have an adverse effect upon its credibility, and some of the explanations given were far from satisfactory. The jury could well question the quick washing of certain articles, including the floor mat of the car, and the explanation for the sudden decision to remove and burn the seat covers does not seem plausible in view of all of the evidence. The victim was an elderly man interested in mining, and it would seem more probable that he would be interested in going to see a claim producing this tungsten ore than in going some 40 miles to eat at that time of night. If, as appellants stated, they were reluctant to go to Needles and wanted to eat where they were it seems peculiar that when Mimms got out of the car, almost as soon as he entered it, they would not have gone back to the El Rey to eat. This is especially true since Mr. Wang testified that it was "time to eat" when the trip to Needles was first mentioned and that when they left for Needles they intended to return to the El Rey. If they changed their minds and decided to go on home, while still at or near Searchlight, it would strain anyone's credulity to accept their explanation that they gave no thought to such a thing as the advisability of checking out and paying their bill. The same may be said of the reason given by Mr. Wang for registering at the El Rey Club under a different name. It also seems unusual that the appellants, after they were on Highway 66, would have turned off at Amboy and gone over a winding road through the foothills which was "not too easy to drive," thus leaving the main highway to San Bernardino and points west of there. The appellants also testified that Mimms, when he got out of their car, was worried about having left his own car and the things he had in it. That he would again leave later that night, with another

man and woman, seems improbable. While the evidence is circumstantial it is sufficient, with the inferences that the jury could reasonably draw from it, to support the verdict. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Green*, 13 Cal.2d 37, 87 P.2d 821; *People v. Kittrelle*, 102 Cal.App.2d 149, 227 P.2d 38.

The only other point raised is that the court erred in removing Mr. Wang's discharge certificate from the army and his service record from evidence, and instructing the jury to disregard them. It is argued that these were offered for the purpose of proving the reputation of Mr. Wang, and that they were admissible as Uniform Business Records under Sections 1953c and 1953f of the Code of Civil Procedure.

[2, 3] The court first admitted these papers in evidence and later reversed its ruling and instructed the jury to disregard them. When the documents were first offered in evidence the district attorney offered, in the presence of the jury, to stipulate that Mr. Wang's separation from service was an honorable discharge, expressing the opinion that this was the only legitimate purpose of going into the matter at that time. When the court reversed its ruling and told the jury to disregard this evidence appellants' counsel stated "If you wish me to do so, I will be happy to withdraw them." Ordinarily, character witnesses called by the defense may testify only to general reputation as limited to the neighborhood where the accused resides. Whether or not these papers (the certificate of honorable discharge is particularly relied on) should have remained in evidence, it would be unreasonable to hold that they could have affected the verdict, and no possible prejudice appears. *People v. Houser*, 85 Cal.App.2d 686, 193 P.2d 937.

The judgments and orders are affirmed.

GRIFFIN, J., concurs.

145 Cal.App.2d 102

Mildred Jean COLICH et al., Plaintiffs
and Appellants,

v.

UNITED CONCRETE PIPE CORPORA
TION et al., Defendants and Appellants.

Civ. 21458.

District Court of Appeal, Second District,
Division 1, California.

Oct. 15, 1956.

Rehearing Denied Nov. 8, 1956.

Hearing Denied Dec. 12, 1956.

Action by children to establish constructive trust in shares of common stock which were purchased by corporation from their father's estate or for the recovery of damages for fraud. The Superior Court of Los Angeles County, A. Curtis Smith, J., entered judgments of dismissal after sustaining demurrers without leave to amend and children appealed. The District Court of Appeal, Doran, J., held that complaint which alleged that cousin of children's father took charge of probate of father's estate and that such cousin utilized fiduciary position as administrator of the estate to arrange a purchase of the stock by the corporation at a reduced price, was sufficient to state a cause of action for damages for fraud and also for declaration of a constructive trust.

Judgments reversed with instructions to overrule demurrers.

1. Judgment ⇨443(1)

Where a judgment has been obtained by extrinsic or collateral fraud, relief can be obtained by an independent suit in equity.

2. Judgment ⇨443(1)

The vital question in equity suit to set aside a judgment allegedly obtained by extrinsic or collateral fraud is whether the successful party has by inequitable conduct, either direct or insidious in nature, lulled the other party into a state of false security, thus causing the latter to refrain from appearing in court or asserting legal rights.

3. Limitation of Actions ⇨179(2)

Complaint, which was filed by children to establish constructive trust in shares of stock which were allegedly fraudulently purchased by corporation from their father's estate at a price below value of the shares, and which alleged that upon learning of the unfair price paid for such shares instant action was instituted, was sufficient to show timely commencement of the action.

4. Limitation of Actions ⇨199(2)

Whether a certain circumstance within the knowledge of an alleged defrauded party is sufficient to make it the duty of such person to investigate so as to avoid bar of three-year statute of limitations, is a question of fact to be determined by the jury or the trial court.

5. Fraud ⇨43

Trusts ⇨371(2)

Complaint which was filed to establish constructive trust in shares of stock allegedly purchased from estate at a reduced price by means of fraud, and which alleged that cousin of deceased was sent by corporation to take charge of probate of the father's estate for purpose of utilizing his fiduciary position to arrange purchase of the stock at a reduced price by the corporation, was sufficient to state a cause of action for damages for fraud and also for declaration of a constructive trust. West's Ann.Civ.Code, § 2235.

Grant & Popovich, Irvin Grant, and George J. Popovich, Los Angeles, for appellants.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., Los Angeles, for respondent United Concrete Pipe Corp.

Freston & Files, Eugene D. Williams, Ralph E. Lewis, Los Angeles, for respondent Steve Kral.

Gwyn S. Redwine, Hollywood, for respondents B. J. Ukropina and T. P. Polich.

DORAN, Justice.

Plaintiffs' Fifth and Sixth Amended Complaints, substantially identical, seek to establish a trust in 1,465 $\frac{1}{2}$ shares of common stock of United Concrete Pipe Corporation, or the recovery of damages for fraud. The plaintiffs are the four children of Veda and John L. Milich who were married in 1927. John L. Milich died intestate on April 12, 1943; the widow, now Veda Milich Nikevich, is joined as a plaintiff herein for the purpose of submitting to jurisdiction and seeks no relief. The four children were all minors at the time of Mr. Milich's death.

John L. Milich was employed by the defendant United Concrete Pipe Corporation at its Modesto, California plant, and previous to the marriage with Veda, had purchased from the defendants Kral, Ukropina and Polich, 2,198 shares of common stock in United. The defendants Kral, Ukropina and Polich were, until 1952, directors and officers in charge of United, and owned more than 90% of the stock. In 1950 all outstanding stock was sold to unnamed third persons, not parties herein.

According to the complaint, shortly after the death of John L. Milich in 1943, Veda, "his widow, retained a local attorney (in Modesto) to handle the probate", but before such attorney "could file a petition for letters of administration, defendant Steve Kral, a cousin of John L. Milich, was sent by defendants * * * from Los Angeles for the purpose of taking charge of the probate of the Estate of John L. Milich." It is alleged that Kral represented to Veda "that the defendants would take care of everything", and that if United's attorneys handled the probate, "no attorneys fees would be charged against the Estate"; that Veda, without business experience, relied on Kral's representations, and agreed to have Kral appointed administrator, whereupon the latter dismissed the Modesto attorney, and retained Stephen Monteleone, Kral's attorney in Los Angeles, who proceeded to have Kral appointed administrator of the Milich estate.

It is further alleged that on September 30, 1943, Kral, as administrator, filed in Stanislaus County, California, verified inventory and appraisal listing as assets in the Milich Estate,

8 shares of Bolsa Chica	
Oil Corp. stock	\$8.00
2,198 shares, United Concrete Pipe Corp.	\$24,596.94
1937 Dodge Sedan	\$290.00
Total	\$24,894.94

and that the appraisal of the United stock "was made by the inheritance tax appraiser upon the basis of a balance sheet furnished * * * by the defendants; that the said balance sheet did not reflect the true financial condition of United", and that the stock was "worth greatly in excess of the sum * * * and said fact was known to the defendants".

The complaint then alleges that "Steve Kral was familiar with the financial affairs of John L. Milich for over 30 years", and represented to the probate court "that all the property listed was the community property of the decedent and his widow", knowing that the United stock had been acquired from the individual defendants "prior to the time of his marriage and was his separate property", which representations were made "on behalf of all of the defendants, in furtherance of said plan to prevent" the United stock "from becoming the property of his minor children and to permit defendants to acquire the stock at a sum greatly below its true value".

It is then alleged that sometime prior to July 31, 1945, defendants requested Attorney Monteleone to prepare an agreement whereby Veda agreed to sell to United the entire 2,198 shares of United stock at a price of \$14 per share, or a total of \$30,772, which agreement was duly executed by Veda and United. A copy of this agreement was attached to the complaint as Exhibit A. In this agreement it is stated that

when the stock was sold to Milich, "said company, by an oral agreement, reserved the option to repurchase said shares", and that Veda, "as his widow, succeeded to all the right, title and interest of said John L. Milich in and to said shares of stock", which representations were false, and known by the defendants to be false at the time the said agreement was executed. It is alleged that Veda, "by virtue of the trust and confidence she had in the defendants", believed that the statements in the agreement were true and relied thereon in executing the agreement.

There are allegations to the effect that Steve Kral, as administrator, in the First and Final Account, heard and approved on October 1, 1945, made false statements "intended to deceive and did deceive the court so that the court would approve the same", in failing to advise the court of the existence of the agreement whereby Kral's company, United, would purchase the stock; in stating that the stock was in the hands of the administrator, "whereas, the stock had actually been purchased by the defendant United * * * and was in the hands of said defendant" under said agreement with Veda; in stating that all claims against the estate had been paid, whereas the administrator claimed an indebtedness of \$7,100.36 upon a promissory note which had never been presented to the court for approval, and "payment thereof having been obtained by Steve Kral pursuant to an authorization procured from Veda * * * to United * * * authorizing immediate payment of said sum together with other claims against Veda * * * and the Estate * * * out of the proceeds payable under the agreement" with Veda; that the statement that the stock was community property was false and since it was the separate property of Mr. Milich, "was required by law to be distributed one-third to Veda * * * and one-sixth to each of his four surviving children".

The complaint also alleges that neither Kral, as administrator, nor Attorney Monteleone, advised the plaintiffs that the stock

was separate property in which the children were entitled to share, nor were the minor children advised of the agreement made with Veda, nor of the true value of the stock. It is also charged that the individual defendants conducted the United business "as though it were a partnership or family corporation wholly owned and controlled by said defendants", treated the earnings of United "as their own personal earnings", and "so dominated and controlled the operations * * * that the said corporation constituted a mere conduit whereby * * * defendants carried on their own personal business affairs; that in order to prevent fraud or injustice the separate entity of United Concrete Pipe Corporation should be disregarded".

It is further alleged that in July, 1950, the defendants negotiated a sale of all outstanding stock in United, approximately 60,000 shares, for the sum of \$6,287,800. Upon learning of this sale, Veda caused inquiry to be made, and "after failure of extended negotiations to settle her claim against the defendants arising from the said sale of stock to United," instituted an action on the ground of fraud of Steve Kral, seeking relief from the sale agreement, which action is still pending. It is also alleged that Steve Kral, in a deposition taken in that action, stated that the indebtedness of \$7,100.36 on a promissory note of John L. Milich, hereinbefore referred to, "arose by reason of the purchase of stock from said defendants by John L. Milich prior to the marriage with Veda"; that until such admission by Kral, Veda "believed that the said stock was the community property" of John and Veda. By reason of these facts, it is alleged that "defendants, and each of them, hold in trust for plaintiffs 1,465 $\frac{1}{3}$ shares of common stock in United * * *". A second cause of action pleads the allegations, and seeks damages for fraud, both actual and exemplary.

Demurrers to the amended complaints aver that no cause of action is stated because the Decree of Distribution in the

Milich Estate "conclusively determined the ownership of the stock", as community property, and "is an absolute bar to the claim of appellant children", and that such a decree can only be reopened for extrinsic fraud, which is not shown by the complaint. It is also claimed that "The action was filed more than three years after the 'discovery' of the fraud * * * and, accordingly, the Statute of Limitations is an absolute bar to the claims of those appellants who reached their majority prior to the commencement of the statutory period".

The respondents also claim that "The allegations of the complaint are not sufficient to show that the stock was the separate property of the deceased"; and that a cause of action for imposition of a constructive trust has not been stated because it is not shown that United was unjustly enriched; that United "has no property or proceeds upon which a constructive trust can be imposed", and that "it is owned in its entirety by persons who are bona fide purchasers for value without notice of any of the alleged fraud".

[1] Appellants and respondents are agreed on the legal principle that where a judgment has been obtained by extrinsic or collateral fraud, relief can be obtained by an independent suit in equity. Many decisions have been cited stating the general rule and its application to varying situations which, however, involve situations factually dissimilar from those of the present case. As in other matters, the mere statement of an abstract rule is relatively easy but the practical application thereof to a complicated set of facts is the occasion of considerable difficulty.

In *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 19, 193 P.2d 728, 732, it is said that while the terms "intrinsic" and "extrinsic" fraud or mistake are generally accepted as appropriate to describe two different categories of cases, "They do not constitute, however, a simple and infallible formula to determine whether in a given case the facts surrounding the fraud or mistake warrant equitable relief from a judgment".

Citing the *Jorgensen* case, a footnote to the opinion in *Thiriot v. Santa Clara, etc., School District*, 128 Cal.App.2d 548, 551, 275 P.2d 833, 836, says: "Intrinsic fraud may, under appropriate circumstances, furnish a basis for voiding a judgment when a party's adversary has concealed or misrepresented facts in violation of a duty arising from a trust or confidential relation * * * but no such relation obtains in the instant case."

[2] Mere terminology or some abstract classification is, obviously, a matter of secondary importance. The vital question in this and every case must always be whether the successful party has by inequitable conduct, either direct or insidious in nature, lulled the other party into a state of false security, thus causing the latter to refrain from appearing in court or asserting legal rights. This is undoubtedly the gist of plaintiffs' complaint.

As hereinbefore noted, the present appeal is not from judgments rendered after a trial on the merits but from judgments of dismissal entered after the sustaining of demurrers without leave to amend. In two recent cases this court has found occasion, to comment on the well-established rules in respect to demurrer hearings and the duties of trial courts in reference thereto. In *Griffith v. Department of Public Works*, 141 Cal.App.2d 376, 296 P.2d 838, 842, it is said that upon the hearing of a demurrer, "the allegations of the complaint must be regarded as true, and a reviewing court 'is confined to the allegations of the complaint', as is a trial court, in determining the matter. Other matters, outside the complaint, although doubtless proper subjects for consideration at the trial, should not be considered. Whether plaintiff is able to establish the allegations made, to the satisfaction of a trial court or jury, or what the final outcome may be, are matters of no importance so far as the present inquiry is concerned".

In *Hardy v. Vial*, — Cal.App. —, 299 P.2d 973, 975, citing the *Griffith* case just mentioned, the reviewing court says: "The

question is one of law only, and if the plaintiff has on any theory stated a cause of action, a trial on the factual issues is warranted". Reversing a judgment entered after sustaining demurrers to the complaint, the court comments on the "liberal rule of pleading [which] has always prevailed in this state and plaintiff should be accorded the benefit of such liberal policy. * * * The sustaining of a demurrer without leave to amend, and entry of judgment thereon, is a matter of the utmost importance, and, unless a high degree of care be exercised by a trial court, such procedure may easily work irreparable damage by denying plaintiff the right to a plenary trial of the issue".

Such appears to be the situation in the instant case. If the truth of the facts alleged be assumed, as it must be at a demurrer hearing, the defendants, with full knowledge of the facts, have indulged in an inequitable course of conduct well designed to lull the plaintiffs into a sense of apparent security, causing the latter to refrain from presenting the true situation to the probate court. The alleged situation becomes even more aggravated when it is considered that Steve Kral, a cousin of Mr. Milich, not only occupied the fiduciary position of administrator but was also one of the managing directors of United, the purchaser of the stock from Mrs. Milich. A trial court or jury might well believe that the defendants' concealment and misrepresentations effectually prevented the plaintiffs from asserting in court the legal rights flowing from Mr. Milich's separate ownership of the United stock. And, if the decree of distribution was thus fraudulently obtained, it cannot be deemed conclusive in determining that the stock was community property in which the minor children would have no interest.

Section 2235 of the Civil Code provides that "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the

latter without sufficient consideration, and under undue influence".

Section 192, Comment d, of the Restatement of Restitution, reads as follows: "A fiduciary violates his duty to the beneficiary where he purchases for himself individually property entrusted to him for sale, but also where he has a personal interest in the purchase of such a substantial nature that it might affect his judgment in making the sale. *Thus, where the fiduciary sells the property entrusted to him to a corporation in which he has a controlling or substantial interest*, the sale can be set aside unless the corporation is a bona fide purchaser". (Italics added.)

[3,4] Nor is any substantial merit found in the other assertions made in the respondents' brief. Timely commencement of the action after discovery of the fraud, is sufficiently alleged in the complaint. As said in *Bliss v. Martin*, 74 Cal.App.2d 500, 506, 169 P.2d 61, 66, "Whether a certain circumstance within the knowledge of an alleged defrauded party is sufficient to make it the duty of such person to investigate is a question of fact to be determined by the jury or the trial court".

The respondents' contention that "The allegations of the complaint are not sufficient to show that the stock was the separate property of the deceased", predicated upon a forced and unnatural interpretation of the language used, is untenable. There is likewise no merit in respondents' charge that no cause of action in reference to a constructive trust has been stated. In reference to these matters and other criticisms of the complaint, the respondents' brief has commented upon matters outside the pleading, which, as hereinbefore mentioned, are not open for consideration on the hearing of a demurrer.

[5] Plaintiffs' complaint, as it stands, is deemed to state a cause of action necessitating a trial on the merits. In certain particulars, doubtless, the complaint could be improved, but under the liberal rule of pleading in force in this state, it was prej-

udicial error to sustain demurrers thereto and enter judgments of dismissal. Plaintiffs, who were minors and especially entitled to judicial protection, must not be thus deprived of an opportunity to present evidence at plenary hearing. Whether plaintiffs will be able to prove the material facts alleged, is a matter of no importance in reference to the present inquiry.

The judgments are reversed with instructions to overrule the demurrers, to allow the respondents a reasonable time to file answers, if so advised, and to proceed to a trial on the merits.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SPENCE, J., dissenting.



145 Cal.App.2d 367

Louise H. GOUTHRO, Plaintiff and
Appellant,

v.

E. A. WINSTANLEY, administrator of the
Estate of Fred H. Gouthro, deceased,
Defendant and Respondent.

Civ. 21630.

District Court of Appeal, Second District,
Division 2, California,

Oct. 24, 1956.

Action by the divorced wife against the administrator of deceased husband's estate involving the issue of whether an award for the wife's support made in an Illinois decree of divorce and designated as alimony, was in fact an award in gross and hence an obligation surviving the death of the husband. Judgment for defendant in the Superior Court of Los Angeles County, Joseph W. Vickers, J., and the plaintiff appealed. The District Court of Appeal, Ashburn, J., held that the award was not of alimony of gross and did not survive the death of the husband.

Judgment affirmed.

1. Divorce \S 389

In action by divorced wife against administrator of the husband's estate involving question of whether an award for wife's support made in Illinois decree of divorce survived the death of the husband, Illinois law was controlling.

2. Divorce \S 247

Under Illinois law periodic payments of alimony, other than installments of a gross award, cease upon death of the wife or husband, or upon remarriage of the wife, regardless of silence of the agreement or decree on the subject.

3. Divorce \S 231, 241, 245(1), 247

Executors and Administrators \S 202(1)

Under Illinois law the term "alimony" is for an indefinite period of time and usually for an indefinite total sum, while the phrase "alimony in gross" or "gross alimony" is for a definite amount and the payment is always for a definite length of time, and is a charge upon the husband's estate and is not modifiable.

See publication Words and Phrases, for other judicial constructions and definitions of "Alimony", "Alimony in Gross", and "Gross Alimony".

4. Divorce \S 245(1), 247

The employment of the word "alimony" or the phrase "permanent alimony" in a divorce decree is an indication of intention to make a modifiable and terminable award under Illinois law.

5. Divorce \S 247

Under Illinois law, alimony terminates upon death of the husband in the absence of special provisions in the decree evidencing an intention to bind the heirs to continue such payments.

6. Divorce \S 247

Where court in an Illinois divorce action disposed of property pursuant to an agreement and adjudged that "in addition to the foregoing" the husband should pay to the wife \$50 monthly sums as provided in the agreement "as and for her permanent alimony" and for and during the period of her natural life or until she remarried, in which event payments should cease, award

was not an award of "alimony in gross" but an award of mere alimony, and its obligations did not survive the death of the husband.

See publication Words and Phrases, for other judicial constructions and definitions of "As and for Her Permanent Alimony" and "In Addition to the Foregoing".

7. Divorce ⚖️241

The payment of a fixed sum forthwith or over a specific period is the essence of an award of alimony in gross, not only in Illinois but also as a matter of general law.

Bachrack & Wilson, Los Angeles, Ralph Wilson, Los Angeles, of counsel, for appellant.

Harold W. Kennedy, County Counsel, and Henry W. Gardett, Deputy County Counsel, Los Angeles, for respondent.

ASHBURN, Justice.

This action, brought by the divorced wife of Fred H. Gouthro, deceased, against the administrator of his estate, presents the question of whether an award for the wife's support made in an Illinois decree of divorce and therein designated as alimony was in fact an award in gross—gross alimony payable in installments—and therefore an obligation surviving the death of the husband. The trial court gave judgment in favor of defendant and plaintiff appeals.

The divorce was granted to the wife (as cross-complainant) on the ground of cruelty on December 26, 1923. Prior to filing of the action the spouses "entered into an agreement as to the disposition of their property rights and the alimony to be paid to the appellant" (quoting agreed statement on appeal). It was merged into the decree, which "finds that the parties hereto have entered into an agreement as to the disposition of their property rights and the alimony to be paid the cross-complainant" (wife). Then follow findings that the agreement provides that two parcels of real property, held jointly, be conveyed to plain-

tiff; that a certain bank account be retained by her; that another sum of \$189 and a Liberty bond be divided equally; "and that *in addition thereto* the said cross-defendant shall pay to the cross-complainant the sum of Fifty dollars (\$50.00) per month, payable in two installments of Twenty-five dollars (\$25.00) each on the 1st and 15th day of each month, *as and for her alimony*, such payments to be made to the said cross-complainant during her natural lifetime or until she re-marries, in which latter event the said payments shall cease; that the said cross-defendant shall at no time be obliged to pay any further sum or sums of money than the said Fifty dollars (\$50.00) per month, by reason of the marital relations heretofore existing between the parties." (Emphasis added.)

As indicated, the foregoing are findings as to the contents of the agreement. The court then disposes of the property pursuant to the agreement and adjudges that "*in addition to the foregoing*" the husband shall pay to the wife the \$50 monthly sums as provided in the agreement "*as and for her permanent alimony.*" (Emphasis added.) Same to continue "for and during the period of her natural life or until she re-marries, in which event the said payments shall cease."

[1] Appellant argues that this decree provides for alimony in gross and that the payments continue after the husband's death and until the death or remarriage of plaintiff wife. She relies upon the phrase "for and during the period of her natural life or until she re-marries, in which event the said payments shall cease." It is conceded that the payments cease upon the husband's death if same are mere alimony, but appellant argues that this is an award of "alimony in gross." This presents a question of Illinois law and both sides agree to that.

The trial judge held in the case at bar that the portions of the agreement and the decree relating to wife's alimony "are separable and distinct from those portions of said agreement and said decree, which pro-

vides for the disposition of their property rights, and constitute an allowance of periodic payments of permanent alimony to said Louise H. Gouthro, to be construed and dealt with in all respects according to the pertinent law of Illinois applicable to allowance of alimony." We agree.

It is to be noted that the Illinois court finds the agreement to be dual in nature, (1) "the disposition of their property rights" and (2) "the alimony to be paid"; after making appropriate order for division of the property it finds and adjudges that "in addition thereto" the husband shall pay and the wife receive \$50 a month "as and for her alimony" and "as and for her permanent alimony." There is no aggregate sum fixed, nor any definite time prescribed for termination of payments. They are to continue "for and during the period of her natural life or until she re-marries, in which event the said payments shall cease." The last quoted phrase is immediately followed by the words, "as and for her permanent alimony." There is no attempt to make the payments binding upon the husband's estate; on the contrary the decree contains a declaration "that the compliance of the cross-defendant with the foregoing provisions of this decree shall be in full and complete settlement and satisfaction of all claims and demands of every kind and character arising out of the marital relations heretofore existing between the said cross-complainant and the said cross-defendant."

[2,3] Under Illinois law periodic payments of alimony (other than installments of a gross award) cease upon death of the wife or the husband, or upon remarriage of the wife; the legal result flows from the event regardless of silence of agreement or decree on the subject. *Walters v. Walters*, 346 Ill.App. 561, 94 N.E.2d 726, 729; *Kramp v. Kramp*, 2 Ill.App.2d 17, 117 N.E. 2d 859, 860; *Cross v. Cross*, 5 Ill.2d 456, 125 N.E.2d 488, 491. The distinction between the ordinary modifiable alimony and gross alimony is made clear in *Walters v. Walters*, supra, 94 N.E.2d 726, 729: "These and many other Illinois cases hereafter

considered indicate that the term 'alimony' bears certain distinguishing characteristics. It is for an indefinite period of time and usually for an indefinite total sum. * * * On the other hand, the phrase 'alimony in gross' or 'gross alimony' is always for a definite amount of money; the payment is always for a definite length of time; it is always a charge upon the husband's estate and has uniformly been held by our courts to be not modifiable." The concurring opinion says, 94 N.E.2d at pages 734-735: "Alimony in gross is a definite, fixed sum for, in lieu of, or in satisfaction of all or a portion of alimony in the usual form of a periodic allowance. * * * The difference between alimony in the usual form of a periodic allowance and alimony in gross is clear. In the latter there is a single award or allowance of an ascertained, fixed sum, payable absolutely and not conditionally or contingently, in a single payment or in instalments, and therefore a vested right in the beneficiary from the entry of the decree. In a periodic allowance of alimony each allowance for a period is separate and distinct from all others, is a mere expectancy which cannot vest until the day of payment, and then only in the event the beneficiary is living." This case was re-heard by the Supreme Court, 409 Ill. 298, 99 N.E.2d 342, at page 344 which said: "Recurrently, decrees in matrimonial cases refer to 'alimony in gross' or 'gross alimony.' Most generally these terms are applied to an amount agreed upon or determined in full or in lieu of all alimony and the amount is frequently payable in installments. Most of the confusion in those cases has resulted from a loose application of these terms and the intention of the parties has not been clearly established by the order or decree. * * * We think the rule in this State is that in cases prior to the amendment of 1949 [Ill.Rev.Stat.1949, c. 40, § 19], where it clearly appears the order is for support and sustenance of the spouse and the provision therefor is plainly separable and segregable from the property provisions of

the contract or decree upon which it is based, the total award, when it is so payable in installments, is modifiable at any time, upon a proper showing. In other words, if it is in fact an allowance for alimony, then it is modifiable as such, and therefore, before the amendment, remarriage would bar future payments."

[4, 5] There is no word suggesting a gross award in the decree under discussion. The employment of the word "alimony" or the phrase "permanent alimony" is "an indicium of intention" to make a modifiable and terminable award. *Maybaum v. Maybaum*, 349 Ill.App. 80, 110 N.E.2d 78, 81. It is said in *Cross v. Cross*, supra, 5 Ill.2d 456, 125 N.E.2d 488, 491, that alimony terminates with the death of the husband "in the absence of special provisions in the decree evidencing an intention to bind the heirs to continue such payments." *Cooper v. Cooper's Estate*, 350 Ill.App. 37, 111 N.E.2d 564, 566, quoting *Lennahan v. O'Keefe*, 107 Ill. 620: "In the absence of language showing, unequivocally, that the intention was to bind the heir by such a decree, we are of opinion that it does not do so, but that its life terminates with the life of the defendant." This case has been followed frequently in other cases by our Supreme and Appellate Courts."

Respondent relies heavily upon *Coleman v. Coleman*, 341 Ill.App. 462, 94 N.E.2d 507, 509, a case which is persuasive. There the plaintiff was awarded alimony in the sum of \$12,000 payable \$1,000 within ten days from entry of decree, \$500 on the first day of January and of July of each year beginning in the year 1949, up to and including July 1, 1959. Paragraph 11 provided that in the event of the death of the husband prior to that of the wife any unpaid portion of the \$12,000 should be paid out of the estate of the husband and constitute a lien thereon. Plaintiff wife remarried in 1948 and defendant successfully moved for an order terminating the payments. In affirming the appellate court adverted to the facts that the agreement

provided the \$12,000 was to be paid "as alimony" and that the agreement was entitled "'Property Settlement and Alimony Agreement.'" At page 509 of 94 N.E.2d, it is further said: "In the first place, it should be noted that the agreement is entitled 'Property Settlement and Alimony Agreement,' thus indicating at the very beginning that the parties were settling both property rights and alimony. In the second place, paragraph 11 of the agreement does not contain any wording that would indicate the provision for \$12,000 was a settlement of property rights. In paragraph 8 the \$12,000 is designated 'as alimony.' Other parts of the agreement deal exclusively with property rights. In the third place, the decree of divorce which was probably drawn by plaintiff's attorney and undoubtedly approved by her attorney, in the paragraph (g) above quoted, orders the defendant to pay to the plaintiff 'alimony' in the sum of \$12,000. Reviewing the whole agreement and the decree entered by the court, it seems to us quite clear that the \$12,000 ordered paid by the defendant under paragraph (g) of the decree was a payment of alimony and not a settlement of any property rights. The clause in paragraph 11 of the agreement above quoted was an attempt by the parties to extend the alimony payments in spite of the contingency of death of either of both parties and perhaps in spite of the remarriage of the plaintiff."

[6] The agreement at bar is dual and divisible in its nature, just like the *Coleman* agreement. Appellant argues that the gross aspect of the award is found in the emphasized words in the phrase "for and during the period of her natural life or until she re-marries, in which event the said payments shall cease." We cannot agree it has any such significance. Under then existing law periodic alimony payments would cease upon the death of the wife or the husband or upon remarriage of the wife (cases cited *supra*). The phrase in question suggests dubiety, rather than

any purpose to convert the award to one in gross. Certainly it does not make that clear showing which the Illinois cases require.

[7] In *re Kuchenbecker's Estate*, 4 Ill.App.2d 314, 124 N.E.2d 52, is appellant's chief reliance as supporting authority. In that instance the agreement between the parties, which was held to have been merged in the decree, 124 N.E.2d at page 54, required the husband to pay to the wife \$325 a month "during the remainder of her natural life, or until such time as she remarries"; also, to maintain insurance on his life in the sum of \$25,000 payable after his death in monthly installments of not less than \$325 "until said policy has paid out, so long, only as she shall remain single and unmarried." 124 N.E.2d at page 53. But the decree into which the agreement was merged provided that the payments to be made during lifetime should continue until further order of court, and defendant was ordered to pay the premiums and keep the insurance in force "until the further order of the court." This phraseology clearly denotes an intention to reserve jurisdiction for the purpose of modification or termination at any appropriate time. Plaintiff wife sought to enforce the obligation for monthly payments against the estate of the husband. She succeeded in the appellate court. At page 54 of 124 N.E.2d the opinion says: "The sole question presented upon this appeal is whether the decree and the agreement of the parties embodied therein clearly disclose an intention to settle all of the property rights; and whether it constitutes a settlement of alimony in gross payable in installments; or whether the decree must be considered as a decree for the payment of alimony only, payable in installments, which ceased upon the death of the defendant." Relying upon what it deemed to be the purport of *Walters v. Walters*, *supra*, 346 Ill.App. 561, 94 N.E.2d 726, the court said: "We think that the instant case presents as strong a showing

of property settlement, constituting a settlement of alimony in gross, as that appearing in the *Walters* case. In harmony with the holding of this court and the Supreme Court in the latter case, we are compelled to conclude that the claim in question is a proper one and survived the death of the defendant in the decree." No mention is made of the cardinal facts that the *Walters* agreement and decree expressly provided for an award of "alimony in gross" and that a fixed sum of \$34,540 was awarded, payable in installments which were expressly made a charge upon the estate of the husband. There was in the *Kuchenbecker's* case no fixed sum and no fixed period for payments except as the \$25,000 of insurance had that aspect. The effect of the merger of the agreement into the decree was a substitution of the obligations of the decree for those of the agreement. *Flynn v. Flynn*, 42 Cal.2d 55, 58, 265 P.2d 865. The language, "during the remainder of her natural life or until such time as she re-marries" thus became "until the further order of the court." As we see it, this *Kuchenbecker's Estate* case has little of gross alimony in it and does not square with the other decisions in that state, especially *Walters v. Walters*, *supra*, which is reported in 94 N.E.2d 726 and in 99 N.E.2d 342. The payment of a fixed sum forthwith or over a specific period is of the essence of an award in gross, not only in Illinois but also as a matter of general law. See *Robinson v. Robinson*, 79 Cal. 511, 515, 516, 21 P. 1095; *Huellmantel v. Huellmantel*, 124 Cal. 583, 588, 57 P. 582; *Honey v. Honey*, 60 Cal.App. 759, 761-762, 214 P. 250; *Tremper v. Tremper*, 39 Cal.App. 62, 65, 177 P. 868; 27 C.J.S., *Divorce*, § 235, p. 966; 17 Am.Jur. § 594, p. 466; *Ballentine's Law Dictionary*, p. 66. To say that the phrase, "during the remainder of her natural life or until such time as she re-marries" effects that result, seems to force a desired conclusion. Under then existing Illinois law such periodic payments would automatically cease upon re-

marriage of the wife or death of either party. Whether the Kuchenbecker's case ever found its way to the Supreme Court we do not know. But it appears not to have been cited in any later Illinois case. It is our opinion that this case is not reconcilable with Walters and Coleman, supra, and that it does not correctly reflect the Illinois law. Hence it is not controlling here. The ruling of the trial court was correct.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.



145 Cal.App.2d 386

Loretta L. SIMPSON, Plaintiff and Appellant,

v.

The CITY OF SANTA MONICA, a Municipal Corporation, et al., Defendants and Respondents.

Civ. 21745.

**District Court of Appeal, Second District,
Division 2, California.**

Oct. 24, 1956.

Suit against city to compel restoration of plaintiff's permit to operate a rock steam bath and massage parlor. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered a judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence supported city council's action in revoking plaintiff's permit on ground that the permit was being abused to detriment of public or was being used for a purpose different from that for which it was issued.

Affirmed.

1. Section 6124 of the Santa Monica Municipal Code provides as follows:

"Revocation of Permit. Any permit

1. Physiclans and Surgeons §11(3)

Fact that report of police officer assigned to investigate plaintiff's operations was read at hearing before city council to revoke permit to operate a rock steam bath and massage parlor did not establish that the entire evidence before council was hearsay, where officer was personally present at hearing before council and testified that the report would be his statement as to the investigation that he had made in the matter.

2. Physiclans and Surgeons §11(3)

In proceeding before city council to revoke permit to operate a rock steam bath and massage parlor on ground that permit was being abused to detriment of public or was being used for a purpose different from that for which it was issued, purpose for which place was being used or occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence.

3. Physiclans and Surgeons §11(3)

Evidence supported action of city council in revoking permit to operate a rock steam bath and massage parlor on ground that permit was being used to detriment of public or was being used for a purpose different from that for which it was issued.

A. Brigham Rose, Los Angeles, for appellant.

Robert G. Cockins, City Atty., Robert D. Ogle, Asst. City Atty., James W. Shumar, Deputy City Atty., Santa Monica, for respondents.

FOX, Justice.

In January, 1955, the Police Chief of the city of Santa Monica issued plaintiff permit No. 105 to operate a rock steam bath and massage parlor at 2815 Pico Boulevard. On May 20, 1955, after an investigation, the chief revoked¹ the permit.

issued by the chief of police pursuant to this code may be suspended or revoked, by the chief of police when it shall appear

Five days later plaintiff duly appealed² by requesting a hearing before the city council for a restoration of the permit. The city council held such hearing on June 14, 1955. Plaintiff had been present when the hearing date was set. Subsequently a letter was sent to her advising her of the time and place. She was neither present in person nor represented by counsel at the hearing. At the conclusion of the hearing the city council voted to sustain the action of the chief in revoking the permit, and authorized the mayor to sign proper findings.³

By her amended and supplemental complaint, plaintiff seeks to have her permit restored. She incorporated in her pleading a transcript of the proceedings before the city council. The demurrer of the city and the chief of police was sustained without leave to amend. The action was thereupon dismissed. Plaintiff appeals from the judgment of dismissal.

[1] Plaintiff's position is that the entire evidence before the city council was hearsay. She then argues, relying on *Walker v. City of San Gabriel*, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383, and *Desert Turf Club v. Board of Supervisors*, 141 Cal.App.2d 446, 296 P.2d 882, that hearsay evidence alone is insufficient to support the revocation of her permit. Plaintiff, however, misconceives the state of

the record. The evidence before the city council was not entirely hearsay. Officer Tom, who was assigned to investigate plaintiff's operations, was personally present at the hearing before the city council and testified. True, his report, or at least a part thereof, was read at this hearing. But he testified that the report would be his statement as to the investigation that he made in this matter. Hence he adopted the report as his testimony and vouched for its correctness. Furthermore, he was present and available for cross-examination had plaintiff been present or represented by counsel.

Officer Tom called the telephone number of the address in question on May 19, 1955. A woman answered the telephone. The officer told her he was from out of town and had been given the address of her place by a friend. The woman told him that "Dee," which was the nickname of the telephone subscriber, was out, but to call back after 1:00 o'clock. The officer again telephoned at 2:30. The same woman answered the call. She told the officer that Dee did not know him by name (Jack Coleman), and that she and Dee were very angry with the man who had given him the unlisted telephone number. She said the man should have known better, as telephone deals were dangerous. Officer Tom gave the fictitious friend's name as Harry Shaperio. The woman stated that

that the business of the person to whom such permit was issued has been conducted in a disorderly or improper manner, or in violation of any statute of the state, or ordinance of this city, or any provision of this code, or that the person conducting said business is of unfit character to conduct the same, or *that the purpose for which the permit has been issued is being abused to the detriment of the public, or that the permit is being used for a purpose different from that for which it was issued* * * * (Emphasis added.)

2. Section 6126 of the Santa Monica Municipal Code reads as follows:

"Right of Appeal. Any person aggrieved by the action of the Chief of Police or the City Manager in suspend-

ing or revoking any such permit or license may appeal to the City Council by filing a written notice thereof with the City Clerk within ten days from the date of mailing notice of such action. The Council shall make a decision within thirty days from receipt of the notice by the City Clerk, and the decision of the Council, after a hearing on the appeal, upon notice to the permittee or licensee shall be final and conclusive."

3. The findings include, inter alia, the following:

"The City Council finds that the purpose for which the Police Permit No. 105 was issued is being abused to the detriment of the public and is being used for a purpose different from that for which it was issued."

Dee had told her to tell him, i. e. the officer, to get Shaperio to come with him to her place or to telephone and verify that he was OK. The woman said any time Saturday afternoon would be fine. She said "Shaperio knows better than to give strangers this number," and to tell Shaperio when he saw him that "they were disappointed in him." A massage or steam bath was not mentioned in either conversation. Later that afternoon the officer went to the address in question wearing Douglass badge No. 428 and sought admission. He was met at the door by a man dressed in a white outfit. This person said the masseuse had gone home and no one could take care of him. The officer remarked that some friends at Douglass had suggested that he come by. The man replied: "Bring some of them with you next time, and if we know them, you'r OK." Officer Tom saw no steam or other evidence of steam baths being given there. On the outside of the building was "a very small sign"—about 2 or 2½ inches high, containing three words—"Rock Steam Bath." The reception area was approximately four by five feet; a wooden partition completely blocked the view into the rest of the house. One could not see into the building, either in the front or in the rear.

[2, 3] If this place had been at the time legitimately operated as a steam bath and massage parlor there could have been no necessity for its prospective patrons to be vouched for by former customers. The evasiveness in connection with making an appointment, the oblique interrogation of prospective clients, and the clandestine operation of the enterprise are entirely out of harmony with the purpose for which the permit was issued. The evidence and the reasonable inferences therefrom amply support the finding of the city council, quoted in footnote 3, for "The purpose for which the place was being used or occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence". People v. Renek, 105 Cal.App.2d 277, 281,

233 P.2d 43, 46; People v. Battaglia, 107 Cal.App.2d 476, 479, 237 P.2d 70; People v. King, 140 Cal.App.2d 1, 294 P.2d 972. Judgment affirmed.

MOORE, P. J., and ASHBURN, J., concur.



145 Cal.App.2d 390

Ina Schonclte BARLIN, Plaintiff and Appellant,

v.

Benjamin BARLIN, Union Bank & Trust Company, Walston & Company, Benjamin Barlin Company, Irvin Kahn, Eleanor Barlin Kahn, I. Lloyd Hahn, Bekins Van & Storage Company, New Grand Coulee Hotel, Davenport Hotel, Rose Barlin, Bank of America, Santa Monica, California Bank, Santa Monica, Security First National Bank, Santa Monica, California Commercial, Santa Monica, Beverly Hills National Bank, Beverly Hills, John Doe I to X inclusive, Jane Doe I to X inclusive, John Doe copartnership I to X inclusive, John Doe corporation I to X inclusive, Defendants,

Benjamin Barlin, Respondent.

Benjamin BARLIN, Plaintiff and Respondent,

v.

Ina SCHONCITE, also known as Ida Schonclte, also known as Ina Barlin, doing business under the false and fictitious name of Ina's 14 Karat Shop, and under the false and fictitious name of Alrede's, Doe I, Doe II, Doe III, and Doe IV, Defendants,

Ina Schonclte Barlin, Appellant.
Civ. 21651.

District Court of Appeal, Second District,
Division 3, California.

Oct. 24, 1956.

Actions for money alleged to have been lent and for a divorce wherein counter claims were filed. From an adverse

judgment of the Superior Court of Los Angeles County, Walter R. Evans, J., the wife appealed. The District Court of Appeal, Vallée, J., held that where the court found an accounting was not necessary to joint venture and that it was terminated by mutual consent and that wife was indebted to the husband in a certain amount, evidence supported court's findings that court did not err in not awarding costs to wife in the action for money lent and that manner of payment of attorneys' fees was not improper.

Judgment affirmed.

1. Joint Adventures Ⓒ5(1)

Under ordinary circumstances, one joint adventurer may not sue his associate for return of money contributed to the venture except by an action for dissolution and an accounting.

2. Joint Adventures Ⓒ5(1)

Where the joint adventurer has been terminated and one of the adventurers is entitled to a sum certain, he may sue another for breach of the contract or for a share of the profits or losses or for a contribution for advances made in excess of his share.

3. Joint Adventures Ⓒ5(2)

In action for money lent where defendant counterclaimed on the ground that the parties were engaged in a joint adventure and that the money was advanced to the venture and that profits and losses were to be shared alike, evidence sustained finding that an accounting was not necessary, that the joint adventure was terminated by mutual consent and that the defendant was indebted to the plaintiff in a certain amount.

4. Appeal and Error Ⓒ901, 931(1)

Findings of trial court are presumed to be supported by the evidence and the burden is upon the appellant to show that they lack evidentiary support.

5. Appeal and Error Ⓒ901

Where appellant challenges the figures found by the trial court, he must show

that under no possible view of the evidence could the court have arrived at that figure.

6. Joint Adventures Ⓒ5(1)

Where venture for the purchase or sale of jewelry had been terminated and the court found that the plaintiff was entitled to sum certain, he was entitled to sue at law therefor and an accounting was not necessary.

7. Costs Ⓒ32(1)

In an action for money lent, where the defendant counterclaimed on the ground that parties were engaged in a joint venture and that the money lent was advanced to the venture and that profits and losses were to be shared where the judgment was rendered in the favor of plaintiff, the court did not err in not awarding cost to the defendant in the action for money lent. West's Ann.Code Civ.Proc., § 1032.

8. Joint Adventures Ⓒ5(1)

In action for money lent where defendant counterclaimed on ground that parties were engaged in a joint venture and that money lent was advanced to the venture and that profits and losses were to be shared alike, where court found that venture had been terminated by agreement of parties prior to commencement of action for the money lent and that an accounting was not necessary, and that it was defendant and not another that was indebted to plaintiff, such other was not a necessary party to the action.

9. Joint Adventures Ⓒ5(1)

In action for money lent where defendant counterclaimed on ground that she and defendant were engaged in a joint venture and that money lent was advanced to venture, rendering judgment in favor of defendant on the counterclaim for an amount alleged to have been paid to plaintiff out of moneys of the joint adventure was not error.

10. Divorce Ⓒ223

Whether the attorneys' fees in a divorce action will be made payable to a party or to his attorney is a matter in the

discretion of the trial court. West's Ann. Civ.Code, § 137.5.

11. Divorce — 228

Where the court ordered defendant in a divorce action to pay the wife's attorneys and ordered that amount be paid by deducting it from a judgment in favor of the husband in the action for money lent and to pay it to the wife's attorneys, manner of payment was not improper on the ground that the husband should have been ordered to pay the full amount of attorneys' fees to the attorneys and that attorneys had no right of judgment. West's Ann.Civ.Code, § 137.5.

Bertram S. Harris, Los Angeles, and Alvin Gershenson, Beverly Hills, for appellant.

Jerome Weber and David Hoffman, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from parts of a judgment in consolidated actions for money alleged to have been lent and for a divorce.

Benjamin Barlin brought an action (624730) against Ina Schoncite Barlin for money lent in two counts: 1) that he had loaned \$20,000 to defendant, only \$7,243 had been repaid, leaving a balance due and owing of \$12,787; and 2) he had loaned an additional \$11,000 to defendant, no part of which had been repaid, and there was due and owing to him the sum of \$11,000.

Ina filed an answer and counterclaim, denying she was indebted to Benjamin. She pleaded affirmatively that she, Benjamin, and one Sidney Wolfe were engaged in a joint venture, the \$20,000 was advanced to the joint venture, and profits and losses were to be shared alike. As to the second count she pleaded the \$11,000 was neither loaned to her nor advanced to the joint venture for any purpose whatever. In her counterclaim she alleged that upon the repayment of moneys advanced by Benjamin, along with his share of the profits arising out of the joint venture,

she overpaid him \$5,344.62 through error; and that upon her demand for repayment, he refused to pay. She prayed for a judgment against him in the sum of \$5,344.62. As her second counterclaim, she alleged that on February 4, 1954 the joint venture was terminated by mutual consent of the parties and the business was dissolved.

Ina was the owner and operator of a retail jewelry store in Beverly Hills. Sidney Wolfe was an expert diamond cutter and dealer in the purchase of diamonds and other valuable gems. Benjamin was an entrepreneur. On January 1, 1953 the three entered into a joint venture for the purchase and sale of jewelry on these terms and conditions: 1) Benjamin was to advance all necessary funds for the purchase of the jewelry; 2) Wolfe was to locate and purchase the jewelry with the funds advanced by Benjamin; 3) Ina was to sell the jewelry through her retail store; and 4) the profits and losses of the venture were to be shared equally.

Benjamin advanced \$20,010 to Wolfe for the purchase of five or six pieces of jewelry. Wolfe bought the jewelry and left it with Ina for sale. Certain pieces of the jewelry were sold and the profits were divided equally. One piece purchased for \$1,525 never was sold and Ina has it. Another item was sold for \$8,250 plus taxes, towards which Ina advanced \$1,200 for additional diamonds. She was not reimbursed for the \$1,200. The customer paid \$3,200 on account, leaving a balance of \$5,050, plus taxes in excess of \$1,000. Ina brought an action in her own name against the buyer for the amount owed. The \$8,250 to be derived from the sale of the latter piece of jewelry, when paid in full, plus the unsold item for \$1,525, constituted the assets of the joint venture on its dissolution.

In October 1953 Ina and Benjamin married. The joint venture continued until February 4, 1954, when they separated. On February 11, 1954 Benjamin instituted the action (624730) for money alleged to have been lent Ina.

On February 16, 1954 Ina commenced the action (D-464637) for divorce against Benjamin. He answered and cross-complained for annulment. The two actions were consolidated.

The trial court found: 1. Ina was not indebted to Benjamin under the first count for money lent but that a joint venture existed between Benjamin, Ina, and Wolfe; the profits and losses of the venture were to be divided equally; Ina took over all of the remaining property of the venture; Benjamin advanced certain money to the venture and Ina is now indebted to him in the sum of \$5,045. 2. The \$11,000 alleged in the second count was not advanced to the joint venture nor loaned to Ina. 3. Ina did not overpay plaintiff. 4. By reason of the method of doing business by the joint venture, no accounting was necessary between the parties; the joint venture was by mutual consent and agreement terminated and dissolved on February 4, 1954, and that upon such dissolution Ina became indebted to Benjamin in the sum of \$5,045, which has not been paid.

One judgment was rendered in the consolidated actions. It decreed: 1) Ina is entitled to a divorce from Benjamin; 2) Benjamin shall recover \$5,045 from Ina; 3) Benjamin shall pay Ina's attorneys \$2,800 as attorneys' fees and that the amount shall be paid as follows: Ina shall deduct the \$2,800 from the \$5,045 awarded to Benjamin in the action for money lent and pay the money to her attorneys and pay the balance of \$2,245 to Benjamin. 5) Benjamin shall take nothing on the second count in the action for money lent; 6) Ina shall take nothing by reason of her first and second counterclaims; and 7) each of the parties shall bear his or her own costs except to the extent of costs theretofore paid by Benjamin in the divorce action. Ina appeals from the part of the judgment which awards Benjamin \$5,045, and the parts which deny her counterclaim for moneys alleged to have been overpaid to Benjamin, provide the manner of payment of attorneys' fees, and decree

that each party is to bear his or her own costs.

The assignments of error are: 1. The court erred in rendering judgment in favor of Benjamin for \$5,045 when it found that a joint venture existed. 2. The court erred in not awarding her costs in the action for money lent. 3. The court erred in adjudicating the rights of the parties which arose out of the joint venture since Sidney Wolfe was not made a party to the action. 4. The court erred in not rendering judgment in her favor for certain sums of money allegedly advanced by her to Benjamin outside the joint venture. 5. The court erred in setting up terms and conditions for payment of her attorneys' fees.

Ina's first assignment of error is based on the premise that a joint adventurer is not entitled to sue another member at law until an accounting has been had and it has been determined that the other is indebted to him.

[1,2] Under ordinary circumstances one joint adventurer may not sue his associate for the return of money contributed to the joint venture except by an action for dissolution and an accounting. *Elias v. Erwin*, 129 Cal.App.2d 313, 318, 276 P.2d 848. Where the venture has been terminated and dissolved and one of the joint adventurers is entitled to a sum certain, he may sue another at law for a breach of the contract or for a share of profits or losses or for a contribution for advances made in excess of his share. *Elsbach v. Mulligan*, 58 Cal.App.2d 354, 369-370, 136 P.2d 651.

[3-6] The court found an accounting was not necessary, the joint venture was terminated and dissolved by mutual consent, and Ina is indebted to Benjamin in the amount of \$5,045. We cannot say the evidence does not support these findings. Ina says there is no basis in the evidence for the figure \$5,045. The findings are presumed to be supported by the evidence. The burden is on her as appellant to show they lack evidentiary support. This she

has not done. The most she says is that the manner in which the court arrived at the figure \$5,045 is "a complete mystery." This is not enough. She must show that under no possible view of the evidence could the court have arrived at that figure. The record is deficient. Numerous exhibits were introduced in evidence, including financial statements, statements of account, a ledger sheet, cancelled checks, and income tax returns. None of them is here. It appears that the testimony of one witness, Fleming, is not in the reporter's transcript. We are unable to say from the maze of figures that do appear in the record that the figure \$5,045 is not supported by the evidence. Ina further claims the court should not have awarded judgment in favor of Benjamin for any amount without an accounting. Since the venture has been terminated and dissolved and the court found that Benjamin was entitled to a sum certain, he was entitled to sue at law therefor. The court did not err in adjudging that an accounting was unnecessary.

[7] Nor did the court err in not awarding costs to Ina in the action for money lent. The judgment in that action was in favor of Benjamin and he was entitled to costs. Code Civ.Proc., § 1032. He is not complaining because costs were not awarded to him.

[8] Since the court found that the joint venture had been terminated and dissolved by agreement of the joint adventurers prior to the commencement of the action for money lent; that an accounting was unnecessary; and that it was Ina, not Wolfe, that was indebted to Benjamin, Wolfe was not a necessary party to the action.

[9] We cannot say the court erred in not rendering judgment in favor of Ina on her counterclaim for \$5,344.22 alleged by her to have been paid Benjamin out of

the moneys of the joint venture through error. She says now the amount should be \$3,318.41. The effect of the judgment is to vest title in Ina to the two pieces of jewelry remaining in her possession and to award Benjamin judgment against her for \$5,045. The argument of appellant is not persuasive. It is largely based on her erroneous premise that the court should have ordered an accounting. Examination of her computations in the light of the record shows them to be erroneous in several respects. No purpose would be served in attempting to reconcile all the various transactions between the parties. Many of them were outside the joint venture and apparently between them as husband and wife.

[10, 11] As noted, the court ordered Benjamin as defendant in the divorce action to pay Ina's attorneys \$2,800 as attorneys' fees; and ordered that the amount be paid by Ina by deducting it from the judgment for \$5,045 in favor of Benjamin in the action for money lent, and pay it to her attorneys. The argument in support of the claim that the manner of payment is erroneous seems to be that section 137.5 of the Civil Code gives Ina's attorneys "the right of judgment" for attorneys' fees and that Benjamin should have been ordered to pay the full amount to them. Ina's attorneys had no "right of judgment." Whether attorneys' fees in a divorce action will be made payable to a party or to his attorney is a matter in the discretion of the trial court. "Such fees may, in the discretion of the court, be made payable, in whole or in part to the attorney." Civ.Code, § 137.5. The court merely set off Benjamin's obligation to Ina against her obligation to him. We find nothing improper in its doing so.

The parts of the judgment appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Carl M. FRAENKEL, d/b/a The Matthis Company, Plaintiff and Appellant,

v.

J. G. TRESCONY, Defendant and Respondent.*
Civ. 16883.

District Court of Appeal, First District,
Division 1, California.

Oct. 18, 1956.

Hearing Granted Dec. 13, 1956.

Action against farmer for balance due under contract for construction of grain elevator by person who did not hold contractor's license. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment for farmer, and builder appealed. The District Court of Appeal, Bray, J., held, in part, that grain elevator, which was constructed on land owned by farmer in unincorporated town, on main street adjacent to railroad tracks, about three and one half miles from farm, was "on farm" within requirement that structure be constructed "on farm" to be within exemption of construction or operation incidental to farming from statute precluding recovery for work done by one who does not have contractor's license.

Judgment reversed.

1. Licenses ⇐39.43

Use by farmer of grain elevator for storage of his own grain produced on his own premises is incidental to his farming operation and is part of his farm, within requirement that structure be constructed "on farm" to be within exemption of construction or operation incidental to farming from statute precluding recovery for work done by one who does not have contractor's license. West's Ann.Bus. & Prof.Code, §§ 7031, 7049.

2. Licenses ⇐39.43

Test whether land not attached to particular land upon which growing operations are carried on is part of farm, is use to which former is put, within requirements that structure be constructed "on farm"

* Opinion vacated 300 P.2d 819.

to be within exemption of construction or operation incidental to farming from statute precluding recovery for work done by one who does not have contractor's license. West's Ann.Bus. & Prof.Code, §§ 7031, 7049.

3. Licenses ⇐39.43

Grain elevator, which was constructed on land owned by farmer in unincorporated town, on main street adjacent to railroad tracks, about three and one half miles from farm, was "on farm" under requirement that structure be constructed "on farm" to be within exemption of construction or operation incidental to farming from statute precluding recovery for work done by one who does not have contractor's license. West's Ann.Bus. & Prof.Code, §§ 7031, 7049.

See publication Words and Phrases, for other judicial constructions and definitions of "On Farm".

4. Licenses ⇐39.44

In action against farmer for balance due under contract for construction of grain elevator by person who did not hold contractor's license, evidence sustained finding that while purpose of elevator was primarily for storage of defendant's own produce, it was also to be used for storage of grain of others on a rental basis. West's Ann.Bus. & Prof.Code, §§ 7031, 7049.

5. Licenses ⇐39.43

Rental of excess space in grain elevator constructed for farmer by person who did not hold contractor's license, would not change purpose of elevator's use to commercial, within exemption of construction or operation incidental to farming from statute precluding recovery for work done by one who does not have contractor's license. West's Ann.Bus. & Prof.Code, §§ 7031, 7049.

6. Licenses ⇐39.43

Whether grain elevator which person, who did not hold contractor's license, constructed for farmer, was commercial would be determined as of date of construction;

and mere fact that after construction building was used for different purpose than originally contemplated, would not relate back to period of construction so as to deprive contractor of payment for his services and material, under statute relating to contractor's licenses. West's Ann. Bus. & Prof. Code, §§ 7031, 7049.

Jack Flinn, Carroll F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondent.

BRAY, Justice.

The questions posed by this appeal by plaintiff from a judgment in favor of defendant are whether the following findings are supported (they bear on the question of whether the work was agricultural, exempting plaintiff under section 7049, Business and Professions Code, from the requirement of a contractor's license under section 7031):

1. That the grain elevator was not constructed on a farm, either actually or constructively.

2. Was the fact that the elevator was to have some rental use fatal to the exemption?

Record.

Plaintiff, a licensed mechanical engineer, and defendant entered into a written contract for the construction for defendant of a grain elevator and storage facility¹ on certain premises owned by defendant. Upon completion of the work plaintiff sued defendant for the balance claimed due under the contract.² At the trial it was stipulated that there were only two issues: (1) whether the construction was on defendant's farming land and incidental to his farming operations, thereby bring-

ing the exemption of section 7049 into play, plaintiff admittedly not having a contractor's license; (2) the amount due. This appeal is limited to the court's finding on the first issue.

The court found that the elevator was constructed on land owned by defendant in the unincorporated town of San Lucas, at a location on Main Street (which is improved with business buildings and homes on town lots) and the Southern Pacific main line railroad tracks and highway 101, adjacent to the railroad depot and to buildings and commercial grain sheds and tanks of an individual; that the site is approximately 3½ miles from defendant's farm and its only access therefrom is by public highway. This finding is not challenged. The court further found "That said grain elevator and storage facility was designed with the intent that it would be usable primarily for the defendant's own produce, but also for the storage of the grain of others on a rental basis; and that said structure was incidental to both farming and commercial operation by the defendant." This finding is challenged, except as to the portion finding that the primary use was for defendant's own produce. The court also found, and the finding is challenged, that the elevator "was not constructed on a farm, either actually or constructively * * *." The court's judgment was that as the elevator was not constructed on a farm and was to be used to some extent for commercial purposes, the exemption of section 7049 did not apply, and plaintiff, not having the contractor's license required by section 7031, could not recover herein.

1. Was the Construction on a Farm?

It is conceded that plaintiff must have the contractor's license required by section 7031 unless the work contracted for is "farming" or "agriculture" which section

1. Hereafter referred to as "elevator."

2. Formerly plaintiff appealed from an order sustaining defendant's demurrer to his complaint without leave to amend. *Fraenkel v. Trescony*, 40 Cal.2d 905, 256 P.2d

573. That appeal was consolidated with his appeal in *Fraenkel v. Bank of America*, 40 Cal.2d 845, 256 P.2d 569, hereafter discussed, the decision in which was expressly made controlling of both appeals.

7049 exempts from the requirements of section 7031. Section 7049 reads: "This chapter does not apply to any construction or operation *incidental* to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or to *farming, dairying, agriculture, viticulture, horticulture, or stock or poultry raising*, or clearing or other work upon land in rural districts for fire prevention purposes, except when performed by a licensee under this chapter." (Emphasis added.)

In *Fraenkel v. Bank of America*, supra, 40 Cal.2d 845, at page 850, 256 P.2d 569, at page 572, the court said: "So here, if the grain elevator was built on defendant's farm and designed to function as an incidental part of his own farming operations rather than as a commercial enterprise * * * there would be a factual basis for holding such structure to be within the terms of the exemption as a 'construction or operation incidental to * * * farming'. * * *" At the trial both parties assumed as the law of the case the apparent holding in the *Fraenkel* case (and its companion case, the former appeal herein) that to come within the exemption of section 7049 the work must be (1) on a farm and (2) incidental to farming operations.³

[1] Accepting the Supreme Court requirement that the construction must be on "defendant's farm," was the site of the elevator a part of defendant's farm? We believe that within the intent of section 7049 it was. In the *Bank of America* case the court said, 40 Cal.2d at pages 849-850, 256 P.2d at page 571: "In exempting construction 'incidental' to farming, agriculture, and allied occupations from the

licensing requirements, the Legislature undoubtedly considered that such construction would include only those structures so closely appertaining to and necessary for the conduct of the designated occupations that they may reasonably be dissociated from the objects and purposes of the licensing law.

* * * Not only are the nature of the activity and its close relationship to agriculture among the elements to be considered, but an additional factor is the nature of the business conducted by the person for whom the service is rendered. Thus, specialized services on a farm * * * performed for the farmer himself and constituting an essential contributing factor to the efficient operation of his farming enterprise, are regarded as part of the general farming operation * * *. Plaintiff testified that before the contract was entered into defendant wanted the elevator built on his own land, showing him concrete foundations of an old barn; that plaintiff advised defendant that those foundations were unsuitable and it would be more advantageous to build the elevator near a railroad track. Defendant then stated that his sister had land near the railroad which he thought he could obtain from her. This he did. Suppose that the elevator had been built just across the highway from the 5,000 acres owned by defendant, on a site purchased for and limited to the elevator, could it be contended that the site was not a part of defendant's farm? The use by a farmer of a grain elevator for storage of his own grain produced on his own premises is certainly incidental to his farming operation and in the sense required by section 7049 is likewise a part of his farm. Particularly is this so when it is realized that the logical place for an elevator is near a railroad, and unless the farmer is fortunate

3. We have some doubt as to whether the setting forth of the rule in those cases was not dicta, as the only questions before the court were (1) the propriety of sustaining a demurrer to a complaint which alleged neither that plaintiff had a contractor's license nor that the proposed uses of the building were those for which exemption was allowed, and (2) the pro-

priety of denying plaintiff the right to amend. See *Millsap v. Balfour*, 158 Cal. 711, 714, 112 P. 450; *Tomaier v. Tomaier*, 23 Cal.2d 754, 757, 146 P.2d 905, for the proposition that dictum cannot establish the law of the case. However, the case was tried on the sole theory that the test of exemption is as set forth in the *Bank of America* case.

enough to have a railroad adjacent to the land where his crops are grown, he must necessarily build such a structure where the railroad exists. The fact that to construct the elevator at the most convenient and adequate spot meant constructing it approximately 3 miles from the growing operations would in no wise make the elevator and its use any the less incidental to his farming operation, nor the site any less a part of his farm. It is undoubtedly true that if "on a farm" means on a single tract of land which is used for growing crops, the elevator was not "on a farm". But such an interpretation of this phrase seems much too narrow in this day and age. "A farm" is no longer predominantly thought of as a unitary acreage where all the operations pertaining to that farm are carried on. Farming is now commonly a more complex operation primarily because of the advancements in mechanization of farm machinery and transportation. No longer is a farmer restricted by the practical factors of time and space to operating on a single tract. He may now conduct an efficient operation on multiple widely-scattered tracts. Applicable here is the following from *Irvine Co. v. California Emp. Comm.*, 27 Cal.2d 570, 582-583, 165 P.2d 908, 915: "Agriculture, like industry, has developed, changed and grown under modern conditions incident to the adoption of new methods and the advent of improved machinery, including the use of electrical power and the internal combustion engine. This has also brought about, in some cases, changes in the methods and ways of doing the necessary work in carrying on agricultural operations. * * *

A large part of agricultural production now takes place on large farms, the efficient operation of which would, in many instances, have been impossible a generation ago, and which systematically utilize modern methods and machinery. But despite such changes in methods and means of operation, they still are agricultural enterprises and are operated for the purpose of producing agricultural crops. It may fairly be said that the determinative consideration here is whether the act in ques-

tion contemplated 'agricultural labor' under the conditions then actually existing and well known to the Legislature, and as broadly applying to the business of agriculture in its entirety, or whether the general exemption was intended to be limited to 'agricultural labor' under primitive conditions or as pursued a century or more ago, and to apply only insofar as those conditions and methods may still survive. Reasonably viewing the generality of the term, it would seem that it was intended to cover and apply to the conditions prevailing when the act was adopted and under which agriculture now flourishes throughout the state."

We can well paraphrase the following portion of the paragraph above quoted by inserting the words "farming" and "agriculture" for the words "'agricultural labor.'" "It may fairly be said that the determinative consideration here is whether the act in question contemplated * * * ['farming' and 'agriculture'] under the conditions then actually existing and well known to the Legislature, and as broadly applying to the business of agriculture in its entirety, or whether the general exemption was intended to be limited to * * * ['farming' and 'agriculture'] under primitive conditions or as pursued a century or more ago, and to apply only insofar as those conditions and methods may still survive."

In determining that the Supreme Court did not intend a narrow interpretation of the expression "on a farm" used in the *Bank of America* case, the following language from that case is significant: "* * * the Legislature undoubtedly considered that such construction would include only those structures so closely appertaining to and necessary for the conduct of the designated occupations that they may reasonably be dissociated from the objects and purposes of the licensing law. Thus, *the Legislature may well have had in mind prevailing conditions in many rural districts where there are few, if any, licensed contractors and where other persons in the area having the necessary training and experience are readily available for doing various construction jobs as the need may arise.* Moreover, many

farmers themselves develop special skill in various construction trades qualifying them for contracting among themselves for undertaking the erection of structural improvements upon neighboring farms and yet they are not regularly licensed for such occasionally performed work." 40 Cal.2d at p. 849, 256 P.2d at page 571; emphasis added.

It is inferable that the Legislature in taking cognizance of the situation described in this quotation, also took cognizance of the factual situation which seems to obtain in the instant case in relation to large farming corporations, particularly grain farming not far from a railroad. The word "on" does not necessarily have a fixed, rigid, narrow meaning. The word "on" is frequently understood to mean "'with respect or pertaining to'". Jerome H. Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699, 704; 29 Words and Phrases, p. 426. It may mean "near, or adjacent to". O'Mara v. Jensma, 143 Iowa 297, 121 N.W. 518, 519; Fisher v. Sun Ins. Co. of London, 74 W.Va. 694, 83 S.E. 729, 730, L.R.A.1915C, 619; Hinton v. Vinson, 180 N.C. 393, 104 S.E. 897, 900; 29 Words and Phrases, p. 422. In interpreting "on a farm" in the Bank of America case it is important to bear in mind the discussion in California Employment Commission v. Butte County, etc., Ass'n, 25 Cal.2d 624, 636, 154 P.2d 892, 897, where the Supreme Court was considering "agricultural labor" "incident to ordinary farming operations". There the court said, 25 Cal. 2d at page 636, 154 P.2d at page 897: "Thus, to come within the 'agricultural labor' exemption, *off the farm* services must be an integral part of farming operations performed for the farmer as such—not for a third person separate and apart from such fundamental concept." It thereby recognized that a farming operation could be conducted "off the farm", that is, off the growing area of the farm, provided that the "off the farm" operation was not only incidental to farming but to the farming of the employer. Thus, in the Bank of America case the court required (1) that the construction be incidental to the farming oper-

ation of the owner and (2) that it be "on a farm" in the sense that the operation is limited to the owner's own farming operation. An operation might be incidental to the farming operation of a farmer, but not restricted thereto. Thus a farmer building an elevator principally for commercial purposes, would nevertheless be using it incidentally for his own farming operation if he used it for storage of his own grain, and yet such storage might be a minor portion of the elevator business. But the Supreme Court said that in addition to the construction being for a purpose incidental to his farming operation, it must be "on a farm" in the sense that it is primarily for that purpose rather than secondarily.

Defendant contends that the specially concurring opinion in the Bank of America case proves that the majority opinion intended to give a very narrow interpretation of the phrase "on a farm", because the concurring opinion points out in effect that although the only limitation placed by section 7049 upon the type of construction exempted is that it must be "incidental * * * to farming," and the majority opinion might be construed to require the construction to be on the physical limits of the growing area. Such is not necessarily the fact. The interpretation of the writer of the concurring opinion is not necessarily the interpretation which the majority had in mind. Moreover, the writer of the concurring opinion may have written for the purpose of suggesting by way of precaution a means of broadening sometime in the future the seemingly narrow interpretation of the expression "on a farm".

A somewhat similar situation was presented by the majority and the specially concurring opinions in People v. Gory, 28 Cal.2d 450 and 459, 170 P.2d 433, involving the question whether or not a charge of violating the narcotics law included, as an element, knowledge by the defendant that the substance possessed or sold was of a narcotic character. Some things said in the majority opinion seem susceptible to the interpretation that all the defendant needed to know was that he possessed or sold this

substance, not that he needed to know that it was of a narcotic character.

The writer of the specially concurring opinion said in part: "I do not agree to the implication, if there be such, that mere conscious possession of an object, not knowing its true character (as, for example, possession of marijuana believed in good faith to be ordinary tobacco), any more than conscious possession of an object lawful in itself but within which, unknown to the possessor, contraband is concealed, constitutes a criminal act." 28 Cal.2d at page 459, 170 P.2d at page 438.

Later, in *People v. Cole*, 113 Cal.App.2d 253, 258, 248 P.2d 141; *People v. Candiott*, 128 Cal.App.2d 347, 350-353, 275 P.2d 500; *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40, it was held that the majority opinion in the *Gory* case did not mean what the concurring opinion said it implied. Thus, here, the statements in the concurring opinion in the *Bank of America* case do not require a narrow interpretation of the expression "on a farm" as used by the majority.

[2,3] The test as to whether land not attached to the particular land upon which growing operations are carried on is a part of a farm, is the use to which the former is put. As stated before, storage of grain produced on the owner's own property is a use necessarily incidental to and a part of his farming operation.

2. Commercial Use.

[4] The court found that while the purpose of the elevator was primarily for the storage of defendant's own produce, it was also to be used for the storage of the grain of others on a rental basis. Defendant contends that the latter part of the finding is not supported by the evidence. The finding is based upon defendant's own testimony. He stated that although he proposed to use the elevator for his own crops, he intended that if he had a short season he would rent storage for his neighbors. He had been told by the owner of the adjoining elevator that he would rent stor-

age if defendant had space. He stated that plaintiff had told him that he could make money renting the elevator. Was the fact that rental of space not necessary to defendant's use was contemplated fatal to the exemption? In considering this question, it must be remembered that a narrow interpretation of this question will result in the plaintiff, who according to his testimony was told by defendant that the elevator was to be used only for defendant's own grain, being denied a recovery for his work and material, and defendant will, by a technicality, receive an unconscionable gain.

[5,6] The building consisted of a concrete dump put where trucks would unload grain into a bucket elevator which would raise the grain to an elevation where it could be spouted into the five tanks erected to store it. The fifth tank was not included in the original contract but was added during the construction of the rest of the building to be used specially for defendant's seed grain. The size of the structure was determined from the acreage and past harvests as stated by defendant. Defendant claimed to be producing 800-1000 tons of grain per season and desired such capacity. Defendant told plaintiff that the elevator was for use in his farming operations and mentioned nothing about using the elevator for commercial renting or storage or any use other than for his own grain. After the construction was started defendant told plaintiff that his crop came out exceptionally well that year and he wanted another storage bin for his seed grain. Defendant did not have a warehouseman's license. Defendant borrowed money from the Commodity Credit Corporation for the erection of the elevator. The note he signed stated that the loan was made "for the purpose of enabling the borrower to construct farm storage facilities." Defendant understood that the regulations of the Commodity Credit Corporation allowed such loans only for the purpose of erecting storage facilities for the

farmer's own produce, and not for commercial or other purposes. This regulation was read to defendant when he signed the note: "'Storage loans will not be available to increase storage facilities for commodities purchased or for commodities in which the borrower has no interest in the production.'" Defendant testified that when he first discussed the capacity of the elevator with plaintiff he said he would need 800 tons, which was the capacity contemplated in the contract. The additional 200 tons capacity was added later as above set forth. The capacity of the elevator as built was 1000 tons. In actual use defendant used the elevator for his own grain and only rented the excess storage space. Thus, the first year he stored 800 tons of his own grain, and 200 tons on rental; the next year he stored 700 tons of his own grain and 300 on rental. We doubt that the rental of excess space changes the purpose of the elevator's use to commercial. In determining this question, it must be borne in mind that it must be determined as of the date of the construction. What was the intended use? The mere fact that after construction the building was used for a different purpose than originally contemplated, if it were, would not relate back to the period of the construction so as to deprive the contractor of payment for his services and material. For example, suppose that a contractor agreed to construct a barn for a farmer who represented that it was to be used for storage of hay, and that after being finished, the farmer used it as a public dance hall, could the farmer successfully claim that he did not have to pay for the barn's construction because the contractor did not have a license? Obviously not. So here, as far as the contractor was concerned, this was to be an elevator for the farmer's own crops, built for a farmer who had acreage enough to reasonably require the storage space provided, had no warehouseman's license, and who had obtained a loan from the Commodity Credit Corporation based upon his representation that he would only use the

building for his own crops. The plaintiff denied that defendant told him he intended to rent excess space. The court did not find whether defendant did; it only found that the defendant intended to rent excess storage space. Assuming, however, that defendant told plaintiff that he intended to rent space if his crops did not come up to expectations, we do not believe such fact, in view of all the circumstances, required plaintiff to obtain a contractor's license. Defendant did not intend to and did not enter into a commercial enterprise. We see no reason why the renting of the amount of excess space here would convert defendant's operations in any sense or part into a commercial enterprise. Certainly in constructing a farm building, a farmer must allow space for variance in the size of his crops, and when a smaller crop occurs, he should have the right to rent his excess space. Suppose that during vacation the farmer should rent his home for a month or two, while he is on a trip with his family, such fact would not make the home any less a farmhouse.

Machinery Engineering Co. v. Nickel, 1951, 101 Cal.App.2d 748, 226 P.2d 78, is not in point. There the plaintiff constructed a large and complicated hay mill adjacent to extensive hay lands owned by several of the defendants. Admittedly the mill was not to be connected with, used as a part of, or in connection with, any particular farm. It was to be used to mill the hay of others than the six individuals who contracted for its construction. It was intended to be "a commercial enterprise * * * to grind the hay of farmers generally * * *." 101 Cal.App.2d at pages 751-752, 226 P.2d at page 80. Nor are the facts in *California Employment Commission v. Butte County, etc., Ass'n*, supra, 25 Cal.2d 624, 154 P.2d 892, at all comparable to those in our case. There the defendant was an incorporated cooperative association. The warehouse was to service nonmembers as well as members. As said by the court, the defendant intended

to operate "a profitable *public warehouse business*." 25 Cal.2d at page 636, 154 P.2d at page 897.

There is no evidence that defendant's estimate of the capacity required for his crops was not made in good faith, nor that his statement that his crops ran from 800 to 1000 tons per year was untrue. The fact that defendant contemplated renting

storage in the event that the crops in any year did not come up to expectancy did not justify a finding that defendant was building the elevator for "commercial operation."

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

47 Cal.2d 249

Leola WASHINGTON, a/k/a L. W. Holmes,
Plaintiff and Respondent,

v.

George WASHINGTON, Defendant and
Appellant.

S. F. 19249.

Supreme Court of California,
 In Bank.

Oct. 30, 1956.

Divorced wife brought action against divorced husband for partition and for declaratory judgment that divorced wife had an interest in personal injury judgment obtained by divorced husband. The Superior Court of the City and County of San Francisco, George W. Schonfeld, J., entered judgment adverse to divorced husband, and he appealed. The Supreme Court, Traynor, J., held that cause of action for personal injuries vests in injured spouse when marriage is dissolved by divorce.

Reversed.

Shenk, J., dissented.

Opinion, 296 P.2d 896, vacated.

1. Husband and Wife ⇨223

A spouse's entire cause of action for personal injuries survives to such spouse, and does not abate, on death of other spouse.

2. Husband and Wife ⇨223

Civil Code provisions concerning survival of actions do not affect causes of action which would not otherwise abate on death and do not affect surviving spouse's interest in his or her cause of action for his or her own injuries. West's Ann.Civ. Code, § 956.

3. Assignments ⇨24(2)

Divorce ⇨249(3)

Causes of action for personal injury are not assignable and therefore the court in a divorce action cannot assign the cause of action as if it were ordinary community property. West's Ann.Civ.Code, §§ 146, 956.

4. Husband and Wife ⇨272(1)

In the absence of a rule permitting apportionment of damages resulting from personal injury between the separate interests of the spouses and their community interests, the entire cause of action for personal injuries vests in injured spouse on dissolution of the marriage by divorce.

5. Husband and Wife ⇨272(1)

Where judgments for husband for his personal injuries did not become final until after entry of final divorce decree, wife acquired no interest in the judgments.

Edward D. Mabson, San Francisco, for appellant.

Carl B. Metoyer, Berkeley, Terry A. Francois and Murville C. Abels, San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff and defendant were married in October, 1944, and separated in August, 1946. There was one child of the marriage. In October, 1946, plaintiff filed an action for divorce on the grounds of extreme cruelty, and defendant answered putting the existing property rights of the parties in issue. In September, 1948, defendant lost a leg as a result of a collision between a San Francisco police car and a car driven by Mervin E. Garner. He filed an action against the City and County of San Francisco and Garner, and in December, 1950, the jury returned a verdict against both defendants for \$85,000. Judgment was entered on the verdict against Garner, but the trial court granted the City and County's motion for judgment notwithstanding the verdict. The judgment against Garner became final in August, 1951, after he dismissed his appeal. The judgment in favor of the City and County was reversed on appeal with directions to enter judgment on the verdict. The City and County then moved for a new trial, and following the denial of its motion, appealed from the judgment, which was affirmed and became final in April, 1954. In the meantime, the divorce action was

brought to trial, and an interlocutory decree in favor of plaintiff was entered in March, 1950. No supplemental pleadings were filed putting in issue the parties' rights in the cause of action for defendant's personal injuries, and no disposition of property rights was made in the interlocutory decree and no alimony or child support was awarded.¹ The custody of the minor daughter of the parties was awarded to plaintiff. A final decree of divorce was entered in May, 1951, and plaintiff remarried in November, 1952. After the judgment against the City and County became final in 1954, plaintiff brought this action for declaratory relief and partition asserting the right to half of defendant's recovery. Deductions were made for attorneys' fees and costs advanced by them, and judgment was entered in favor of plaintiff for \$34,087.11, half the remainder, plus costs and interest. Defendant appeals.

[1, 2] In *Kesler v. Pabst*, 43 Cal.2d 254, 258, 273 P.2d 257, 259, we pointed out that although a wife's cause of action for personal injuries is community property, it differs from ordinary community property in that on her husband's death the entire cause of action survives to her by operation of law. He "cannot, either by exercising or failing to exercise his power of testamentary disposition over half of the community property, affect his wife's rights in her cause of action." Although the *Kesler* case was concerned with the wife's cause of action for her injuries, there is no reason to treat the husband's cause of action for his injuries differently. As

pointed out in the *Kesler* case, the reason the wife's entire cause of action survived to her was to prevent her loss of full recovery for her injury by the abatement of her husband's interest in her cause of action on his death. *Moody v. Southern Pac. Co.*, 167 Cal. 786, 790-791, 141 P. 388. For the same reason the husband's entire cause of action for his injuries survives to him on his wife's death. It is true that in 1949 the Legislature enacted section 956² of the Civil Code providing for the survival of causes of action for personal injuries, and it may be contended that it is no longer necessary for the entire cause of action to survive to the injured spouse to prevent its partial abatement on the death of the other. To interpret section 956 as changing the rule of the *Moody* case, however, would require reading into it words that are not there. As here relevant that section provides that certain actions shall not abate on the death of one or another of the parties, but it contains no provisions affecting causes of action that would not otherwise abate on such a death. Accordingly, since under the rule of the *Moody* case, an injured spouse's cause of action has never abated in whole or in part on the death of the other spouse, section 956 does not affect the surviving spouse's interest in his or her cause of action for his or her own injuries.

[3] In the present case the marriage was dissolved by divorce rather than death, and the question presented is whether a cause of action for personal injuries vests by operation of law in the injured party

1. It appears that the community property referred to in the pleadings had been exhausted before trial and that defendant was unable because of his injury to earn money to pay alimony or child support.

2. "A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing

in action. When the person entitled to maintain such an action dies before judgment, the damages recoverable for such injury shall be limited to loss of earnings and expenses sustained or incurred as a result of the injury by the deceased prior to his death, and shall not include damages for pain, suffering or disfigurement, nor punitive or exemplary damages, nor prospective profits or earnings after the date of death. The damages recovered shall form part of the estate of the deceased. Nothing in this article shall be construed as making such a thing in action assignable."

when the marriage is dissolved by divorce. We have concluded that just as the rule that personal actions abated on the death of the plaintiff compelled treating a spouse's cause of action for personal injuries differently from other community property in its devolution on the death of the other spouse, the rule prohibiting the assignment of such a cause of action compels the same disposition of the cause of action when the marriage is dissolved by divorce. See, *Chase v. Chase*, 72 Mass. 157, 159. It is significant in this respect that although the Legislature has provided for the survival of such causes of action, it has expressly retained the rule that they are not assignable. Civil Code, § 956. Clearly the court in a divorce action could not exercise its power to assign the community property (e. g., by assigning all or a major share of a spouse's cause of action for personal injuries to the other in a case of adultery or extreme cruelty) over a cause of action for personal injuries without violating the foregoing rule. See, Civil Code, § 146. Moreover, it would be anomalous if such personal elements of damages as pain, suffering, and disfigurement, which still abate on the death of the injured party, Civil Code, § 956, should be assignable to the other spouse in the case of divorce. On the other hand, the rule by which the entire cause of action vests in the injured party on death or divorce does not violate the rule that such actions do not fully survive or the rule that they are not assignable. *Moody v. Southern Pac. Co.*, supra, 167 Cal. 786, 790-791, 141 P. 388; *Kesler v. Pabst*, supra, 43 Cal.2d 254, 258, 273 P.2d 257.

[4] It is not unfair to the uninjured spouse to terminate his or her interest in the other's cause of action for personal injuries on divorce. The rule that a spouse's cause of action for personal injuries is necessarily community property has been criticized on the ground that it fails to distinguish between damages that could reasonably be considered personal to the injured spouse such as those for

pain, suffering, and disfigurement and damages properly belonging to the community such as those for loss of earning power, past and future medical expenses incurred or to be incurred, and disability of the injured spouse directly to contribute to the community venture. See, 1 De Funiak, *Principles of Community Property*, 225-230. A rule permitting apportionment of the damages as suggested, however, has never been adopted in this state, and in the absence thereof, treating the entire cause of action as community property protects the community interests in the elements that clearly should belong to it. See, 2 *Armstrong*, *California Family Law* 1513. Although such a rule may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony. Since we have no rule permitting the apportionment of the elements of a cause of action for personal injuries between the spouses' separate and community interests and since such a cause of action is not assignable, it must vest in the injured party on the dissolution of the marriage.

[5] In the present case no judgment was entered against the City and County until after the entry of the final decree of divorce, and the judgment against Garner did not become final until after that time. Accordingly, since the cause of action against the City and County was not assignable and the judgment against Garner could not be assigned until it became final, *Pacific Gas & Elec. Co. v. Nakano*, 12 Cal. 2d 711, 713-714, 87 P.2d 700; see, 121 A.

L.R. 420, plaintiff acquired no interest in either judgment.

The judgment is reversed.

GIBSON, C. J., and SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the result reached in the majority opinion.

I think it is clear, however, that this court now recognizes that its former opinions, holding that causes of action for personal injuries are community property, are unrealistic and outmoded.

In *Zaragoza v. Craven*, 33 Cal.2d 315, 202 P.2d 73, 76, 6 A.L.R.2d 461, in which I dissented, it was held that " * * * it must be considered as the present law of this state that the cause of action for personal injuries suffered by either spouse during marriage, to whatever extent such cause of action may constitute property (see *Franklin v. Franklin*, supra, 67 Cal. App.2d 717, 725, 155 P.2d 637), as well as any recovery therefore, constitutes community property—at least in the absence of agreement otherwise between the spouses. Any contrary implications which may be derived from the language of the *Franklin* case are disapproved."

The accident here involved occurred after the plaintiff had sued for divorce, but before the interlocutory decree was entered. The parties were therefore still husband and wife despite the fact that the divorce action had been filed almost two years prior to the accident in which defendant was injured.

I am of the opinion now, as I have always been, that a cause of action for personal injuries is a separate and personal one and that the recovery therefor should be the separate property of the injured spouse except for the actual loss to the community in the earning power of the injured spouse, see dissenting opinion in *Zaragoza v. Craven*, 33 Cal.2d 315, 323, 324, 202 P.2d 73, 6 A.L.R. 461. As I have heretofore pointed out in my dissents, *Zaragoza*

v. Craven, supra; *Flores v. Brown*, 39 Cal.2d 622, 633, 248 P.2d 922; and *Kesler v. Pabst*, 43 Cal.2d 254, 260, 273 P.2d 257, 260, there is no reason whatsoever to characterize a cause of action for personal injuries a " 'community cause of action.' " The wife, or husband, has a right to sue in her, or his, own name, Code Civ.Proc. § 370; *Sanderson v. Niemann*, 17 Cal.2d 563, 567, 110 P.2d 1025, and the recovery therefor should be the individual's sole and separate property, *De Funiak*, *Principles of Community Property*, pp. 225, 232; 24 Cal.L.Rev. 739; *Rest.Torts*, § 487.

In *Zaragoza v. Craven*, supra, a majority of this court held that a cause of action for personal injuries which arose during the marriage relationship was community property (thereby overruling a contrary statement in *Franklin v. Franklin*, 67 Cal. App.2d 717, 155 P.2d 637). In *Flores v. Brown*, supra, Mr. Flores died as a result of the accident giving rise to Mrs. Flores' cause of action and, in order to avoid its former rule of imputation of contributory negligence, a majority of this court decided that even though the cause of action arose during marriage, that marriage was terminated by Mr. Flores' death at the time of the accident and therefore the entire cause of action devolved to Mrs. Flores and that the contributory negligence of Mr. Flores was not imputable to her. I pointed out in my dissent in *Kesler v. Pabst*, supra, that the holding in the *Flores* case was quite inconsistent with the majority holding in the *Zaragoza* case.

It has been said quite often and with a great deal of truth that "hard cases make bad law."

In the instant case, a woman who has brought suit against her husband for divorce and who was separated from him, seeks to recover half of the compensation awarded him for an injury which took place while the marriage was still in being although after suit for divorce had been filed. If what was said in the *Zaragoza* case is still the law, the cause of action accruing during the existence of the marital rela-

tionship, because of defendant's personal injuries, was community property and any judgment recovered as a result thereof should relate back so as to take on the same character.

In the case under consideration, however, in neither the original complaint for divorce, nor in the amended complaint, did Mrs. Washington allege the cause of action for Washington's personal injury to be community property and pray for a division thereof when the same had been reduced to final judgment.

As Mr. De Funiak aptly said, Principles of Community Property, p. 225: "Their [courts] usual decision to consider the property received in exchange for separate property as taking the character of separate property is a fortunate triumph of common sense over a lack of understanding of the principles of community property. But apparently the courts are inclined to apply a similar reasoning to the right of action for personal injuries and to the compensation received; that is, it is a property acquired during marriage and is not acquired by gift, etc., therefore it must be community property. But this overlooks the principles of onerous and lucrative titles and other pertinent principles. Except for gifts clearly made to the marital community, community property only consists of that which is acquired by onerous title, that is, by labor or industry of the spouses, or which is acquired in exchange for community property (which, of course, was acquired itself by onerous title, again with the exception as to the gift). It must be plainly evident that a right of action for injuries to person, reputation, property, or the like or the compensation received therefor, is not property acquired by onerous title. The labor and industry of the spouses did not bring it into being. For that matter it is not property acquired by lucrative title either. * * * Since the right of action for injury to the person * * * is intended to repair or make whole the injury, so far as is possible in such a case, the compensation partakes of the same

character as that which has been injured or suffered loss."

If this court would hold, logically and reasonably, once and for all that a cause of action for personal injuries was personal to the injured spouse and that the recovery constituted his, or her, separate property (see section 171c, Civil Code, as it relates to the wife) then it would not be necessary to engage in legal acrobatics in a case such as this in order to reach a just result. I have no complaint with the statements in the majority opinion that the causes of action for the personal injuries to Mr. Washington were not assignable and that no assignments thereof could be had until final judgments had been rendered therein. When this case and the Flores case are considered together, it appears to me that perhaps, in time, a majority of this court will recognize the fallacy in earlier holdings that a cause of action for personal injuries accruing during marriage is community property.

I am happy to see a majority of the members of this court depart from the rule of the Zaragosa case which, if carried to its logical conclusion, would have prevented the conclusion reached in Flores v. Brown, supra, and the just result reached in the case under consideration. I am hopeful that in time the court will come to the full realization that a cause of action for personal injuries and the compensation received therefor is personal to the injured person since such cause of action and compensation were always intended as a substitute for the violation of a personal right. The majority opinion, however illogical in the light of the rule of the Zaragosa case, is a small step in the right direction.

SHENK, Justice (dissenting).

In no uncertain terms the Legislature has classified property owned by spouses before marriage and property acquired by them after marriage. Since 1872 section 162 of the Civil Code has provided that "All property of the wife, owned by her before marriage, and that acquired afterwards by

gift, bequest, devise, or descent, * * * is her separate property." And for a like period section 163 of the same code has provided that, "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, * * * is his separate property." Section 164 then and since has provided that, "All other property acquired after marriage by either husband or wife, or both * * * is community property".

Without question the right of action acquired by the defendant was property. It was a chose in action and personal property as defined by section 14 of the Civil Code. See also 6 West's Anno.Calif.Code p. 67 and cases cited in note 15. It was acquired during the marriage and lifetime of the spouses and before the entry of the interlocutory decree. That decree did not sever the marriage relationship. On the record here presented the cause of action and the fund derived therefrom continued to be community property. *Brown v. Brown*, 170 Cal. 1, 147 P. 1168. Such a cause of action was held to be community property in *Zaragosa v. Craven*, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461, and that case cannot be distinguished from the case at bar. The property right here involved was either the separate property of the defendant or the community property of the spouses. It could not be both. The Legislature has so defined separate property as to exclude it from that category. The Legislature has also declared that *all* property not defined as separate property is community property. Now the court holds that *all* does not mean *all*, and declares in effect that the cause of action was not community property. The statutory definitions include all property of whatever description owned or acquired by the spouses. The fund here involved is certainly not included within the definition of separate property and is therefore community property.

I can see no justification for setting at naught the decision in the *Zaragosa* case and other cases cited therein in support thereof. The District Court of Appeal of the First District, Division Two, affirmed

the judgment in a well-considered opinion authored by Mr. Justice Dooling and reported in 296 P.2d 896. For the reasons stated in that opinion and on the authority of the *Zaragosa* and other cases to like effect, I would adhere to the plain language of the statute as heretofore applied by this court and affirm the judgment.



47 Cal.2d 177

Guy HALL, Plaintiff and Respondent,

v.

The CITY OF TAFT, a Municipal Corporation, Glen Black, Jack Kirsner, Ted Pheal, William O. Erickson, Dale Huey, as members of the City Council thereof, and Walter McKee, as Chief of Police thereof, Defendants and Appellants.

L. A. 24244.

Supreme Court of California.

In Bank.

Oct. 19, 1956.

Building contractor's action to enjoin city and others from enforcing its building ordinance against him in connection with construction of public school building. The Superior Court, Kern County, William L. Bradshaw, J., entered judgment for contractor and defendants appealed. The Supreme Court, Carter, J., held that the state had pre-empted the field of regulating public school building construction so that construction of such building by school districts is not subject to building regulations of municipal corporation within which building is erected.

Affirmed.

Opinion 297 P.2d 686, vacated.

1. Schools and School Districts 20

The public schools are a matter of state-wide rather than local concern and

their establishment, regulation and operation are governed by the Constitution. West's Ann.Const. art. 4, § 25; subd. 27; art. 9, §§ 1, 3, 3.1, 4, 5, 7; art. 13, § 15.

2. Schools and School Districts ⇨20

The power of the state Legislature over the public schools is plenary subject only to any constitutional restrictions. West's Ann.Const. art. 9, §§ 6, 6½, 8, 14.

3. Municipal Corporations ⇨592(1)

Public school system is of state-wide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. West's Ann.Const. art. 9, §§ 6, 6½, 8, 14.

4. Schools and School Districts ⇨65

Public school property is held in trust for school purposes by the persons and corporations authorized for the time being to control such property, and it is within the power of the Legislature to provide for a change in the trusteeship of such property in certain contingencies.

5. Schools and School Districts ⇨71

Constitutional provision giving any county, city, town or township power to enforce within its limits all local, police, sanitary and other regulations not in conflict with general laws, does not confer upon local unit power to regulate construction of public school buildings. West's Ann. Const. art. 11, § 11; West's Ann.Gov.Code, §§ 38601, 38660.

6. Municipal Corporations ⇨592(1)

The state has completely occupied the field of regulating public school building construction, and construction of such school buildings by school districts is not subject to the building regulations of a municipal corporation in which the building is constructed. West's Ann.Education Code, §§ 5021, 5041, 18001, 18002, 18009, 18055, 18057, 18101, 18102, 18151, 18191, 18193, 18194-18196, 18199-18201.

7. Municipal Corporations ⇨592(1)

A city may not enact ordinances which conflict with the general laws on statewide matters.

8. Schools and School Districts ⇨71

The provisions of the Health and Safety Code requiring buildings with certain exceptions to meet certain standards as well as requiring building permits to be obtained from proper city or county officers charged with enforcement of laws for regulating construction, do not limit or modify provisions of Education Code delineating standards for public school buildings. West's Ann.Health & Safety Code, §§ 19100-19170, 19130, 19132, 19150, 19151; West's Ann.Education Code, §§ 18191 et seq., 18202-18204, 18221, 18222.

9. Schools and School Districts ⇨71

Purpose of rules adopted for construction of school buildings under the Education and Health and Safety Codes is to protect lives and property of people by regulating the design and construction of public school buildings so that, in addition to the normal loads to which such buildings are subjected, they shall resist future earthquakes. West's Ann.Health & Safety Code, §§ 19100-19170, 19130, 19132, 19150, 19151; West's Ann.Education Code, §§ 18191 et seq., 18202-18204, 18221, 18222.

10. Administrative Law and Procedure
⇨330

The final construction of a statute is the function of the courts.

Henry G. Baron, City Atty., Taft, and Allen Grimes, Modesto, for appellants.

Mack, Bianco, King & Eyherabide and Dominic Bianco, Bakersfield, for respondent.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., Johnson & Stanton, Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, as amici curiae on behalf of respondent.

CARTER, Justice.

Defendants, Taft, a non-chartered city of the sixth class, its council and chief of police appeal from a judgment enjoining it from enforcing against plaintiff, a building contractor, its building ordinance.

There is no dispute as to the facts. On April 22, 1955, plaintiff as contractor entered into a contract with Taft Union High School and Junior College District, hereafter called district, a school district duly organized under the state laws, to construct in Taft for the district, a school building for \$614,113. The plans and specifications for the building were approved by the State Department of Education and State Division of Architecture. Plaintiff commenced construction which was to be completed in 320 days, but work was "stopped" by Taft, the city, demanding that plaintiff obtain a building permit from it involving a \$300 fee and submission to the building ordinance¹ of Taft. The district has employed an inspector to assure that the building is constructed according to the plans and specifications. Defendants assert that plaintiff has refused to obtain a permit from the city for the construction of the building and they intend to enforce the penal and civil provisions of the building ordinance of the city.

The issue is whether a municipal corporation's building regulations are applicable to the construction of a public school building by a school district in the municipality. Taft argues that it had power to adopt police regulations—building construction regulations under the Constitution.²

[1] The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto. The Legislature shall not pass local or special laws "Providing for the management of common schools." Cal. Const. art. IV, § 25, subd. 27. "A general diffusion of knowledge and intelligence

being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." Emphasis added; id., art. IX, § 1. There is a State Board of Education, an elected superintendent of public instruction and there are county superintendents whose salary and qualifications are prescribed by the Legislature, id., art. IX, §§ 3, 3.1, 7. The proceeds of all public lands that have been or may be granted by the United States to the state and other property is "inviolably" appropriated to the support of the common schools, id., art. IX, § 4, and "Out of the revenue from state taxes for which provision is made in this article, together with all other state revenues, there shall first be set apart the moneys to be applied by the State to the support of the Public School System and the State University." Id., art. XIII, § 15. "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." Emphasis added; id., art. IX, § 5. "The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System. * * *

[2-4] "The Legislature shall provide for the levying annually by the governing body of each county, and city and county,

1. Taft by ordinance had adopted the "Uniform Building Code 1952 edition adopted and published by the Pacific Coast Officials Conference in 1952."

2. "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Cal. Const. art. XI, § 11.

of such school district taxes, at rates not in excess of the maximum rates of school district tax fixed or authorized by the Legislature, as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required in such fiscal year for the support of all schools and functions of said district authorized or required by law." Emphasis added; *id.*, art. IX, § 6. A school district may lie in more than one county and may issue bonds. *Id.*, art. IX, § 6½. No money shall ever be appropriated for "any school not under the exclusive control of the officers of the public schools * * *." *Id.*, art. IX, § 8. "The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and junior college districts, of every kind and class, and may classify such districts." Emphasis added; *id.*, art. IX, § 14. In harmony with those provisions it has been held that the power of the state Legislature over the public schools is plenary, subject only to any constitutional restrictions. *Pass School Dist. of Los Angeles County v. Hollywood Dist.*, 156 Cal. 416, 418, 105 P. 122, 26 L.R.A.,N.S., 485; *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558; *Worthington School Dist. v. Eureka Dist.*, 173 Cal. 154, 159 P. 437; *Merrill Elementary School Dist. of Tehama County v. Rapose*, 125 Cal.App.2d 819, 271 P.2d 522; see *Woodcock v. Dick*, 36 Cal.2d 146, 222 P.2d 667; *Seidel v. Waring*, 36 Cal. 2d 149, 222 P.2d 669. The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. *Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730; *Cloverdale Union High School Dist. of Sonoma County v. Peters*, 88 Cal.App. 731, 264 P. 273; *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 P. 926; *Kelso v. Board of Education*, 42 Cal.App.2d 415, 109 P.2d 29; *Kennedy v. Miller*, *supra*, 97 Cal. 429, 32 P. 558; *Worthington School Dist. v. Eureka Dist.*, *supra*, 173 Cal. 154, 159 P. 437; *Board of Education of City of San Rafael v. David-*

son, 190 Cal. 162, 210 P. 961; *Phelps v. Prussia*, 60 Cal.App.2d 732, 141 P.2d 440; *Lansing v. Board of Education*, 7 Cal.App. 2d 211, 45 P.2d 1021; *People ex rel. Davidson v. Mertz*, 2 Cal.2d 136, 39 P.2d 422; *Gerth v. Dominguez*, 1 Cal.2d 239, 34 P. 2d 135. It is said in *Piper v. Big Pine School Dist.*, *supra*, 193 Cal. 664, 669, 226 P. 926, 928: "It [the education of the children of the state] is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state." School districts are agencies of the state for the local operation of the state school system. *Cloverdale Union High School Dist. of Sonoma County v. Peters*, *supra*, 88 Cal. App. 731, 738, 264 P. 273; *Board of Education of City of San Rafael v. Davidson*, *supra*, 190 Cal. 162, 168, 210 P. 961; *Butler v. Compton Junior College Dist.*, 77 Cal. App.2d 719, 176 P.2d 417; *Lansing v. Board of Education*, *supra*, 7 Cal.App.2d 211, 45 P.2d 1021; *Merrill Elementary School Dist. of Tehama County v. Rapose*, *supra*, 125 Cal.App.2d 819, 271 P.2d 522. The beneficial ownership of property of the public schools is in the state. It is said in *Pass School Dist. of Los Angeles County v. Hollywood Dist.*, *supra*, 156 Cal. 416, 419, 105 P. 122, 124, 26 L.R.A.,N.S., 485: "To the contention that a transfer of ownership thus accomplished works the taking of property without due process of law, it should be sufficient to point out that in all such cases the beneficial owner of the fee [of public school property] is the state itself, and that its agencies and mandatories—the various public and municipal corporations in whom the title rests—are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs. The transfer of title without due process

of law, of which appellant so bitterly complains, is nothing more, in effect, than the naming by the state of other trustees to manage property which it owns and to manage the property for the same identical uses and purposes to which it was formerly devoted. In point of law, then, the beneficial title to the estate is not affected at all. All that is done is to transfer the legal title under the same trust from one trustee to another. In this sense the trustees of the Hollywood City School District became, by operation of law, successors to the trustees of the Pass School District, as is directly held in [School Township of] *Allen v. School Town of Macey*, 109 Ind. 559, 10 N.E. 578, where it is said: 'It is now a well-recognized legal inference deducible as well from general principles as from the decided cases that under the Constitution and laws of this state, public school property is held in trust for school purposes by the persons or corporations authorized for the time being to control such property, and that it is in the power of the Legislature to provide for a change in the trusteeship of such property in certain contingencies presumably requiring such a change, or, indeed, to change the trustees of that class of property whenever it may choose to do so.'

[5] Even if such well-established principles could be set aside under the plea that they work injustice in the individual case, this plea here presented is without merit. The state is profoundly interested in the education of its young, but has no deep concern over the personality of the trustees who shall administer this trust, so long as the administration is in the orderly form of law." See, *Fawcett v. Ball*, 80 Cal.App. 131, 136, 251 P. 679; *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719, 176 P.2d 417; *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558; *Gridley School District v. Stout*, 134 Cal. 592, 66 P. 785. While a large degree of autonomy is granted to school districts by the Legislature, we are referred to no statute or constitutional provision which, as far as

the question here involved is concerned, expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than structures which are built and maintained by the state generally for its use. When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of article XI of the state Constitution, *supra*, should not be considered as conferring such powers on local government agencies. Nor should the Government Code sections which confer on a city the power to regulate the construction of buildings within its limits, see Government Code, §§ 38601, 38660, be so considered. It is said in *In re Means*, 14 Cal.2d 254, 258, 93 P.2d 105, 107, 123 A.L.R. 1378, holding that a state employee working on a state structure in a city need not meet the requirements of a city charter provision: "If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, added to the requirements for employment by the state, and restricted the rights of sovereignty. * * *

"Turning to the contentions of the respondent that the regulation of plumbing is a municipal affair, the rule to be applied is not entirely a geographical one. Under certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable. * * * For example, where one of the city's streets has been declared by an act of the legislature to be a secondary highway, the improvement of that street is not a municipal affair within the meaning of the Constitution. * * * Also, regulations prescribed by charter or ordinance of a city requiring that the work of altering and improving buildings be subject to

local supervision have been held inapplicable to state buildings. *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642, 17 Ann.Cas. 1002.

"In the case of *Kentucky Institution for Education of Blind v. City of Louisville*, 123 Ky. 767, 97 S.W. 402, 404, 8 L.R.A., N.S., 553, the city attempted to enforce an ordinance relating to fire escapes with respect to a state institution for the blind. The court held the ordinance inapplicable, stating: 'The principle is that the state, when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. The municipal government is but an agent of the state—not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities.' How can the city have ever a superior authority to the state over the latter's own property or in its control and management? From the nature of things it cannot have." See, also, *Board of Education of City of St. Louis v. City of St. Louis*, 267 Mo. 356, 184 S.W. 975; *Salt Lake City v. Board of Education*, 52 Utah 540, 175 P. 654; 31 A.L.R. 450.

Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 P. 985, 47 L.R.A., N.S., 892, fails to consider the factors above mentioned and insofar as it is inconsistent with this opinion it is overruled. The question here considered was not involved in *Roman Catholic Welfare Corporation of San Francisco v. City of Piedmont*, 45 Cal.2d 325, 332-333, 289 P. 2d 438.

[6, 7] Moreover, in connection with the foregoing and as an additional ground why the construction of school buildings by school districts are not subject to the

building regulations of a municipal corporation in which the building is constructed, is that the state has completely occupied the field by general laws, and such local regulations conflict with such general laws, when we consider the activity involved. A city may not enact ordinances which conflict with general laws on statewide matters. *Simpson v. City of Los Angeles*, 40 Cal.2d 271, 253 P.2d 464; *Pulcifer v. County of Alameda*, 29 Cal.2d 258, 175 P.2d 1; *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 262 P. 334; *Ganley v. Claeys*, 2 Cal. 2d 266, 40 P.2d 817; *In re Murphy*, 190 Cal. 286, 212 P. 30; *In re Mingo*, 190 Cal. 769, 214 P. 850; *Natural Milk Producers Ass'n of California v. City & County of San Francisco*, 20 Cal.2d 101, 124 P.2d 25; *Pipoly v. Benson*, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515; *Tolman v. Underhill*, 39 Cal.2d 708, 249 P.2d 280. The particular situation presented and discussed in those cases is not helpful. *In re Means*, supra, 14 Cal.2d 254, 93 P.2d 105, 123 A.L.R. 1378, herein discussed is most pertinent as it involves the attempted regulation of a state activity by a city, as distinguished from regulations of the members of the public.

The Education Code sets out a complete system for the construction of school buildings. The Legislature there declares that it is in the interest of the state to aid school districts in the construction of school buildings for the maintenance of the public school system inasmuch as the system is of general concern and the education of the children is an obligation and function of the state. Ed.Code, §§ 5021, 5041. The governing board of any school district shall manage and control the school property within its district, id., § 18001. It (the board) shall furnish and repair the school property. Id., § 18002. It shall provide as a part of school buildings patent flush water closets for the use of the pupils, id., § 18009. It may repair old buildings by day's labor or by force account, id., §§

18055, 18057. The State Department of Education shall: "Establish standards for school buildings", review and approve all plans and specifications for buildings and disapprove those not meeting the standards, furnish plans, specifications and "building codes," and make rules and regulations to carry out those activities, id., §§ 18102, 18101. "The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse", id., § 18151. Except in cities having a board of education the county superintendent shall pass upon all plans for school buildings and plans shall be submitted to him. "The Division of Architecture of the Department of Public Works under the police power of the State shall supervise the construction of any school building or, if the estimated cost exceed four thousand dollars (\$4,000), the reconstruction or alteration of or addition to any school building, for the protection of life and property." Id., § 18191. "Construction or alteration" as used in this article includes any construction, reconstruction, or alteration of, or addition to, any school building." Id., § 18193. "The Division of Architecture shall pass upon and approve or reject all plans for the construction or alteration of any school building. To enable it to do so, the governing board of each school district and any other school authority before adopting any plans for a school building shall submit the plans to the Division of Architecture for approval, and shall pay the fees prescribed in this article." Id., § 18194. "Before letting any contract for any construction or alteration of any school building, the written approval of the plans, as to safety of design and construction, by the Division of Architecture, shall be first had and obtained." Id., § 18195. "In each case the application for approval of the plans shall be accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in every respect with any and all require-

ments prescribed by the Division of Architecture." Id., § 18196. All plans and specifications shall be prepared by a duly state licensed architect or engineer and the supervision of the work shall be by a duly licensed person. Id., § 18199. No contract for construction is valid and no public money shall be paid for any work or materials furnished thereunder "unless the plans, specifications, and estimates comply in every particular with the provisions of this article and the requirements prescribed by the Division of Architecture and unless the approval thereof in writing has first been had and obtained from the division." Id., § 18200. Progress reports must be made to the division, id., § 18201. "The State Division of Architecture shall make such inspection of the school buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this article and the protection of the safety of the pupils, the teachers, *and the public*. The school district, city, city and county, or the political subdivision within the jurisdiction of which any school building is constructed or altered shall provide for and require competent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer and the Division of Architecture. The inspector shall act under the direction of and be responsible to the architect or structural engineer." Emphasis added; id., § 18203. The division may adopt rules and regulations to carry out its duties and a violation of the provisions is a felony, id., §§ 18202, 18204. If the supervisor of health of any school district notes any defect in "plumbing, lighting, or heating," he shall report to the district and if it does not act, to the county superintendent. Id., § 18221. Each building, if two or more stories, shall have fire escapes, id., § 18222.

[8] It is urged, however, that the foregoing provisions must be read in the background in which they were adopted, that is, that some of them were placed in the

Education Code from the Field Act adopted in 1933, Stats.1933, ch. 59, and must be construed with the Riley Act of 1933, Stats. 1933, ch. 601, now in the Health & Safety Code, sections 19100-19170. The Riley Act provides that all buildings (with certain exceptions Health & Safety Code, § 19100) must meet certain standards which are set forth, id., §§ 19150, 19151. Building permits must be obtained from the proper city or county officers charged with the enforcement of laws regulating construction, id., § 19130. Any city or county may establish construction standards higher than those established by sections 19150 and 19151 of the Health & Safety Code. Plans and specifications for buildings shall be filed with the application for a building permit, id., § 19132. Both the Field and Riley Acts were enacted as urgency measures, the urgency being stated to be the series of earthquakes occurring shortly prior thereto, Stats.1933, ch. 59, § 9; 1933, ch. 601, § 8. We do not believe, however, that the Health & Safety Code provisions (Riley Act) limit or modify the provisions of the Education Code (Field Act) above discussed. The former deal with structural design aimed at procuring buildings less dangerous from the standpoint of earthquakes, Health & Safety Code, §§ 19150, 19151, while the latter, as above pointed out, are broad and comprehensive including the whole field of construction regulations. The urgency that impelled the Legislature to enact both as urgency measures may have been the same but the scope is clearly different. Hence the provisions in the former providing for more stringent local regulations are not applicable to the latter.

[9] Reference is made to rules and regulations, past and present, adopted for the construction of school buildings under the Education and Health & Safety Codes. Calif. Administrative Code, Title 21, Public Works, Division of Architecture, Chap. 1, subchap. 1. The purpose of the rules (we refer to the rules now in existence) is to protect lives and property of the people

by regulating the design and construction of public school buildings so that, in addition to the normal loads to which such buildings are subjected, they shall resist future earthquakes. Title 21, subchap. 1, Group 1, Art. I, § 1. The rules are intended to establish "reasonable standards and minimum requirements" for the construction of such buildings in order to attain the requisite stability to withstand loads and forces "and to insure safety of construction" id., § 2. The detailed regulations set forth in sections 101 to 1206 have been adopted as a basis for the approval of plans and specifications. "It is not the intention to limit the ingenuity of the designer nor to interfere with existing building rules and regulations where such rules and regulations are more stringent. Where the designer desires to depart from the methods of analysis set up by these rules and regulations, it will be necessary that he submit his method in detail together with complete information including computations and test data covering the design in question. Permission to deviate from these rules and regulations is optional with the Division of Architecture and is dependent upon the division being satisfied that the structural members or portions of the building involved would provide at least such safety as would have been obtained had these rules and regulations been adhered to strictly." Id., § 70. "Regulations and design values established in these rules and regulations are minimum requirements. Nothing herein contained shall be interpreted to interfere with or to waive the requirements of applicable local or state building laws or ordinances where the requirements of those laws are more stringent than the requirements of these rules and regulations." Id., § 115. However, it is also provided that: "No rule or regulation shall be construed to deprive the Division of Architecture of its right to exercise the powers conferred upon it by law; or to limit the division in such enforcement of the act as is necessary to secure safety of construction and the proper administration of the law." Id., § 5.

[10] It is very doubtful that those rules indicate an intention to interpret the Education Code sections to mean that a city's building regulations must be met in the construction of a school building. They tend more to indicate that the school districts could follow such regulations as well as those of the state but are not bound to do so. In any event, since the final construction of a statute is the function of the courts (2 Cal.Jur.2d, Administrative Law, § 17), we hold the statutes here involved should not be construed as requiring a school district to comply with the building regulations of a city.

There is no necessity for comparing in detail Taft's building code and the numerous comprehensive building regulations contained in the Education Code and the rules and regulations of the Division of Architecture, for as we have seen the state has occupied the field. As said in *In re Means*, supra, 14 Cal.2d 254, 258, 260, 93 P.2d 105, 107, 123 A.L.R. 1378, in speaking of the effect of a city ordinance, establishing standards for plumbers, on a state employee in a city, the state civil service system provides a comprehensive plan for the selection of state employees and although the city ordinance does not purport to prescribe the conditions for state employment, "If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, *added to the requirements for employment by the state, and restricted the rights of sovereignty.* * *

"Although the legislature has enacted no statute regulating plumbing, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service, may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the re-

quirement of its governmental subsidiary. Upon fundamental principles, that conflict must be resolved in favor of the state." (Emphasis added.) The same comments apply to the references in the instant construction contract and specifications that the building is to be constructed in compliance with local regulations.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



W. E. WILLIAMS, Plaintiff and Respondent,

v.

Glen E. REED, Robert M. Cairns, Kenneth W. Arvidson, Thomas F. J. Carroll, Jr., Defendants and Appellants.*

Civ. 16862.

District Court of Appeal, First District,
Division 2, California.

Oct. 18, 1956.

Rehearing Denied Nov. 16, 1956.

Hearing Granted Dec. 12, 1956.

Action by holder against co-makers to enforce payment of two notes and to foreclose a chattel mortgage given to secure them. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered judgment against co-makers and they appealed. The District Court of Appeal held, inter alia, that where only advantage co-maker of certain notes could have received from maker securing a loan from holder of the notes was that maker would be freed from financial difficulty and would be better able to work on organization of a corporation for co-maker, co-maker was an accommodation maker and was discharged from liability under the notes when holder did not secure his consent to remain liable as surety at time holder released maker from liability on the notes by electing to

* Opinion vacated 307 P.2d 353.

pursue to judgment an action against maker based on an accord with maker as to the notes.

Judgment affirmed in part and reversed in part with directions.

Devine, J. pro tem., dissented.

1. Bills and Notes Ⓒ122

Judgment Ⓒ628

Where holder of two notes made loan to maker in order to enable maker to enter into a realty transaction which was supposed to result in great profit, and holder was informed that profits of such realty transaction would go not exclusively to maker, but also to co-makers, and a portion of the money paid by holder went to one of the co-makers, co-makers were not accommodation makers but were themselves beneficially interested in the loan and therefore were not released from liability on the notes by holder's election to pursue to judgment an action based on an accord with maker as to the notes, even though such action prevented further action on the notes against maker.

2. Bills and Notes Ⓒ537(1)

Where the circumstances under which certain notes were signed by a co-maker were undisputed, question of whether co-maker was an accommodation maker was one of law.

3. Bills and Notes Ⓒ23, 49

The essential characteristic of accommodation is the loan of credit or name to another person who receives or has received the consideration and is to provide for the bill or note when it falls due. West's Ann.Civ.Code, § 3110.

4. Release Ⓒ28(2)

Provisions of statute providing that release of one joint debtor does not extinguish the obligations of any of the other joint debtors unless they are mere guarantors, are universal, and include all releases, whether resulting from operation of law, or by virtue of a statutory provision, or by the direct act of the party with whom or for

whose benefit the obligation was entered into. West's Ann.Civ.Code, §§ 1543, 3200.

5. Judgment Ⓒ629

Where obligation of co-makers of a note was both joint and several, judgment against one maker on an action brought on his separate agreement and not on the notes, was not a bar to a subsequent action on the notes against co-makers. West's Ann.Civ.Code, § 726.

6. Bills and Notes Ⓒ49

An "accommodation maker" is on the face of an instrument, a primary party, absolutely required to pay the same. West's Ann.Civ.Code, §§ 3110, 3266a.

See publication Words and Phrases, for other judicial constructions and definitions of "Accommodation Maker".

7. Bills and Notes Ⓒ49, 440

An accommodation party, in his relation to the accommodated party, is a surety and is entitled to reimbursement from him for payment to holder.

8. Bills and Notes Ⓒ140

Extension of time for payment of a note by a holder is not a defense available to an accommodation maker.

9. Principal and Surety Ⓒ112, 118

The liability of a surety normally ceases with the liability of the principal, except where the liability of the principal ends because of his personal disability. West's Ann.Civ.Code, § 2810.

10. Principal and Surety Ⓒ59

Sureties are favored and strictly protected by the law.

11. Bills and Notes Ⓒ52

Defense of release of principal by holder is available to an accommodation maker.

12. Bills and Notes Ⓒ49, 52

Where only advantage co-maker of certain notes could have received from maker securing a loan from holder of the notes was that maker would be freed from financial difficulty and would be better able to work on organization of a corporation for co-maker, co-maker was an accommoda-

tion maker and was discharged from liability under the notes when holder did not secure his consent to remain liable as surety at time holder released maker from liability on the notes by electing to pursue to judgment an action against maker based on an accord with maker as to the notes. West's Ann.Civ.Code, §§ 2810, 2821.

13. Usury ☞53, 78

Where a loan transaction provided for a \$10,000 "bonus", or "finder fee", for a loan of \$30,000, such transaction violated statutory prohibition against receipt in any form of any greater value for a loan than the rate of interest there provided for, and precluded payment of any interest on a judgment for balance due on such notes. West's Ann.Civ.Code, § 1916-2.

14. Usury ☞103

When a loan transaction clearly violates statute prohibiting receipt in any form of any greater value for loan than rate of interest there provided for, and providing that in case of such violation any agreement to pay interest in any sum shall be void, intent of both or either of parties in entering into such transaction is immaterial, and circumstance that not the lender but the borrower took the initiative in the transaction, is also immaterial. West's Ann.Civ.Code, § 1916-2.

Athearn, Chandler & Hoffman, F. G. Athearn, Leigh Athearn, San Francisco, for appellant Cairns.

Roscoe E. Jordan, Oakland, for appellant Carroll.

Carlson, Collins, Gordon & Bold, Martinez, for appellant Arvidson.

Herron & Winn, John Wynne Herron, San Francisco, for respondent.

PER CURIAM.

In April, 1951, plaintiff sued to enforce payment of two negotiable promissory notes and to foreclose a chattel mortgage given to secure them. Both notes were dated June 14, 1950, formulated in the singular, (I promise) and signed by all de-

fendants, Arvidson, Carroll, Reed and Cairns, as makers. One note was for \$30,000 due April 14, 1950, the other for \$10,000 due December 14, 1950. Both provided for the payment of 5% interest and of costs and attorney's fees in case of suit. The chattel mortgage was executed by defendant Reed on the same date as the notes it secured.

In the action Reed defaulted and judgment was entered as to him and foreclosure of the chattel mortgage decreed. The other defendants answered in two separate pleadings one of defendant Cairns one of defendants Arvidson and Carroll. As for the purpose of the appeal there is no essential difference between the answers they will be considered together. They contained the following defenses on the ground of which said defendants moved for a summary judgment, to wit, that an agreement made on October 12, 1950 between plaintiff, Reed and Reed's wife regarding the debts and mortgage constituted a novation, which released the cosigners of the notes, that the fact that plaintiff had brought suit on said agreement and had obtained judgment constituted an election which estopped plaintiff from proceeding on the notes and that plaintiff by his prior action had waived the chattel mortgage to the prejudice of the defendants and had thereby lost his rights against them. The answers contained also allegations to the effect that the answering defendants were accommodation makers for Reed, who received the consideration, a loan of \$30,000, that the note of \$10,000 was given as a bonus for the loan and lacked consideration and that the transaction as a whole was usurious. The trial court dismissed the action summarily as to all defendants except Reed. Plaintiff appealed from the summary judgment of dismissal, which was reversed by the other division of this court, *Williams v. Reed*, 113 Cal.App.2d 195, 248 P.2d 147.

In the opinion, herein further called the prior opinion, Mr. Justice Wood stated and analyzed the contents of the agreement of October 12, 1950 at length. It can be

summarized as follows: Williams agreed to accept payment of \$35,000 plus interest on or before October 28, 1950 in full settlement of both notes. Until said date action on the notes and on the chattel mortgage would be withheld. Reed agreed to pay the \$35,000 within said time, and confessed judgment accordingly. Reed and his wife waived all defenses and remedies against the contract, the notes, the chattel mortgage, the judgment and its execution on their personal property including that subject to the chattel mortgage. Mrs. Reed agreed that the chattel mortgage be deemed to have been executed by her as well as by her husband. Reed warranted that the chattel mortgage was the paramount lien on all chattels subject to the mortgage.

At the time of the prior appeal it appeared that judgment on the contract had been obtained but that nothing had been paid on it and it did not appear that any steps to enforce the judgment by levy of execution or otherwise had been taken. The district court held that from the agreement of October 12, 1950, without further evidence, no intention to substitute said agreement for the notes appeared and that even if there had been a substitution as to Reed such would not necessarily have released Reed's comakers. That the comakers of notes as here involved were presumed to be jointly and severally liable, Civil Code, §§ 1660, 3098 subd. (7) and that then not bringing of action against one, but only satisfaction in some form could constitute a bar as to the others. That section 726 of the Code of Civil Procedure recognizing for a debt secured by mortgage one form of action only and prescribing the requirements for a deficiency judgment was not applicable to the prior action of plaintiff because it was not brought on the secured notes but on the separate agreement with the Reeds. The reversal of the summary judgment was stated to be without prejudice as to any issue of fact thereafter to be tried. The Supreme Court denied a hearing.

In the further proceedings the cause of action relating to the note of \$10,000 was dismissed on plaintiff's motion. After trial the court found in substance that from the note of \$30,000 only \$687 had been paid, which amount was received from the foreclosure sale of the chattel mortgage, that each of the defendants received valuable consideration for the making of the note and were not accommodation parties, that with respect to the note of \$30,000 no usury was involved as the note of \$10,000 given was a separate transaction, that the defendants approved the execution of the agreement of October 12, 1950, that the execution of said agreement did not cause a novation, or a merger of the obligation of defendants under the note, that the same applies to the complaint and judgment in the prior action, that the liability of defendants was in no way extinguished and that the present action did not violate section 726 of the Code of Civil Procedure. Judgment was for plaintiff and the three defendants appeal.

Only Cairns filed briefs on appeal. Arvidson and Carroll joined in said briefs, although it is the position of Cairns, that he did not become a comaker of the notes under the same circumstances as Arvidson and Carroll. He urges on appeal that the finding that he received consideration and was not an accommodation maker is not supported by the evidence, that as an accommodation maker he may interpose the defenses that by obtaining a judgment on the agreement of October 12, 1950, procuring a writ of execution and recording an abstract of judgment respondent made a binding election which precluded him from further action on the notes and the chattel mortgage also as to appellants, especially when section 726 of the Code of Civil Procedure is considered and that the alteration of the obligation of Reed by the agreement of October 12, 1950 to which appellant Cairns did not consent exonerated him. He urges that the finding of his consent is contrary to the evidence. Finally, he predicates error on the allow-

ing of interest, and the finding of absence of usury from the note of \$30,000, because the evidence shows that the two notes were a single transaction.

[1] The evidence shows that Arvidson, Carroll, and Cairns were all in business relations with Reed. Reed professed to be able to assist each of them in organizing the various projects in which each was interested in the form of a foundation to be directed by a corporation of which the defendant would be a director. The character of a foundation would make possible the obtaining of large funds from organizations like the Rockefeller foundation and the defendant would obtain profit by means of his directorate of the managing corporation or still more indirectly. There would also be an important advantage with respect to taxes. Reed himself pretended to be a large scale operator in this manner, but to be temporarily short of money, which he proposed to obtain by a fantastic real property transaction. Thirty thousand dollars would enable him in a very short time to buy and sell a farm with great profit. He, therefore, could give a bonus for a short term loan. Arvidson and Carroll, who knew the plaintiff Williams, a florist with some savings, induced Williams to loan the thirty thousand dollars for the real property transaction. There is evidence, both from testimony of Williams and in a deposition of Reed, indicating that in a conference with Reed, Arvidson and Carroll, Williams was given to understand that the profits of the real estate transaction would not go to Reed alone but also to the foundations to be formed for Arvidson and Carroll. The financial interest of Arvidson and Carroll, who were known to Williams, whereas Reed was not, played a part in Williams' decision to make the loan. The first payment (of \$5,000) made by Williams was in a check to Arvidson. These circumstances justify under the law to be stated hereafter the finding that Arvidson and Carroll were not accommodation makers, who were lending their names only to Reed,

but were themselves beneficially interested in the loan.

[2] However, there is no such evidence supporting the finding that Cairns was not an accommodation maker. The evidence shows that he had declared that he was unable to assist Reed in finding a lender, that he was not present when Reed made his representations to Williams, that he was only asked to sign by Williams and Arvidson because Williams thought the security of the other signatures and the chattel mortgage insufficient for a loan of \$30,000, and that in their presence, Cairns before signing, asked Reed by telephone whether he could be sure that the note gave Reed time enough to pay back. Reed did not declare that he had promised Cairns any part of the profit on the real estate transaction for Cairns' foundation, as he had stated with respect to Arvidson and Carroll. The only interest which it is contended that Cairns may have had in the loan is, that the fact that Reed would be freed from his own financial difficulties would better enable him to work on the organization of Cairns' foundation and corporation. As the circumstances under which Cairns became a comaker of the notes are undisputed the question whether Cairns under these circumstances was an accommodation maker is one of law.

[3] The essential characteristic of accommodation is the loan of credit (name) to another person, who receives or has received the consideration and is to provide for the bill or note when it falls due. Civ. Code, sec. 3110; 11 C.J.S., Bills and Notes, §§ 737, 741, 742; *Gardiner v. Holcomb*, 82 Cal.App. 342, 353, 255 P. 523; *Brown v. Volz*, 90 Cal.App.2d 793, 799, 204 P.2d 110. There can be no doubt that Cairns' action conformed to said test. However, even when there is a loan of credit to another person, the one lending his name may have such an interest in the underlying transaction as to constitute consideration going to him personally and to prevent him from being an accommodation party. 11 C.J.S.,

Bills and Notes, § 742, p. 297; *Gardiner v. Holcomb*, supra; *In re Estate of Chamberlain*, 44 Cal.App2d 193, 201, 112 P.2d 53, 934. So it was held in *Gardiner v. Holcomb*, supra, that a director and large stockholder of a corporation who signed a renewal note for an obligation for which notes of the corporation endorsed by all its directors were collateral, was not an accommodation maker, but that the wife of another director and stockholder who with that director also signed the renewal note, but who did not own stock was an accommodation maker for the directors. In *Re Estate of Chamberlain*, supra, 44 Cal.App.2d at page 199 et seq., 112 P.2d at page 56, it was held, reversing the trial court, that a widow who together with her son signed a note to replace one given by her deceased husband and the son, for a loan taken up by the son, was not an accommodation maker, where mother and son were administrators and heirs of the estate of the father and the signing was part of an agreement with the son with respect to the estate favorable to the mother. In *Warren Nat. Bank, Warren, Pa. v. Suerken*, 45 Cal.App. 736, 188 P. 613, it was held in reversing the trial court that a daughter who was an heir at law of her deceased father and one of the organizers of the family corporation that was taking over his business was not an accommodation party to notes given to prevent the Bank from enforcing against the estate notes it held from the deceased. In *Irwin v. Colburn*, 56 Cal.App. 41, 204 P. 551 it was held that a canning company who endorsed notes for rent of one who was to raise tomatoes on the rented land and sell the tomatoes to the canning company was not an accommodation endorser. Many other examples are found in 11 C.J.S., Bills and Notes, § 742, p. 297. In none of the cases known to us in which it was held that the contended accommodation party had received consideration was his relation to the underlying transaction so indirect and remote as in this case. Cairns would not receive any advantage from the loan itself but only from the peace of mind of

Reed which was expected to result from the loan. Not every motive for the loan of credit which is not purely altruistic can be considered consideration or value received from the transaction. The wife of the director in *Gardiner v. Holcomb*, supra, may well have had a selfish interest in the position of her husband but it was nevertheless held in reversing the court below that she was an accommodation party because she had no direct interest as stockholder or as signer of the collateral notes. We hold that the interest of Cairns was too indirect to justify the finding that Cairns was not an accommodation maker but received value.

[4, 5] With respect to Arvidson and Carroll, who were correctly found not to be accommodation makers, the prior opinion in this case clearly indicates that they were not released by the acts of Williams, even if these acts prevented further action on the notes against Reed himself. (It is now conceded that the agreement of October 12, 1950 did not constitute a novation but it is contended that the judgment obtained on said agreement, the issue of execution, and the recording constituted a binding election, as destructive of the cause of action on the original notes as a novation.) It was pointed out in said opinion, 113 Cal.App.2d at page 202, 248 P.2d at page 152 that even with respect to joint debtors, § 1543 of the Civil Code provides that the release of one "does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him." In *Elizalde v. Murphy*, 146 Cal. 168, 171, 79 P. 866, 867, it is said: "The provisions of this section are universal, and include all releases, whether resulting from operation of law, or by virtue of a statutory provision, or by the direct act of the party with whom or for whose benefit the obligation was entered into." See also section 3200 of the Civil Code which in its enumeration of manners in which a negotiable instrument is discharged does

not mention any manner which could have caused discharge in the situation before us. As stated also in the prior opinion, citing *Grundel v. Union Iron Works*, 127 Cal. 438, 442, 59 P. 826, 47 L.R.A. 467, "‘Nothing short of satisfaction * * * constitutes a bar’" to an action against the remaining joint and several obligors (113 Cal.App.2d at page 204, 248 P.2d at page 154) and section 726 of the Code of Civil Procedure does not prevent the present action, as the prior action was not brought on the notes but on Reed's separate agreement of October 12, 1950 (113 Cal.App.2d at page 205, 248 P.2d at page 154). The liability of Arvidson and Carroll on the notes must be upheld.

[6,7] The liability of Cairns presents a more complicated problem if it is accepted that he was an accommodation maker. This problem was not considered in the prior opinion because there was in that respect a triable issue of fact (113 Cal.App.2d 200, note 1, 248 P.2d at page 151). An accommodation maker is on the face of the instrument a primary party, absolutely required to pay the same. Section 3266a, of the Civil Code; *Schaeffle v. Nolan*, 115 Cal. App.2d 651, 657, 252 P.2d 732, 35 A.L.R. 2d 1027. He is liable as such to a holder for value, notwithstanding such holder knew him to be an accommodation party, Section 3110 of the Civil Code, and is considered liable in that manner also as to the payee. *California Nat. Bank of San Diego v. Ginty*, 108 Cal. 148, 151, 41 P. 38; 8 Cal.Jur. 2d 423. However, in his relation to the accommodated party he is a surety and is entitled to reimbursement from him. This dual relation causes a problem when a payee or holder in due course with knowledge of the accommodation character of a primary party does acts which may prejudice said party and would constitute a defense if said party was simply a surety. This question, which has caused much disagreement among courts and legal writers, has been treated at length but not generally solved in *Mortgage Guarantee Co. v. Chotiner*, 8 Cal.2d 110, 64 P.2d 138, 108 A.

L.R. 1080. The court states that the majority of jurisdictions in which the question has been decided adheres to the rule that suretyship defenses cannot be set up by an accommodation maker of a negotiable note. Although our Supreme Court is critical of the majority reasoning, based on the absence of surety defenses from the enumeration of the manners in which a negotiable instrument and therefore, as urged, also the persons primarily liable on it can be discharged, Uniform Law, § 119, Section 3200 of the Civil Code, which restriction is said to show the actual intent to deprive any party primarily liable from the protection of said defenses, the court adopts said majority rule in the interest of uniformity insofar as the defense of the granting of a binding extension of time to the principal debtor without consent of the accommodation maker is concerned, which defense the court considers as a more technical one, not likely to result in real injury. The court, however, expressly limits its ruling to the defense of extension of time. It states that the jurisdictions which with respect to that specific defense follow the majority rule sometimes deviate when a less technical defense, like that of release of security is presented, but at the same time the court points out that the reasoning based on an express legislative intent to abrogate the surety defenses of accommodation parties does not leave much room for distinction. The law, as stated in the above case has not been further developed in California. However, as the Supreme Court in the principal case indicates that it does not consider the rule refusing surety defenses to an accommodation maker as intrinsically sound, but accepts it with respect to the one defense of extension of time only in the interest of uniformity, following the great weight of authority, the rule excluding such defenses should in this jurisdiction only be followed with respect to those specific defenses which are excluded by a clear weight of authority. In general, this is not the case with other defenses than the one of extension of time. Britton

Bills and Notes, 1121 et seq.; See Annotation, 2 A.L.R.2d 260.

[8] The surety defenses proposed by appellant combine alteration of the original agreement without consent of the surety and discharge of the main creditor by election to pursue an inconsistent cause of action to judgment and execution. The first of these two contentions is not well taken. Appellant Cairns concedes that the agreement of October 12, 1950 did not constitute a novation but was a mere executory accord so that when Reed failed to live up to it, plaintiff could have brought action on the notes against all parties. Plaintiff does not contend that appellant Cairns became a surety on the accord agreement and brings his action against him solely on the note for \$30,000. The only way in which the executory agreement affected the note was by an extension of time, which defense, as we have seen, is not available to an accommodation maker. It is, therefore, irrelevant whether Cairns consented to the agreement, which, if executed would have led to the discharge of the notes without any payment by himself, or not.

[9-12] However, there is merit in the contention that when plaintiff based his prior action against Reed on the accord and not on the notes and pursued said action to judgment, he made an election which prevented plaintiff from thereafter bringing action against Reed on the notes. Evidently, plaintiff was entitled to recover, either on the accord or on the original obligation, but not on both. (Restatement, Contracts, § 417; 6 Williston on Contracts, Revised Ed. 5207). The liability of the surety normally ceases with the liability of the principal, except where the liability of the principal ends because of his personal disability, § 2810 of the Civil Code; *Anderson v. Shaffer*, 98 Cal.App. 457, 460, 277 P. 185; See Restatement, Security, § 122. There is here no contention or evidence that Cairns consented to the institution of the prior action and agreed to remain liable as a surety notwithstanding the

fact that Reed was released from his obligation on the notes. From the standpoint of suretyship the defense is good. The defense is technical and finds little support in equity considering that Reed defaulted and was held liable in the action on the note and Cairns was not actually prejudiced. However, sureties are favored and strictly protected in our law. 23 Cal.Jur. 1023; Suretyship, § 24. In section 2821 of the Civil Code it is expressly provided that if a surety is exonerated by an agreement altering the original obligation of the debtor or impairing the remedy of a creditor, the rescission of said agreement does not restore the liability of the surety. No more can it be said, that, if Cairns was exonerated by the judgment against Reed on the accord, the fact that Reed defaulted in the action on the note could reinstate Cairns as a surety. In contrast to the rule with respect to extension of time, the defense of release of the principal is as a rule considered available to an accommodation maker. 11 C.J.S., Bills and Notes, § 752, p. 323; *Britton on Bills and Notes*, p. 1123. It must also be noted that we are here concerned with the suretyship relation between the immediate parties to the instrument in which normally all defenses of the general law are available as if there were no negotiable instrument. (Brannan's Negotiable Instrument Law, 7th Ed. 1125). We are constrained to hold that Cairns was exonerated.

[13-14] We also agree with appellants in that the evidence shows without any possible doubt that the two notes of \$30,000 and \$10,000 were given as one transaction for the single consideration of a loan of \$30,000. (The actual amount of the loan was \$29,995, but the minimal difference of \$5 can be disregarded.) Williams himself considered the note of \$10,000 as a bonus for the loan. Reed thought that finder fee sounded better. The finding that there were two separate transactions is contrary to the evidence. There is no doubt that said transaction in its entirety violated paragraph 2 of the Usury Law, Deering's

Gen.Laws, Act 3757, West's Ann.Civ.Code, § 1916-2 which prohibits the receipt in any form of any greater value for a loan than the rate of interest there provided for and in case of such violation declares void any agreement to pay interest in any sum. Williams' argument that the bonus note was voluntarily offered and that he dismissed the action on it cannot avail him. When the transaction clearly violates the above prohibition, the intent of both or either of the parties is immaterial, *Martin v. Kuchler*, 212 Cal. 536, 539, 299 P. 52 and so is the circumstance that not the lender but the borrower took the initiative to the transaction, *Martin v. Ajax Construction Co.*, 124 Cal.App.2d 425, 431, 269 P.2d 132. It was error to provide for the payment of any interest.

With respect to defendant and appellant Cairns, the judgment is reversed with direction to the trial court to deny all recovery against him; with respect to defendants and appellants Arvidson and Carroll, the judgment is reversed insofar as it awards plaintiff recovery of interest with direction to the trial court to amend the judgment so as to exclude the recovery of any and all interest. In all other respects the judgment is affirmed, defendants and appellants Arvidson and Carroll to bear their own costs on appeal.

Appellant Cairns to recover his costs on appeal.

DEVINE, Justice pro tem.

I dissent.

I concur in affirming the judgment against defendants Arvidson and Carroll, and in the elimination of interest because of usury, but I dissent from the decision which releases defendant Cairns from the effect of his signing as comaker a promissory note for \$30,000 on the proposition that he is an accommodation party, and that as such he is discharged by a suretyship defense.

In the first place, it does not seem to me that it should be held as a matter of law

and contrary to the finding and conclusion of the trial court, that Cairns was an accommodation maker. In deciding the question whether or not one who signs a promissory note is an accommodation party, the test, according to section 3110 of the Civil Code, is whether or not he signed "without receiving value therefor, and for the purpose of lending his name to some other person." It is presumed that the payee became a party for value. Section 3105, Civil Code. Value in the negotiable instruments law is any consideration sufficient to support a simple contract. Section 3106, Civil Code. Therefore, the inquiry is pushed back to the query whether or not the evidence contrary to the presumption is so overwhelming as to make the trial court's conclusion an arbitrary one. I do not find the evidence to be so, but rather I regard it as supporting the presumption. Cairns did not lend his name to Reed primarily for Reed's benefit; he signed the note in anticipation of profit. The evidence to that effect is this: Reed, a confidence man who later was sentenced to prison, persuaded Cairns to sign the note by which Williams handed Cairns a check for \$24,995 to Arvidson, upon the proposition that Cairns would form an agricultural foundation to revitalize soils, and that he, Reed, would assist and would obtain money for the foundation from philanthropic organizations with which he had contacts. Cairns testified that he expected to gain from the project by selling to growers chemicals with which to revitalize their soil. He testified that he hoped to sell an overhead irrigation system to Reed. Reed told Cairns that he needed \$30,000 to cover personal expenses, and that he was not in any mental condition to contact the prospective benefactors of the Cairns Agricultural Foundation, which had been formed in anticipation of Reed's promised contacts with the great foundations, from the Rockefeller down, until his own pressing financial problems were solved. Cairns' hopes for profit (perhaps accompanied with a certain humanitarian desire with

regard to the foundation but not with regard to Reed) were the reasons for his signing the note, and the fact that the whole plan appears chimerical in retrospect does not do away with the fact that the loan to Reed by Williams was desired by Cairns because of the latter's hopes for gain.

It is said in the majority opinion that the possible benefit to Cairns was too indirect to prevent him from being other than an accommodation party; but what principle of law distinguishes benefits sufficiently direct and those which are too indirect and does so with sufficient clarity and force as to overcome the presumption that value was given, and to overcome, as well, the inferences drawn by the trial court? It would seem that the statutory definition of value, as given above, should apply. In *Gardiner v. Holcomb*, 82 Cal. App. 342, 353, 255 P. 523, 528, it is said: "While a party's intent may be to aid a maker of a note by lending his credit, if he seeks to accomplish thereby legitimate objects of his own and not simply to aid the maker the act is not for accommodation." In that case, the stockholder and officer of a corporation who signed the company's note was held not to be an accommodation maker, while his wife, who held no stock or office, was held to be an accommodation party. Husband and wife were considered in accordance with the general laws relating to spouses, as separate parties in contracting. In the present case, an advantage to Cairns himself was his motive for signing.

Assuming Cairns to be an accommodation maker in relation to Reed, it does not follow that the holder of the note is affected by that relationship. An accommodation maker is liable to a holder in due course. Section 3110, Civil Code. Even the fact that the holder might have known a defendant to be a guarantor in his relation to other defendants would not make him a mere guarantor as to the payee, where it appears from the note that he is a maker.

Casner v. San Diego Trust & Savings Bank, 34 Cal.App.2d 524, 534, 94 P.2d 65.

Here, again, the case of *Gardiner v. Holcomb*, supra, is distinguishable. In that case, the holder of the note was not a party. It was a case in which contribution was sought. The case was described in *Harris v. Holland*, 107 Cal.App. 646, at page 654, 290 P. 903, at page 906, as holding only "that, where three persons sign a note for the purpose of raising funds for a corporation and two of them are both stockholders and directors of that corporation and the third has no interest in it, if either of the first two are compelled to pay the note, they have no right to contribution from the third."

To what extent the suretyship defenses other than that of extension of time apply to negotiable instruments in this state is a question left open to the Supreme Court in *Mortgage Guarantee Co. v. Chotiner*, 8 Cal.2d 110, 64 P.2d 138, 108 A.L.R. 1080.

In the present case, the defendants were comakers, who signed in the singular, and the presumption is that their liability was joint and several. Section 1660, Civil Code. It would seem that nothing short of satisfaction by Reed would constitute a bar to this proceeding. *Williams v. Reed*, 113 Cal.App.2d 195, 204, 248 P.2d 147. No satisfaction, of course, has been shown.

It is contended by appellant that he has been prejudiced by respondent's action in proceeding on the agreement in that the security has been lost, because by section 726 of the Code of Civil Procedure, there can be but one remedy on a debt secured by mortgage, and that by proceeding on the debt, the creditor waives the security. This argument, too, has been answered in the earlier decision 113 Cal.App.2d at page 205, 248 P.2d at page 154. Respondent, in proceeding originally on the agreement, did not lose his right to proceed on the notes, and, therefore, the mortgage security was not lost.

At the present stage of the cause, this is not merely legal reasoning. Actually,

the chattel mortgage has been foreclosed in accordance with the complaint, which is one for foreclosure and deficiency judgment, and the property has been sold and the amount realized has been applied on the judgment, for the benefit of appellants as well as of the others. I do not see how appellant can be held to have been prejudiced by what he thinks might have happened in face of the fact that he actually received the benefit of the security.

If another reason is required on this point, it is this: the law is that a guarantor's liability (assuming Cairns to be a guarantor) may be enforced without first resorting to the mortgage security, *Loeb v. Christie*, 6 Cal.2d 416, 57 P.2d 1303, because the section is for the benefit of the mortgagor only. *Martin v. Becker*, 169 Cal. 301, 146 P. 665. Thus, if Cairns were a guarantor, he would have lost nothing that he was entitled to have. In fact, to avoid this, he argues towards the end of his brief that he was primarily liable, and that the rule of *Loeb v. Christie*, supra, which applies to guarantors, does not apply to him. Thus, he brings us back to the correct position, that he is not a mere guarantor at all.

The majority opinion states that Williams made an election which prevented him from bringing action against Reed on the notes. The fact is that he brought action against Reed on the notes and obtained judgment and brought action against Arvidson and Carroll on one of the notes and the majority opinion sustains the judgment (except as to interest) against the latter two against their appeal.

The majority opinion concedes that Cairns' defense finds little support in equity. I believe neither law nor equity compels the reversal of the judgment against Cairns, and that the judgment should be affirmed, modified, however, first, by elimination of interest and, second, by reduction of counsel fees to \$6,000, which was the amount alleged to be the reasonable sum chargeable on the one valid note.

145 Cal.App.2d 469

David A. HARGRAVE, Plaintiff and
Appellant,
v.

ACME TOOL & TESTER COMPANY, a corporation; Hobart A. Vorhees; Richfield Oil Corporation, a corporation; James R. Hale and Douglas A. Watson, Defendants and Respondents.

Civ. 21541.

District Court of Appeal, Second District,
Division 1, California.

Oct. 29, 1956.

Hearing Denied Dec. 24, 1956.

'Action for injuries sustained while working in a crew conducting a water shut-off test of an oil well. After verdict for plaintiff on second trial, the Superior Court of Los Angeles County, Harold C. Shepherd, J., granted a new trial on the ground of insufficiency of the evidence to justify the verdict, and plaintiff appealed. The District Court of Appeal, White, P. J., held that there was no abuse of discretion when the court granted a new trial after denial of defendant's motion for nonsuit, directed verdict, and judgment notwithstanding the verdict.

Affirmed.

1. Appeal and Error \S 874(5)

On plaintiff's appeal from order granting a new trial, order denying defendants' motion for judgment notwithstanding the verdict may be reviewed.

2. Appeal and Error \S 1213

Where nonsuit has been reversed on appeal on basis that there was evidence which, if believed, would support a verdict for plaintiff, on retrial the case must be submitted to the jury.

3. Appeal and Error \S 1213

Neither trial court nor jury were required to believe plaintiff's witnesses, resolve conflicts in plaintiff's favor, or find for plaintiff on second trial after District Court of Appeal had reversed a nonsuit.

4. New Trial Ⓒ69, 72, 159

Trial judge, upon motion for new trial, must consider credibility of witnesses, weight of evidence, draw own inferences, and make independent conclusions.

5. Courts Ⓒ99(1)

Denial of defendants' motions for nonsuit, directed verdict, and judgment notwithstanding verdict did not preclude trial judge from granting defendants' motion for a new trial upon his own appraisal of the evidence.

6. Appeal and Error Ⓒ977(3)

An order granting a new trial will not be reversed on appeal unless an abuse of discretion of trial judge is affirmatively shown or manifestly appears.

7. Appeal and Error Ⓒ1213

In action for personal injuries sustained while working in a crew conducting a water shut-off test of an oil well, although judgment for defendants after nonsuit had been reversed on former appeal, granting defendants a new trial after verdict for plaintiff was not an abuse of discretion.

8. Appeal and Error Ⓒ1097(1)

In reviewing order denying defendants' motion for judgment notwithstanding the verdict, decision on former appeal reversing judgment for defendants after nonsuit was the law of the case.

9. Judgment Ⓒ199(3.5)

Judgment notwithstanding the verdict may be granted only where, viewing all the evidence most favorably to the plaintiff, with every legitimate inference drawn in his favor, and disregarding all conflicting evidence, the record is insufficient to support verdict for plaintiff.

10. Appeal and Error Ⓒ1213

Where all evidence which constituted prima facie case for plaintiff, under law of prior case, was again before the court on retrial after reversal of nonsuit, further evidence, either cumulative or conflicting, could not justify the granting of a judgment for defendants notwithstanding the verdict for plaintiff.

Russell H. Pray, William C. Price, Long Beach, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss, Henry F. Walker, Los Angeles, for respondents Acme Tool & Tester Company, a corporation, and Hobart A. Vorhees.

Ball, Hunt & Hart, Clarence S. Hunt, Long Beach, for respondents Richfield Oil Corp., James R. Hale and Douglas A. Watson.

WHITE, Presiding Justice.

After the second trial of the instant action and verdict rendered for plaintiff for \$50,000 for personal injuries suffered while working in the crew conducting a water shut-off test of an oil well, defendants moved for judgment notwithstanding the verdict. Those motions were denied. Defendants then moved for a new trial on all grounds applicable to jury trials and those motions were granted "on the ground of the insufficiency of the evidence to justify the verdict".

[1] Plaintiff has appealed from the order granting the motions for a new trial, and, as contended by respondents, by reason of plaintiff's said appeal, the order denying defendants' motions for judgment notwithstanding the verdict may be reviewed on this appeal. C.C.P. § 629; In re Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692.

Appellant urges two grounds for reversal: (1) that the doctrine of the law of the case requires it; and (2) that the trial judge abused his discretion in granting the new trial.

After plaintiff's evidence had been introduced in the former trial, judgment for defendants followed the granting of their motions for nonsuit. That judgment was reversed by this court, *Hargrave v. Acme Tool & Tester Co.*, 125 Cal.App.2d 34, 40, 269 P.2d 913, for the reason that the evidence was sufficient to raise a question of fact to be decided by the jury and that a motion for nonsuit should be granted only when there is no substantial evidence to support a verdict in favor of plaintiff.

Seneris v. Haas, 45 Cal.2d 811, 821, 291 P.2d 915. After the decision of this court upon said former appeal, hearing was denied by the Supreme Court.

All parties to the instant appeal agree that the entire summary of the evidence in the decision on the former appeal, *Hargrave v. Acme Tool & Tester Co.*, *supra*, is a correct statement of some of the evidence at the second trial. The decision which we have reached makes it unnecessary to summarize the additional evidence introduced at the second trial.

[2,3] The law of the case, as determined by the decision of this court on the former appeal reversing the judgment rendered after nonsuit, is that there was some evidence, which, if believed, would support a verdict in favor of plaintiff. That decision on appeal required that the trial judge submit the case to the jury. *Kramm v. Stockton Elec. R. Co.*, 10 Cal.App. 271, 280, 101 P. 914. That was done. After submission of the case to the jury in the second trial, neither the jury nor the trial judge was required to believe plaintiff's witnesses, resolve the conflicts in plaintiff's favor, or to find for plaintiff.

[4,5] After the jury's verdict for the plaintiff, the trial judge, as he is required to do upon a motion for a new trial, considered the credibility of the witnesses and the weight of the evidence, drew his own inferences, and made his independent conclusions therefrom. The fact that he considered the evidence sufficient to justify his denial of defendants' motions for nonsuit, for directed verdict and for judgment notwithstanding the verdict did not preclude the trial judge from granting defendants' motions for a new trial upon his own appraisal of the evidence. *Woods v. Walker*, 57 Cal.App.2d 968, 971, 136 P.2d 72; *Kalfus v. Frazee*, 136 Cal.App.2d 415, 430, 288 P.2d 967.

While appellant has urged the reversal on appeal on the ground that the trial court abused its discretion by granting the defendants' motions for new trial, he has failed to refer to any instance of such abuse

in the record. Appellant cites and quotes from the decision in *Perry v. Fowler*, 102 Cal.App.2d 808, 229 P.2d 46. By that decision, however, an order granting a new trial after both the first and second trials had resulted in verdicts for defendants was affirmed.

[6,7] An order granting a new trial will not be reversed on appeal unless an abuse of discretion on the part of the trial judge is affirmatively shown or manifestly appears. *Brooks v. Metropolitan L. Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689. No such showing has been made in the instant action, and it would serve no useful purpose to discuss the many reasons shown by respondents why a new trial was properly granted.

[8,9] Reviewing the order denying defendants' motions for judgment notwithstanding the verdict, the decision on the former appeal reversing the judgment for defendants after nonsuit is the law of the case. The trial court is authorized to grant a motion for judgment notwithstanding the verdict only where, viewing all the evidence in the light most favorable to plaintiff, with every legitimate inference drawn in his favor, and disregarding all conflicting evidence, the record is insufficient to support the verdict for plaintiff. *Rodabaugh v. Tekus*, 39 Cal.2d 290, 291, 246 P.2d 663.

[10] Defendant *Acme Tool & Tester Co.* contends that, at the second trial there was evidence which, as a matter of law, absolved it and its employees from all responsibility for plaintiff's injury. That contention is untenable. Since all the evidence which constituted a *prima facie* case for plaintiff, under the law of the case, is again before the court, further evidence, either cumulative or conflicting, could not justify the granting of a judgment notwithstanding the verdict.

The orders denying motions for judgment notwithstanding the verdict and the orders granting a new trial are, and each of them is, affirmed.

DORAN and FOURT, JJ., concur.

145 Cal.App.2d 492

**Matter of the Application of Marla GROZE,
a/k/a Marla Crose, for a Writ of
Habeas Corpus.
Cr. 5778.**

District Court of Appeal, Second District,
Division 1, California.
Oct. 29, 1956.

Habeas corpus proceeding involving custody of child. The District Court of Appeal held that even though pleadings in Superior Court habeas corpus case, involving child custody, had presented issue as to whether petitioner had abandoned her child, Superior Court's findings, that petitioner had voluntarily delivered child to respondents and made only token effort to support or communicate with him, would not support its conclusion that there had been an abandonment; and held that therefore petitioner was not estopped from having that issue tried in the instant proceeding.

Order accordingly.

Nourse, J. pro tem., dissented.

1. Habeas Corpus ⇨120

Superior Court order denying writ of habeas corpus in child custody case is not res judicata in broad sense that it bars further proceedings for custody of child, but in very narrow sense that petitioner for writ of habeas corpus cannot, in District Court of Appeal, again litigate issues of fact decided in Superior Court unless, since hearing in Superior Court, there has been change of circumstances affecting right to custody.

2. Habeas Corpus ⇨119

Superior Court decision on question of law, in habeas corpus proceedings involving child custody, does not bar petitioner from presenting that same question of law to District Court of Appeal on application filed in that court.

3. Bastards ⇨15

Habeas Corpus ⇨25(2)

The mother of an illegitimate, unmarried minor is entitled to his custody, service and earnings, and she may enforce her right to custody by petition for writ of habeas corpus; but relief will be denied her if she has abandoned child or is unfit to have custody. West's Ann.Civ.Code, § 200.

4. Habeas Corpus ⇨113(3)

Neither party to habeas corpus proceeding involving child custody has right to appeal from order made by Superior Court.

5. Parent and Child ⇨2(3.7)

Mother voluntarily delivering her child to third persons to be gratuitously cared for by them until such time as she might be in a position to properly care for child could not be held to have abandoned child, and to have thereby forfeited her right to custody of child. West's Ann.Civ.Code, § 200.

6. Habeas Corpus ⇨112

Welfare and Institutions Code section, specifying minors within jurisdiction of Juvenile Court and subject to being declared free from custody and control of parents, had no applicability to habeas corpus proceeding involving child custody; and court in such proceeding had no power to declare minor free from custody and control of his mother, but could only deny her right to custody of her child. West's Ann.Welfare & Inst.Code, §§ 701(a), 720(b).

7. Habeas Corpus ⇨120

Even though pleadings, in Superior Court habeas corpus case involving child custody, had presented issue as to whether petitioner had abandoned her child, Superior Court's findings, that petitioner had voluntarily delivered child to respondents and made only token effort to support or communicate with him, would not support its conclusion that there had been an abandonment; and therefore petitioner was not estopped from having that issue tried

in subsequent habeas corpus proceedings brought in District Court of Appeal.

Manuel Ruiz, Jr., Los Angeles, for petitioner.

Sanchez, Halpern & Knapp, Leopoldo G. Sanchez, Los Angeles, for respondents.

PER CURIAM.

Petitioner is the mother of a minor, and seeks by the proceeding herein to have the possession of this child delivered to her by the respondents.

By her petition she alleges that said child is of the age of three and one-half years and that heretofore she has been unable to properly care for said child by reason of economic factors beyond her control; that by reason thereof she delivered said child to the respondents Garcia to be gratuitously cared for by them until such time as petitioner would be in a position to properly care for such child; and that she has demanded possession of said child from respondents but they have refused to surrender him to her.

She further alleges that prior to filing her petition for writ of habeas corpus from this court she filed a like petition in the Superior Court of the County of Los Angeles; that her petition was, on the 18th of September, 1956, denied; and that, the superior court having failed to find that she is a person unfit to have the possession of said child, the order of the superior court denying her possession of the child is res judicata of the fact of her fitness.

The return to the petition here filed by the respondents Garcia alleges in substance that petitioner abandoned said minor to the respondents, that petitioner is and at all times since the birth of said child has been an unfit mother and that it is to the best interests of the child that respondents retain the custody and control of said minor. They further plead the order of the superior court denying a writ of habeas corpus to petitioner as res judicata, and allege that in the proceedings in the supe-

rior court that court found petitioner was an unfit mother, that petitioner abandoned the child to respondents, and that it is for the best interests of said child to remain with respondents.

By stipulation of the parties the record of the proceedings in the superior court has been lodged with this court.

Neither petitioner's contention that, the superior court having failed to make any finding upon the question of petitioner's fitness to have custody of the minor child, its order denying a coercive writ against respondents is res judicata of petitioner's fitness, nor respondents' contention that that order is res judicata of petitioner's right to the custody of the minor so as to preclude this court from granting a coercive writ against respondents, can be sustained.

[1,2] Where habeas corpus proceedings have been prosecuted in the superior court and that court has made findings of fact, its order is res judicata of the issues tendered, tried, and decided by the superior court; and the petitioner, if unsuccessful in the superior court, is estopped in the absence of a change in circumstances from again trying those issues upon a petition to the District Court of Appeal for a writ of habeas corpus. In re Holt, 34 Cal.App. 290, 167 P. 184; In re Gille, 65 Cal.App. 617, 224 P. 784; In re McDaniel, 90 Cal. App. 307, 265 P. 884; In re Gury, 103 Cal.App. 738, 284 P. 944; In re Martin, 79 Cal.App.2d 584, 586, 180 P.2d 383; In re Browning, 99 Cal.App.2d 337, 221 P.2d 736. The decisions just cited hold that the decision of the superior court is res judicata of the issues determined by the superior court, but it is apparent from them and from the decision of the Supreme Court in In re Bruegger, 204 Cal. 169, 267 P. 101, that the order denying the writ is not res judicata in the broad sense that it bars further proceedings for the custody of the child, but in the very narrow sense that a petitioner for a writ of habeas corpus cannot, in the District Court of Appeal, again litigate the issues of fact decided in the superior court unless after the hearing in

the superior court there is a change of the circumstances which affect the right to custody; nor does a decision by the superior court, which constitutes merely a decision of a question of law rather than a fact, bar the petitioner from presenting that same question of law to the District Court of Appeal upon an application for a writ of habeas corpus filed in that court. In *re White*, 49 Cal.App.2d 160, 121 P.2d 100; In *re Landry*, 61 Cal.App.2d 230, 142 P.2d 432; In *re Livingston*, 108 Cal. App. 716, 718, 292 P. 285.

[3] The mother of an illegitimate, unmarried minor is entitled to his custody, service and earnings, Civ.Code, sec. 200. She may enforce her right to custody by a petition for a writ of habeas corpus. But the court, in such a proceeding, is not obligated to enforce this naked legal right by a coercive writ against the persons having custody of the minor, but may deny the writ if upon inquiry it finds as a fact that the mother has abandoned the child—that is to say, that she has knowingly and willfully deserted her child with the “intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same”, *Guardianship of Snowball*, 156 Cal. 240, 243, 104 P. 444, 446; or finds as a fact that the petitioner is a person morally or mentally incompetent to have the custody and control of her child—that is to say, that she is unfit to have such custody and control. If it finds either abandonment or unfitness, the mother may not again, in the absence of a change of circumstances affecting either the question of abandonment or the question of fitness, try those issues through the means of an application filed in the District Court of Appeal.

[4] As neither party has the right to appeal from the order made by the superior court either granting or denying the application to it for a writ of habeas corpus, In *re Bruegger*, *supra*, it must clearly appear to this court that the superior court did find facts constituting an abandonment by petitioner of her child or that the supe-

rior court tried and determined as a fact that the petitioner is mentally or morally unfit to have possession of her child, before this court will hold her estopped to apply to this court for relief.

Examination of the record of the proceedings in the superior court in the present matter demonstrates that the issue as to petitioner's fitness was neither tendered nor tried by the superior court, and that the court did not find any facts upon which its conclusion that petitioner had abandoned her child could be predicated.

The superior court did not make any written findings of fact or conclusions of law, although it would have been the better practice in a proceeding of this kind to have done so. It did, however, in the minute order by which it denied petitioner the custody of her child, state the findings and conclusions upon which it based its order. This minute order does not contain any findings as to whether petitioner was morally or mentally unfit to have possession of her child, nor did the petition filed in the superior court or the return filed there by respondents raise that issue.

The petition filed in the superior court and the return thereto did, however, present the issue as to whether petitioner had abandoned her child. If the superior court did determine that issue against the petitioner, we must deny her relief here, inasmuch as she is not entitled to relitigate it, and the determination of that issue adversely to her by the superior court is determinative of her present right to custody. We are convinced, however, that that issue was not determined as a matter of fact by the superior court and that petitioner is not estopped from trying it here.

By the petition filed in the superior court it was in substance alleged that by reason of economic factors beyond petitioner's control she had delivered her child to respondents to be gratuitously cared for by them until petitioner would be able to properly care for him; and that petitioner was then able to care for said child but that the respondents had refused to surrender him

to her. By their return filed in the superior court respondents in substance alleged that in October of 1953 petitioner had intentionally abandoned her son to them, and had not, during the three years thereafter, maintained, provided for, or supported her son, although she had the ability so to do.

By its minute order the court did not make any finding as to the factors which caused petitioner to put the child in the possession of respondents or as to what her intent was in so doing, or as to whether or not she had had the ability to support him, but found as facts, only, that she acted voluntarily in delivering her child to respondents and that she thereafter had made only "token effort to support or communicate with said minor child." From these facts the court concluded that the child "has been abandoned under the provisions of Section 701(a), Welfare and Institutions Code, that petitioner has abandoned said minor child, and that petitioner has no legal right to the custody of said minor child."

[5] The only facts found by the court were that the child had been voluntarily delivered to respondents and that petitioner had made only a token effort to support or communicate with him. These facts fall far short of a finding that petitioner had actually deserted her child with the intention of entirely severing her parental relationship to him and with the intent to throw off all of the obligations growing out of that relationship; nor do they negative the allegations of the petitioner that she delivered the child to respondents due to economic factors beyond her control and with the intent to recaption him when she was in a situation to properly care for him. Unless these allegations were negated, abandonment could not be found. *In re Green*, 192 Cal. 714, 719-721, 221 P. 903; *Roche v. Roche*, 25 Cal.2d 141, 143, 152 P.2d 999.

[6] The balance of the minute order constitutes merely an erroneous conclusion

of law drawn from those facts. The superior court apparently acted under the misapprehension that section 701(a) of the Welfare and Institutions Code was applicable. But it is not. That section has no applicability to proceedings of this nature. It merely defines minors who are within the jurisdiction of the juvenile court and as to whom a petition may be filed under section 720(b) of the Welfare and Institutions Code to have that person declared free from the custody and control of his parents. If such a petition had been filed and an order made thereon, the situation here would be different; but the court, in the present matter, was not sitting as a juvenile court and had no power to declare the minor here free from the custody and control of his mother, and could only deny the petitioner the right to the custody of her child if it found facts which would constitute an abandonment as we have heretofore defined that term.

[7] It follows that the findings made by the trial court do not support its conclusion, and that the issue of abandonment was not determined by the trial court and that therefore petitioner is not estopped from having that issue tried here.

The return to the writ here having tendered both the issue as to petitioner's fitness and the issue of abandonment, and neither of those issues having been determined as matters of fact in the proceedings in the superior court, it is necessary that we appoint a referee to find the facts as to said issues.

It is therefore ordered that the order heretofore made submitting this matter is hereby vacated, and A. Edward Nichols, Commissioner of the Superior Court of the State of California, in and for the County of Los Angeles, is hereby appointed referee to take evidence and determine the facts as to whether the plaintiff is a fit person to have the custody of her child and the issue as to whether or not she has abandoned said child, and to report said facts and his findings and conclusions of law to this court within sixty days.

NOURSE, Justice pro tem.

I dissent. I cannot agree with the views expressed by the majority of this court or with their conclusions, because I believe that they have thereby set at naught the established rule that where habeas corpus is used not to determine whether a person is illegally confined or restrained but to determine who shall have the right to keep a minor in custody, a finding of fact upon an issue litigated in the superior court estops the parties from again litigating that fact upon an application for a writ of habeas corpus in the appellate court; and because the effect of the majority opinion is to turn the application for a writ of habeas corpus in this court into a writ of error with a trial *de novo* in this court, should error be found.

For nearly thirty years it has been the established rule that where a proceeding in the form of an application for a writ of habeas corpus has been had in the superior court to determine the rights of the parties to the custody of a minor and in that proceeding an issue of fact has been tendered and tried which, if determined adversely to the petitioner, would preclude the issuance by the superior court of a coercive order against the respondent in that proceeding and the superior court does deny the coercive writ, the petitioner may not, upon the same facts and without any change in the circumstances, again litigate that issue upon a petition for a writ of habeas corpus filed in the District Court of Appeal. In *re Holt*, 34 Cal.App. 290, 167 P. 184; In *re Gille*, 65 Cal.App. 617, 224 P.2d 784; In *re McDaniel*, 90 Cal.App. 307, 265 P.2d 884; In *re Gury*, 103 Cal. App. 738; In *re Martin*, 79 Cal.App.2d 584, 586, 180 P.2d 383; In *re Browning*, 99 Cal.App.2d 337, 221 P.2d 736. The effect of these decisions is not to make the order of the superior court discharging the writ a bar to the petitioner's again asserting her legal right to custody, but to estop her, until there is a change in facts and circumstances, from again litigating issues which have been determined against

her and which preclude her from enforcing her bare legal right to custody.

As I have pointed out, the order of the superior court discharging a writ of habeas corpus and denying a petitioner custody of his or her child does not operate as *res judicata* in the sense that it is a judgment barring a further assertion of petitioner's right; and if in the superior court an issue of fact such as petitioner's abandonment of her child or her unfitness to have custody of the child is not tendered and tried but the order of the superior court merely holds as a matter of law that petitioner does not have a legal right to the custody of the child, then its order is not *res judicata* and the question may be relitigated upon a petition filed in the District Court of Appeal. In *re White*, 49 Cal.App.2d 160, 121 P.2d 100; In *re Landry*, 61 Cal.App.2d 230, 142 P.2d 432; In *re Livingston*, 108 Cal.App. 716, 718, 292 P. 285.

The majority opinion, while noting and acknowledging the first rule stated, seeks to support its conclusion that the issue of abandonment tendered to the superior court was not tried and determined by that court, by holding that the superior court merely made an erroneous decision upon a question of law. In order to arrive at this conclusion the majority holds that the minute order of the superior court constituted the findings of that court and that those findings were insufficient to uphold the conclusion that petitioner had abandoned her child, and that the superior court therefore decided only a question of law and that its order is therefore not *res judicata*.

To my mind this reasoning is not sound. The estoppel, arising under the doctrine of *res judicata*, against relitigating an issue is as applicable to an erroneous decision upon the issue litigated as it is to a correct determination of that issue. In the case here it is admitted that the issue as to whether petitioner had abandoned her child was tendered to the superior court, that it was tried there and determined adversely to petitioner; and there is no claim here that there has been any change in circumstances.

(Only twelve days elapsed between the entry of the order of the superior court and the filing of the petition here.)

Assuming, as the majority does, that the minute order of the court constituted findings of fact and conclusions of law and demonstrates that the superior court *erroneously* determined that the petitioner had abandoned her child, that does not detract from the fact that it did determine the issue of abandonment; and it is only by treating the petition for a writ of habeas corpus here as a petition for a writ of error, and then finding that there was error and granting a trial in this court, that the decision of the majority can be sustained. To so hold in effect abolishes the established rule that an issue litigated in the superior court cannot be relitigated here; for if this court can find error in that the findings do not support the judgment, it can find error because the evidence does not support the findings, thus in every case permitting this court to review the action of the superior court as a basis for this court trying the same issues as were tried in the superior court.

The decision of the majority does in the present case relieve petitioner from what is apparently—from the record before us we do not have any record of the oral proceedings—a miscarriage of justice. But in my opinion our decision should not be molded so as to meet the exigencies of the present case, but should follow the established principles of law even though the present petitioner may have suffered an injury.

The majority says that petitioner has no right to appeal from the judgment of the superior court. In this I think they are in error, for the judgment of that court is final as to her right to the custody of her child until there is a change of circumstances.

A writ of habeas corpus is an ancient prerogative writ by which, in its original form, one might seek immediate relief from an illegal imprisonment, and it is the privilege of the use of this writ which the

Constitution of the United States, art. I, sec. 9, clause 2, and the Constitution of this state, art. 1, sec. 5, guarantee to the people. The courts of this state have inherent power to issue this writ irrespective of any statute, nor could the Legislature take away the power to issue this writ to protect the citizen from illegal imprisonment or restraint. *Matter of Hughes*, 159 Cal. 360, 366, 113 P. 684. I do not think, however, that it could be contended that the Legislature could not limit the procedure by which the parties could try their private rights to the custody of a child so as to preclude the trial of that issue by a writ of habeas corpus.

The writ was at common law, and in this state and, insofar as my research discloses, in all other states of the Union has been used for the purpose of litigating private rights as to the custody of a minor. When so used, it is a proceeding *in rem*, equitable in nature, in which the child is the *res*, and the right determined is that of petitioner to the custody of the minor, not the minor's right to be free from restraint. *In re Frazier*, 50 Cal.App. 45, 47, 194 P. 510; *Ex parte Armstrong*, 169 Or. 320, 128 P.2d 951, 953-954; *Richards v. Collins*, 45 N.J.Eq. 283, 17 A. 831; *Ex parte Bush*, 240 Mich. 376, 215 N.W. 367; *Ex parte Turner*, 86 Or. 590, 167 P. 1019, 169 P. 109; *Green v. Campbell*, 35 W.Va. 698, 14 S.E. 212; *Ex parte Parker*, 195 Okl. 224, 156 P.2d 584; *Application of Habeck*, 75 S.D. 535, 69 N.W.2d 353, 357; *Ex parte Flynn*, 87 N.J.Eq. 413, 100 A. 861, 862; 25 Am.Jur. 203, 205; 39 C.J.S., *Habeas Corpus*, § 41 note 93, page 569 and pocket part.

It is uniformly held that the judgment in such a proceeding is a final determination of the rights of the parties litigated therein until there has been a change in circumstances affecting the best interests of the minor or the rights of the parties, and the issues so determined are *res judicata* not only in a subsequent proceeding in habeas corpus but in any other proceeding in which the right to the custody of the minor

is put in issue. In re Holt, 34 Cal.App. 290, 167 P. 184; In re Gille, 65 Cal.App. 617, 224 P. 784; In re McDaniel, 90 Cal. App. 307, 265 P. 884; In re Gury, 103 Cal. App. 738, 284 P. 944; In re Martin, 79 Cal.App.2d 584, 586, 180 P.2d 383; In re Browning, 99 Cal.App.2d 337, 221 P.2d 736; In re Clifford, 37 Wash. 460, 79 P. 1001; Freeman on Judgments, 5th ed. vol. 2, 1764-1766; 25 Am.Jur. 253; 17 Am.Jur. 514; Annotation, 110 A.L.R. 748.¹

In Freeman on Judgments, supra, the author says (p. 1766): "The principles of public policy requiring the application of the doctrines of estoppel to judicial proceedings, in order to secure the repose of society, are as imperatively demanded in the cases of private individuals contesting private rights under the form of proceedings in habeas corpus as if the litigation were conducted in any other form. * * * 'The question of the custody of a minor child, once properly and finally adjudicated, whether in a habeas corpus proceeding or otherwise, is settled for all time, unless there be an appeal, and the judgment rendered is impregnable as against a collateral assault.'"

The courts of a majority of the other states of the Union have held that where the writ is used to determine the rights of private parties to the custody of a child an appeal will lie, although an appeal will not lie where the writ is used for its original purpose of determining whether or not a person is illegally deprived of his liberty.

Inasmuch as the proceeding is equitable in nature and as the judgment is a final determination of the rights of the petitioner insofar as it determines any issue

of fact, it would seem to necessarily follow that that order is appealable as a final order or judgment under the provisions of section 963 of the Code of Civil Procedure.

I am cognizant of the decision of our Supreme Court in the case of In re Bruegger, 204 Cal. 169, 267 P. 101, but I respectfully submit that the reasons given by the court there for its decision that an appeal would not lie from an order denying a parent the right to the custody of his child in a proceeding such as this are not valid and that the question should be reexamined by the Supreme Court and In re Bruegger overruled.

The first reason given by the court is that the adjudication is final and res judicata only so long as the facts are the same and the conditions affecting the child's welfare or the parent's right remain unchanged, and the order of the court is therefore but temporary and interlocutory.

But every order affecting the right to custody of a minor child is in the same sense temporary and interlocutory. Every such order is subject to modification or change when there is a change of circumstances affecting either the competency of the person originally awarded custody or the best interests of the child. An award of custody in an interlocutory decree of divorce is subject to modification at any time within the discretion of the court. 16 Cal.Jur.2d 557, and cases cited. The removal of a guardian and the appointment of another may be made within the discretion of the court upon the showing of a change of circumstances, 24 Cal.Jur.2d 336, 337; yet all such orders are appealable. An order removing one guardian and appointing another is expressly made ap-

1. I am not unmindful of the decision of the District Court of Appeal in Guardianship of De Brath, 18 Cal.App.2d 697, 64 P.2d 968, in which it was held that a determination of a question of fact in a habeas corpus proceeding was res judicata only in another habeas corpus proceeding. But this decision seems to me entirely unsound. The basis for the doctrine of res judicata is "the sound

public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy", Bernhard v. Bank of America, 19 Cal.2d 807, 811, 122 P.2d 892, 894, and I know of no rule which would make the rule applicable only if the issue were tendered in the same type of action or proceeding as that in which it was first decided.

pealable by statute; an order modifying a decree of custody so as to give custody to a person other than the one originally awarded custody is appealable as an order after final judgment; and an order made in a divorce proceeding awarding custody to one of the parties to the exclusion of the other is appealable as a final judgment. Yet these orders are no more final than the order made in this matter denying petitioner the right to the custody of her child.

The second ground stated is that the primary purpose of the writ of habeas corpus when used for the purpose of determining a right to the custody of a minor child is to provide a summary and speedy mode of determining that question; and the court concludes that if the right of appeal were granted, an order made would be suspended by appeal and the proceeding deprived of its efficacy. If this reason ever had validity, it was only in cases where the petition had been granted and the appeal was by the respondent; for if the writ were denied, the petitioning parent would have to await a change in circumstances in order to further assert any right, even though the superior court had erroneously determined that right.

Since the enactment in 1955 of section 949a of the Code of Civil Procedure, this second reason assigned by the court for its decision clearly loses all force, for under that section an appeal will not stay an order of the court granting a coercive writ to the parent which would give her custody of her child.

The court further states that it deems it to be definitely settled that in the absence

of legislative action an appeal will not lie in matters of this kind. It cites as establishing this rule *In the Matter of Perkins*, 2 Cal. 424; *Matter of Ring*, 28 Cal. 247; *Matter of Zany*, 164 Cal. 724, 130 P. 710, and *Matter of Hughes*, *supra*. In all of these cases the superior court, in issuing the writ, was acting under its inherent powers which are confirmed by the Constitution. In none of them was the superior court exercising its equitable powers and trying private rights as to the custody of one not a party to the proceedings, and in none of them was the ruling of that court *res judicata* as to any issue, and in each of them the petitioner had the right to successive applications in the Appellate Courts. The case is far different where the judgment of the lower court is *res judicata* and precludes a retrial of the issues of fact upon an application to the Appellate Court.

I recognize that the Supreme Court has repeatedly, in keeping with its decisions that an appeal does not lie in habeas corpus proceedings, held that it does not have power to grant a hearing after a decision by the District Court of Appeal either granting or denying a writ of habeas corpus, but in each of the decisions in which it is so held the writ was sought solely to determine the right of the People to deprive a person of his liberty, and in none of them did the court have before it the question as to whether it might grant a hearing where the purpose of the writ was to try in the Appellate Court the private rights of the parties as to the custody of a child not a party to the proceedings.

I would discharge the writ.

145 Cal.App.2d 473

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Dorothy MILLER and Neal Collins,
Defendants,

Neal Collins, Defendant and Appellant.
Cr. 5639.

District Court of Appeal, Second District,
Division 1, California.
Oct. 29, 1956.

Hearing Denied Nov. 28, 1956.

Defendant was convicted of contributing to delinquency of a minor. The Superior Court of Los Angeles County, Allen T. Lynch, J., imposed sentence and denied motion for new trial. Defendant appealed from judgment and order. The District Court of Appeal, White, P. J., held that in prosecution of defendant for contributing to delinquency of 12 year old girl who claimed to have witnessed him and her mother in act of sexual intercourse, evidence sustained finding that conduct of defendant was of such nature as to affect directly the welfare and morals of the girl, though she was not participant in act, and despite alleged inconsistencies and improbabilities in girl's testimony.

Judgment and order affirmed.

1. Infants \S 13

Minor need not be participant in act in question to sustain conviction of person of offense of contributing to delinquency of minor; statute is not to be construed as restricted to such acts or omissions as relate directly to minor. West's Ann. Welfare & Inst.Code, \S 700, 702.

2. Infants \S 13

The main purpose of statute punishing one who contributes to delinquency of minor is to remove minors from immoral and evil influences which would incline them toward state of delinquency; and this purpose is accomplished by making any act or omission which would tend to cause minor to become delinquent, a

misdemeanor. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

3. Infants \S 13, 20

Under statute relating to offense of contributing to delinquency of minor, it is not required that effect of act complained of must have had absolutely certain and unmistakable tendency to cause minor to lead idle, dissolute, lewd or immoral life; and in determining whether act in question would reasonably so affect minor, jury may apply teachings of human experience. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

4. Infants \S 20

In prosecution of defendant for contributing to delinquency of 12 year old girl who claimed to have witnessed defendant and her mother in act of sexual intercourse, evidence sustained finding that conduct of defendant was of such nature as to affect directly welfare and morals of the girl, though she was not participant in act, and despite alleged inconsistencies and improbabilities in girl's testimony. U.S.C.A.Const. Amend. 14; West's Ann. Welfare & Inst.Code, \S 700 and subd. (k); \S 702; West's Ann.Pen.Code, \S 1237, subd. 1.

5. Infants \S 13

Fact that fornication is not crime would not preclude conviction of one whose alleged act of fornication with another was witnessed by 12 year old girl for offense of contributing to delinquency of minor. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

6. Criminal Law \S 1159(4)

Alleged inconsistencies and improbabilities in testimony of 12 year old girl who claimed to have witnessed act of sexual intercourse between girl's mother and defendant, charged with contributing to delinquency of minor, were not such as to require rejection of her entire testimony, nor reversal of conviction. West's Ann. Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

7. Criminal Law \S 1159(2)

In view of rule that it is exclusive province of trier of fact to determine truth or falsity of facts upon which a determination depends, even testimony which is subject to justifiable suspicion does not warrant reversal of conviction. West's Ann. Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

8. Infants \S 20

If court, in prosecution for contributing to delinquency of minor who claimed to have witnessed act of sexual intercourse between her mother and defendant, believed testimony of girl in the main, or if court believed only that portion of her testimony bearing on immediate circumstances of commission of act charged, it was within province of trial court to base its decision upon that particular portion of her testimony, though court might have regarded statements of girl on other points as of doubtful verity. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

9. Criminal Law \S 1159(4)

Where, in prosecution for contributing to delinquency of minor who claimed to have witnessed act of sexual intercourse between her mother and defendant, it was within trial court's province to base its decision upon that particular portion of testimony of girl deemed credible by court, though court might have regarded statements of minor on other points as of doubtful verity, decision would be conclusive on appeal. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

10. Criminal Law \S 742(1)

Fact that 12 year old girl who claimed, in prosecution for contributing to delinquency of minor, to have witnessed act of sexual intercourse between her mother and defendant, had been angry with her mother at time of defendant's arrest, and had had arguments with defendant concerning her association with an older man, was matter for trier of facts to consider in determining credibility of girl as witness. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

11. Criminal Law \S 260(11), 1159(4)

Matters relating to motives of witness in criminal case are to be dealt with and determined by jury, or by trial judge if trial is to the court; and on appeal, unless it is shown that testimony of witness is inherently improbable or impossible of belief, determination of duly constituted arbiter of facts will not be disturbed.

12. Criminal Law \S 1159(4)

Where testimony of 12 year old girl who claimed, in prosecution for contributing to delinquency of minor, to have witnessed act of sexual intercourse between her mother and defendant, was not inherently false, facts established by her testimony would be taken in support of decision on appeal from conviction. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

13. Infants \S 20

Evidence is admissible in prosecution for contributing to delinquency of minor to show any conduct on part of person toward minor named in information which causes or tends to cause minor to become delinquent, whether such conduct consists in the doing of one act or a series of acts. West's Ann.Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

14. Infants \S 20

In prosecution for contributing to delinquency of minor who claimed to have witnessed act of sexual intercourse between her mother and defendant, questions asked by trial judge, in trial before court, of defendant concerning general nature of defendant's relationship with mother, and whether defendant had engaged in acts of sexual intercourse at times other than dates charged in information, were not irrelevant nor prejudicially improper. West's Ann. Welfare & Inst.Code, \S 700 and subd. (k); \S 702.

15. Criminal Law \S 1035(3)

Where defendant did not object to or move to strike allegedly improper questions asked him by court during trial, defendant could not initially on appeal assail

such conduct of trial judge. West's Ann. Welfare & Inst.Code, § 700 and subd. (k); § 702.

16. Infants ⇐20

Testimony of prosecutrix, in prosecution for contributing to delinquency of minor, that she was 13 years of age was sufficient to establish that fact. West's Ann.Welfare & Inst.Code, § 700 and subd. (k); § 702.

Samuel C. McMorris, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, appellant was charged in Count I with the offense of contributing to the delinquency of a minor, a misdemeanor, Welfare and Institutions Code, sec. 702, committed on or about June 15, 1955, in that he used and occupied a bed with Dorothy Miller, not being married to her, in the presence of Peggy Dee Miller, a minor person of the age of 12 years, and committed acts which would tend to cause the minor to lead an idle, dissolute, lewd and immoral life, and which did cause and tend to cause the minor to become and to remain a person within the provisions of Section 700, Welfare and Institutions Code of the State of California. He was charged in Count II with the crime of contributing to the delinquency of a minor on or about July 10, 1955 in the same manner as in Count I. Appellant pleaded not guilty and trial by jury was duly waived. Pursuant to stipulation, the People's case was submitted on the transcript of the preliminary examination. The minor, Peggy Dee Miller, gave further testimony and appellant testified in his own behalf. The court adjudged him not guilty of the offense charged in Count I, and guilty as charged in Count II. Motion for a new trial was denied. Appellant

was sentenced to serve a term of one year in the county jail. Execution of sentence was suspended and he was granted conditional probation. From the judgment, Penal Code, section 1237, subd. 1, and the order denying his motion for a new trial, appellant prosecutes this appeal.

With reference to the factual background surrounding this prosecution we regard the following as a fair epitome:

During the months of June and July, 1955, the prosecutrix, Peggy Dee Miller (aged 12), her mother, Dorothy Miller, and the appellant occupied a five-room apartment on Raymond Avenue in Los Angeles. Appellant and Mrs. Miller were not married to each other. The bedroom was connected to the living room by a very large door, one section of which was always open. There was a large bed in the bedroom and a couch in the living room. At least a portion of the couch was visible looking through the door from a vantage point on the bed. Sometimes Peggy slept on the couch and her mother and appellant in the bed, and other times she slept in the bed and they on the couch.

One night, around July 10, 1955, it was decided that Peggy could have the bed. It was late and she was tired so appellant and her mother told her that they would wake her and put her on the couch when they finished watching television. Some time later she awakened, heard a noise in the living room, sat up in bed, "scooted down in the bed", and peered into the living room. The room was illuminated by a small red light and she observed appellant and her mother engaged in an act of sexual intercourse. As a witness in his own behalf appellant testified he had known the prosecutrix and her mother for approximately four years; that during the aforesaid months of June and July he frequently stayed all night at the Miller abode. He testified that he would sleep on the couch on these occasions and that he never slept with Mrs. Miller. He denied having sexual relations with Mrs. Miller during this time. He admitted

having had intercourse with her during the year prior to June at his establishment but denied ever having occupied a bed with her or having sexual relations with her in the presence of the latter's daughter.

According to appellant's description of the Miller apartment a person occupying the bed could not see the couch in the living room unless he "stood up and walked".

Appellant asserted that he had developed a paternal attitude towards Peggy and was concerned about the fact that she was keeping company with an older man. He had several "discussions" with Peggy on the subject and told her on one occasion that he might call the authorities if she did not discontinue the relationship and get back to school. Peggy denied that such a threat was made.

Appellant testified further that Peggy called him about two weeks before the trial to ask for some belongings. He asked her why she had made the accusation and she told him that Juvenile Officer Kay Sheldon was "responsible for all the activity".

As his first ground for reversal appellant attacks the constitutionality of Section 702 of the Welfare and Institutions Code, contending that the statute is too vague and consequently invalid under the due process clause of the 14th Amendment to the Constitution of the United States. This contention is unavailing because it has heretofore been decided adversely to appellant by the courts of this state. *People v. Deibert*, 117 Cal.App.2d 410, 417-420, 256 P.2d 355.

[1] Appellant's next contention is that the facts alleged in the information and proved at the trial do not constitute a public offense. He insists that his conduct, as herein narrated, does not tend to corrupt the morals of a minor. That "under California law, the statute (Welfare and Institutions Code, Sec. 702) is to be construed as only such acts or omissions as relate directly to the minor." In other words, that the minor must be a

participant in the act in question before it can be said that the latter is directly affected thereby. We are not in accord with appellant's reasoning in this regard. Section 702 of the Welfare and Institutions Code provides, in part, that "Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person or ward of the juvenile court under the age of 21 years to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of any of the subdivisions of Section 700, is guilty of a misdemeanor * * *."

Among the persons under 21 years of age enumerated in Section 700 as being within the jurisdiction of the Juvenile Court is any person who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life. Sec. 700, Welfare and Institutions Code, subd. (k).

[2] The main purpose of Welfare and Institutions Code, Section 702, is to remove minors from immoral and evil influences which would incline them toward a state of delinquency. The purpose is accomplished by making any act or omission which would tend to cause a minor to become delinquent, a misdemeanor. *People v. McDougal*, 74 Cal.App. 666, 670, 241 P. 598; *People v. Calkins*, 48 Cal.App.2d 33, 36, 119 P.2d 142.

[3-5] We do not deem it proper to give to the foregoing provisions of the statute the narrow and restricted construction for which appellant herein contends. The evident object and main purpose of the

statute is preventive, and as said in *People v. DeLeon*, 35 Cal.App. 467, 470, 170 P. 173, 175: "Its intent was to put a barrier across the threshold of those entrances to downward ways which are open before the feet of youth." It is not required that the effect of the act complained of must have an absolutely certain and unmistakable tendency to cause the minor to lead an idle, dissolute, lewd or immoral life, and in determining whether the act in question would reasonably so affect the minor, the jury may apply the teachings of human experience. The statute is not to be judged in the light of the suggestions of appellant's counsel as to its possible application to suppositious cases wherein acts innocent in themselves might be held criminal according to the whim or prejudice of some judge or jury. It is not by such extreme or fanciful standards that the application of the statute is to be determined, but rather by the reasonableness of its application to the facts of a particular case. In the case at bar we are unable to say that the finding of the judge that the conduct of appellant was of such a nature as to affect directly the welfare and morals of the minor was unreasonable and without the purview of the intent and purpose of the statute. What we have herein stated does not militate against the holding in *People v. Bergotini*, 172 Cal. 717, 158 P. 198, so heavily relied upon by appellant. It is readily distinguishable from the case at bar in that none of the acts therein alleged were in the presence or with the knowledge of the minors. We cannot agree with appellant that his conduct in the presence of the minor would not tend to cause the latter to become delinquent, because fornication is not a crime in California. It certainly falls within the category of immorality which has been defined as including shameless conduct showing among other things "moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare." *Orloff v. L. A. Turf*

Club, 36 Cal.2d 734, 740, 227 P.2d 449, 453. *People v. Lamanuzzi*, 77 Cal.App. 301, 303, 246 P. 557; *People v. DeLeon*, supra, 35 Cal.App. at page 471, 170 P. 173; *People v. Baker*, 38 Cal.App. 28, 34, 175 P. 88.

[6] Appellant's contention that the evidence is insufficient to sustain his conviction because of alleged inconsistencies and improbabilities contained in the evidence presented by the prosecution and the bias of the People's witness, cannot be sustained. Appellant's argument is mainly an attempt to show certain inconsistencies and contradictions in the testimony of the minor girl. As was said by our Supreme Court in *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759:

[7-9] " * * * To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." Even testimony which is subject to justifiable suspicion does not warrant a reversal of a judgment, for it is the exclusive province of the trier of fact to determine the truth or the falsity of the facts upon which a determination depends. *People v. Huston*, supra, 21 Cal.2d at page 693, 134 P.2d at page 759. While the alleged variances and inconsistencies in the minor's testimony may have afforded opportunity for an argument to the trial judge against the reliability of her testimony, we find nothing in them from which a reviewing court could justly conclude that her entire testimony is *per se* unbelievable and that it was therefore the court's duty not only to disregard it but to accept appellant's denial thereof. The gist of the prosecutrix' narrative was that appellant and the former's mother frequently slept together and that on one occasion the witness observed them in an act of sexual intercourse. We fail to see wherein this testimony can be strictured as physically impossible or even

improbable in view of the admitted fact that appellant frequently spent the night at the Miller apartment and the admitted fact that appellant had, on at least one other occasion, had intimate relations with Mrs. Miller. The main inconsistencies alluded to by appellant relate to the exactness of the date of the act in question and to the exact position on the bed from which the witness observed the alleged act of sexual intercourse. These were matters, as above stated, for the trier of facts to consider, as was the ultimate question submitted for his decision, viz., whether or not appellant engaged in the act of sexual intercourse with the mother of the witness as alleged. If, therefore, the court, as manifestly it did, believed the testimony of the minor in the main, or if the court believed only that portion of the testimony bearing on the immediate circumstances of the commission of the act charged, and thus became satisfied beyond a reasonable doubt of appellant's guilt, it was of course within the trial court's province to base its decision upon that particular portion of her testimony, although the court might have regarded the statements of the minor on other points, as of doubtful verity. Consequently, the decision arrived at by the court against appellant is conclusive on appeal. *People v. Voice*, 68 Cal.App.2d 610, 614, 157 P.2d 436; *People v. Carlson*, 73 Cal.App.2d 933, 940, 167 P.2d 812; *People v. Lewis*, 18 Cal.App. 359, 364, 123 P. 232; *People v. Schultz*, 49 Cal.App.2d 38, 42, 120 P.2d 893.

[10-12] It is true, as appellant urges, that the prosecutrix admitted she was angry with her mother at the time of appellant's arrest and that she had had arguments with appellant concerning her association with an older man, but as has been repeatedly held, the matters relating to the motives of a witness are to be dealt with and determined by the jury, or in the instant case, by the trial judge; and, on appeal, unless it be shown that the testimony of the witness is inherently im-

probable or impossible of belief, the determination of the duly constituted arbiter of the facts will not be disturbed. *People v. Fleming*, 166 Cal. 357, 370, 136 P. 291, Ann.Cas.1915B, 881; *People v. Tom Woo*, 181 Cal. 315, 326, 184 P. 389. In the case now engaging our attention, by finding appellant guilty, the court evidently accepted the girl's testimony as being true, despite her motives, and there is nothing in the record upon which we can fairly base the conclusion that her testimony is inherently false; consequently, the facts established thereby must be taken in support of the decision.

[13-15] Appellant contends that the trial judge was guilty of prejudicial misconduct in asking appellant questions as to the general nature of the latter's relationship with the minor's mother and as to whether appellant had engaged in acts of sexual intercourse at times other than the date charged in the information. Since the trial was before the court, we perceive no prejudicial error in the questions propounded by the court. Under Section 700 of the Welfare and Institutions Code, evidence is admissible to show any conduct on the part of a person toward the minor named in the information which causes or tends to cause said minor to become a delinquent, whether such conduct consists in the doing of one act or a series of acts. The questions complained of were not irrelevant to the question of whether the minor was in danger of becoming a delinquent. *People v. Lowell*, 77 Cal.App.2d 341, 345, 175 P.2d 846. Furthermore, not having made objection to or motion to strike the questions of the court, appellant cannot now on appeal, for the first time, assail the conduct of the trial judge. *People v. Deibert*, supra, 117 Cal.App.2d at page 427, 256 P.2d at page 365.

[16] Finally, appellant contends that the testimony of the prosecutrix that she was 13 years of age was legally insufficient to establish that fact. A similar contention was rejected in the cases of *People*

v. Crownover, 34 Cal.App.2d 7, 9, 92 P.2d 929, and People v. Murray, 91 Cal.App.2d 253, 257, 204 P.2d 624.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.



145 Cal.App.2d 524

Edward C. BLACK, Jr., and Ardis B. Black,
Plaintiffs and Respondents,

v.

J. N. BLAIR & CO., a corporation, et al.,
Defendants,

J. N. Blair & Co., a corporation, Tom Wilde
and Newell R. Blair, Defendants
and Appellants.

No. 8815.

District Court of Appeal, Third District,
California.

Oct. 30, 1956.

Action was brought to rescind a contract of sale of personalty to plaintiffs and a lease of realty, and to recover detriment suffered by reason of allegedly false and fraudulent representations made by defendants with respect to profits which plaintiffs could expect from operation of ice cream business. The Superior Court of Sacramento County, Malcolm C. Glenn, J., entered judgment for plaintiffs, and certain of the defendants appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding of Superior Court that defendants, to induce plaintiffs to enter into contract, lease, and note, falsely and fraudulently made statements with respect to profits, knowing the statements to be false and that plaintiffs, believing the statements to be true, relied thereon.

Judgment affirmed.

1. Fraud ⚡(1)

Landlord and Tenant ⚡(1)

Sales ⚡(7)

In action to rescind a contract of sale of personalty to plaintiffs and a lease of realty to plaintiffs, and to recover detriment suffered by plaintiffs by reason of allegedly false and fraudulent representations made by defendants concerning profits which plaintiffs could expect to make in operation of ice cream business it was no defense that statement of one of defendants that out of every dollar taken in by plaintiffs in operation of ice cream business, 30¢ would be theirs, was inconsistent with the statement of that defendant as to specific net profits plaintiffs would receive from sales of \$50 a day and that variance should have put plaintiffs on inquiry, where defendants admitted that both statements had been made to plaintiffs.

2. Fraud ⚡(36)

Landlord and Tenant ⚡(34(5))

Sales ⚡(38(1))

In action to rescind a contract of sale of personalty to plaintiffs and a lease of realty to plaintiffs, and to recover detriment suffered by plaintiffs by reason of allegedly false and fraudulent representations made by defendants concerning profits which plaintiffs could expect to make in operation of ice cream business, any improper items of expenses reflected by plaintiffs' books, were immaterial, where items so charged did not exceed the items of expense set out by written memorandum given by one of the defendants to plaintiffs in order to induce plaintiffs to enter into the contract of sale and the lease.

3. Fraud ⚡(58(2, 4))

Landlord and Tenant ⚡(28(1))

Sales ⚡(52(7))

In action to rescind a contract of sale of personalty to plaintiffs and a lease of realty to plaintiffs, and to recover detriment suffered by plaintiffs by reason of allegedly false and fraudulent representations made by defendants concerning profits which plaintiffs could expect to

make in operation of ice cream business, evidence sustained trial court's finding that defendants induced plaintiffs to enter into the contract, lease, and note by false and fraudulent statements known by defendant to be false, and that plaintiffs, believing the statements to be true, relied thereon.

4. Fraud ⇨20

Landlord and Tenant ⇨28(1)

Sales ⇨38(7)

In action to rescind a contract of sale of personalty to plaintiffs and a lease of realty to plaintiffs, and to recover detriment suffered by plaintiffs by reason of allegedly false and fraudulent representations made by defendants concerning profits which plaintiffs could expect to make in operation of ice cream business, it was no defense that plaintiffs allegedly exhibited unbelievable ignorance in relying on absurd statements of one of the defendants.

5. Sales ⇨127

Where plaintiffs commenced ice cream business on July 21, and gave notice to defendants on November 14 that they were rescinding contract for sale of personalty and lease of realty, on ground of allegedly false and fraudulent representations made by defendants with respect to profits plaintiffs would realize from ice cream business, plaintiffs did not unduly delay their notice of rescission. West's Ann.Civ.Code, § 1691.

Dwyer & King, Sacramento, for appellants.

Wilke & Sapunor, Sacramento, for respondents.

PEEK, Justice.

This is an appeal by defendants from an adverse judgment in an action brought by plaintiffs to rescind a contract of sale of personal property, a lease of real property, and to recover the detriment suffered by reason of the false and fraudulent representations made by defendants.

The record discloses that pursuant to a letter from plaintiffs seeking information pertaining to the ice cream business, the defendant Wilde, a salesman for the defendant corporation, replied in part as follows:

"* * *

"This means that we put you in the Icecream Business.

"We help you select the location you desire.

"We either build or arrange the lease of the bldg.

"We install the equipment and open your store for you.

"And arrange the financing for a low downpayment and very easy terms.

"All that is needed is for both of us to decide on a location, receive the nod of approval from you and we do the rest. When you step out of the service you will step into a going business and we stay with you until you are completely confident you are ready and able to conduct the business yourself.

[Following paragraph typed in red letters.]

"Special Note:

"1. You are in business for yourself.

"2. You pay no royalty or franchise.

"3. Every dollar you take in is yours.

"4. You buy your supplies from whomever you wish.

"a. We suggest but these suggestions are not mandatory.

"Profits: [The words "30¢ Net" also typed in red letters.]

"For Every Dollar You Take In 30¢ Net Is Yours.

"Operators Have Proven This And Are Proving This Fact Daily.

"You Can Interview These Operators Yourself Without Our Presence.

* * *

"This letter is Forceful we admit but the facts themselves hold up and give us the confidence to make these statements. * * *"

Several meetings were held between the plaintiffs and Wilde. At all times Wilde held himself out as an expert in regard to the ice cream business. Specifically he referred to an extensive trip which he had recently taken throughout the Northwest and into Canada in company with another expert, during which he studied the operations of 40 or 50 ice cream establishments. However, at the trial it developed that he had been gone from Sacramento for a total of only five days. It was further shown that his extensive experience in the installation of retail ice cream stores consisted in the establishment of one store. In addition to the letter previously set forth, Wilde also gave to plaintiffs a written memorandum wherein he showed them by his figures what their total expenses would be; that in the summer months most stores averaged \$125 per day; that during the winter months sales would average \$65 to \$80 daily; but that on a basis of only \$50 per day, they would have a monthly profit of approximately \$600. Neither of the plaintiffs had any previous business experience. This fact was mentioned to Wilde and he was informed by them that they were therefore compelled to rely upon his judgment in all matters. At that time Black was 24 years of age, having gone directly from high school into the Air Force. Mrs. Black was 21. The negotiations were begun prior to Black's separation from the service in order that they might immediately go into a small business for themselves. The location selected was in a building owned by the defendants Newell R. Blair and his wife, Dorothy A. Blair. In the latter part of July, 1952, following certain renovations, the establishment was opened for business. To accomplish this it was necessary for plaintiffs to execute a lease of the premises with the Blairs, a contract for the purchase of equipment in the amount of \$9,583.74, and

an F.H.A. note in the sum of \$1,516.58 for the remodeling of the premises. In the early part of November, 1952, plaintiffs realized that the business was not earning what they had been led to expect by Wilde, and on the 13th of that month they gave their notice of rescission.

Upon the evidence so presented, the court found that defendants, to induce plaintiffs to enter into said contract, lease and note, falsely and fraudulently made the statements heretofore summarized, knowing the same to be false, and that plaintiffs, believing the same to be true, relied thereon. Specifically the court found that such false and fraudulent representations were that if plaintiffs would purchase the ice cream freezing equipment, specified and enter into said lease, they would earn from said business an average gross income of \$1,500 monthly from daily sales of \$50; thus earning an average monthly profit of \$633.84; and that from every dollar taken in by plaintiffs from the sale of ice cream, they would realize a net profit of 30 cents.

Defendants first contend that there was no justifiable reliance by plaintiffs in that the defendant Wilde was at most only negligent in not more fully explaining his memorandum to plaintiffs, or in not being sure that they fully understood it, and that plaintiffs were likewise negligent in relying on such absurd representations; secondly, that Wilde's statement that out of every dollar taken in, 30 cents would be theirs, was so completely inconsistent with his statement as to the specific net profits plaintiffs would receive from sales of \$50 per day as to have put plaintiffs on inquiry; and, thirdly, that in any event plaintiffs failed to use due diligence in rescinding after discovery of the alleged misrepresentations.

In support of this contention, defendants argue that the alleged misrepresentations contained in Wilde's memorandum are entirely inconsistent with the statements contained in his letter, i. e., that plaintiffs would make a net profit of 30 cents out of

each dollar taken in; that he did not intend to make any particular representations by the memorandum which he gave to plaintiffs; and that they by "their unbelievable ignorance" were confused as to what he meant. It is then argued that since what was set forth in his memorandum and what Wilde actually meant, was entirely different from what plaintiffs construed it to mean, at most he could only have been negligent in failing to explain more fully his meaning and in failing to be sure it was understood by plaintiffs, and that because the statements were so "absurd" plaintiffs were likewise negligent in relying on them.

[1,2] It would appear, however, that any variance between the actual figures as to net profit set forth in Wilde's memorandum and the 30-cent figure set forth in his original letter would be immaterial since the contents of both are admitted. It would further seem that any improper items of expense reflected by plaintiffs' books would likewise be immaterial since the items so charged did not exceed the items of expense set out by Wilde in his memorandum. The ultimate question presented, being one of fact, comes squarely within the rule of *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291, and the rule therein enunciated must control.

[3,4] Paraphrasing the holding of the court in that case, the record before us amply sustains the findings of the trial court herein that the misrepresentations were made with the knowledge that they were or might be untrue; that plaintiffs were justified in acting in reliance thereon; that if it could be said that Wilde's statements were mere expressions of opinion, nevertheless such statements were made by one who held himself out as an expert in the

field; that such facts were intentionally misrepresented and therefore the negligence, if it was such, on the part of plaintiffs was no excuse for Wilde's actions. Even assuming as defendants contend that the plaintiffs exhibited "unbelievable ignorance" or that Wilde's statements were "absurd" it is still the rule that,

"Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. See cases cited in 6 Cal.Jur.Supp. 45 (note 13); Prosser, Torts, 749. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'" *Seeger v. Odell*, supra, 18 Cal.2d 409, 415, 115 P.2d 977, 981.

[5] Defendants' final contention is likewise without merit. We cannot say as a matter of law that plaintiffs unduly delayed their notice of rescission by their operation of the business for nearly four months. They commenced business on July 21 and gave notice on November 14. As defendants note in their brief, it would take some time for a new business to get started and prove itself. Plaintiffs could not tell what their true financial situation was until at least some of their original operating expenses began to catch up with them, and they were then able to more properly compare their costs with their sales. Under such facts and circumstances it cannot be said that plaintiffs failed to act promptly upon the discovery of the facts entitling them to rescission within the meaning of Civil Code, section 1691.

The judgment is affirmed.

SCHOTTKY, J., and McMURRAY, J.
pro tem.

145 Cal.App.2d 395

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Warren WERTZ, Defendant and Appellant.
Cr. 2687.

District Court of Appeal, Third District,
California.
Oct. 24, 1956.

Defendant was convicted of sex perversion. The Superior Court, Stanislaus County, Gregory P. Maushart, J., entered order denying motion for new trial and suspended pronouncing of judgment and placed defendant on probation. The defendant appealed from order denying motion for new trial and purportedly appealed from judgment and verdict of conviction. The District Court of Appeal, Schottky, J., held that evidence was sufficient to support conviction.

Purported appeal from judgment dismissed and order denying motion for new trial affirmed.

1. Criminal Law §742(2)

In sex perversion prosecution of defendant who purportedly committed the act with complaining witness' companion before committing the act with complaining witness in presence of companion, evidence raised question for jury as to whether companion was such an accomplice to defendant's act with complaining witness that companion's testimony could not be used to corroborate complaining witness' testimony. West's Ann.Pen.Code, §§ 288a, 1111.

2. Criminal Law §899

In prosecution for sex perversion, any objection to testimony of witness for prosecution as to a prior similar act of defendant was waived where defendant's counsel admitted during discussion of objection made to such testimony that testimony would be admissible if jury was told such evidence was not for corroboration but was wholly for purpose of showing a tendency or state of mind of defendant and jury was in-

structed to that effect. West's Ann.Pen.Code, § 288a.

3. Criminal Law §372(1)

In sex perversion prosecution, testimony that on a prior occasion the witness observed the defendant commit the act with complaining witness was admissible. West's Ann.Pen.Code, § 288a.

4. Criminal Law §935(1), 1156(2)

Trial judge has broad discretion in passing on motion for new trial on ground that verdict is contrary to evidence, and his action, whether in denying or particularly in granting the motion, will not be disturbed on appeal unless it clearly appears that he abused such broad discretion.

5. Sodomy §6

In prosecution for sex perversion, evidence was sufficient to support the conviction. West's Ann.Pen.Code, § 288a.

Mark A. Joseph, Modesto, for appellant.
Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant, a man of over 77 years of age, was charged by information with the crime of violating section 288a of the Penal Code, in two counts: Count I, charging that appellant committed the act denounced by said section with James Stinson, a boy of 15 years; and Count II, charging that appellant committed the act with Charles Hopkins, a boy of 16 years. Following appellant's plea of not guilty, the case was tried and at the conclusion of the evidence the court advised a verdict of not guilty as to Count I. The jury then found appellant not guilty as to Count I and guilty as to Count II. Thereafter, the court, after denying a motion to set aside the verdict and for a new trial, ordered that pronouncing of judgment be suspended and that appellant be placed on probation for a period of five years. Appellant has appealed, the notice of appeal stating that the appeal is "from the judgment and verdict of conviction as to Count Two of the Information herein, and

also from the order of the Court denying defendant's Motion for a New Trial as to Count Two of said Information."

The factual situation as shown by the record may be briefly summarized as follows:

On the morning of January 6, 1956, two boys, James Stinson and Charles Hopkins, went together to the home of appellant Warren Wertz in the city of Modesto, Stanislaus County, California. Upon being admitted by appellant, they first went to the kitchen where the boys sat for a while, talked and flipped coins. James Stinson then went into the bedroom with appellant. At this time appellant was dressed only in a shirt and socks. Stinson and appellant undressed and while in the bedroom the appellant copulated the sexual organ of James Stinson with his (the appellant's) mouth. James then proceeded to dress and Charles Hopkins came into the bedroom. The appellant told Charles to take his clothes off, which he did, and appellant then committed the same act with Charles, while James Stinson, who testified to seeing the offense committed by appellant with Charles Hopkins, remained in the room.

Two police officers of the Modesto Police Department then arrived at appellant's residence and, after they knocked on the door for several minutes, the appellant appeared at the door clad only in a pair of pants. The appellant and the two youths were taken into custody.

[1] Appellant's first contention is that Charles Hopkins, the participant with appellant in the commission of the offense charged in Count II, was an accomplice and that his testimony is not corroborated as is required by section 1111 of the Penal Code. Appellant bases his argument upon the contention that James Stinson was an accomplice in the commission of the offense involving Charles Hopkins and that therefore the testimony of Stinson could not be used to corroborate the testimony of Hopkins, who testified to all the details of the offense charged in Count II.

Admittedly, if Stinson must be considered an accomplice in the act committed by appellant with Charles Hopkins, appellant's conviction on Count II could not be upheld. However, there is no evidence in the record that would support, much less compel, a finding that James Stinson aided, abetted or even encouraged the commission of the act of perversion by appellant and Hopkins. Furthermore, the court instructed the jury fully and correctly on the law as to accomplices and specifically instructed the jury that:

"An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the testimony and the circumstances as shown by the evidence.

"To render a person an accomplice, he or she must in some manner knowingly and with criminal intent aid, abet, assist, or participate in the criminal act. If you should find that any witness in this case so conducted himself in respect to any crime charged, you must find that he was an accomplice."

What was said in the case of *People v. McMahon*, 116 Cal.App.2d 883, at page 887, 254 P.2d 903, 905, is quite applicable to the instant case:

"Defendant's second contention is predicated upon the action of the trial court in denying his motion to dismiss Counts 3 and 4. His argument in support of this contention proceeds upon the theory that since both of the boys involved in these counts were over the age of 14 years they were therefore accomplices, and since their testimony was not corroborated it was error for the court to deny his motion. Our examination of the record does not sustain such a contention. While each of the boys was an accomplice with respect to the particular act in which

he participated the evidence does not disclose as a matter of law that he was an accomplice with respect to the acts perpetrated by defendant on the other. Both of the complaining witnesses were present at the time and place; each was the recipient of the same offer and proposition and each identified the defendant as the one who had picked them up in his car and made the propositions to them. The mere fact that each was an accomplice of the defendant with respect to the particular act engaged in by each did not in and of itself render him an accomplice as a matter of law as to the act charged against defendant with the other complaining witness. This was a question of fact to be determined by the jury and the court properly left that to the jury for its determination. *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519."

Appellant next contends that the court erred in admitting the testimony of Raymond Schinn, a boy of 14 years of age, as to similar offenses committed by appellant with Charles Hopkins. This witness was called by the People and testified that he had known the appellant for approximately eight or nine months prior to the trial. About 3:30 o'clock one afternoon some eight or nine months before the trial, this witness visited the appellant at his home. The witness was accompanied by James Stinson, Leon Stinson and Charles Hopkins. After being invited in by the appellant and after some conversation of a general nature, the appellant "made an offer to James Stinson."

At this point in the proceedings, counsel for the appellant interposed an objection and a lengthy discussion occurred between counsel and the court out of the presence of the jury. During this discussion appellant's counsel stated that in his opinion evidence of prior similar acts of a defendant were admissible where such acts were with the same victim or co-participant. Later, during the discussion on the objection, counsel stated as follows:

"Mr. Joseph: I will have no objection, Your Honor, if the jury is properly told at this time when the evidence goes in, it is not to be construed as proof of the particular acts charged in the information. It's not for corroboration, it's solely for the purpose of showing a tendency or state of mind of the defendant."

Upon returning to the courtroom, the court stated to the jury with regard to the testimony of this witness, as follows:

"* * * the evidence is to be considered by you, not as corroboration of any specific act but is permitted merely to show scheme, plan and intent of the defendant on other occasions. It is not offered as proof or as corroboration of the specific acts of which the defendant is here accused."

The witness then testified that on the occasion referred to the appellant and Charles Hopkins went into the bedroom, that the witness went into the bedroom shortly thereafter for the purpose of telling Charles that the others were going outside, and while in the bedroom the witness observed the appellant in the act of copulating the sexual organ of Charles Hopkins with the appellant's mouth.

[2,3] Thus it would appear that appellant waived any objection to the introduction of this evidence, and appellant is hardly in a position to urge it upon appeal. However, we believe that the testimony was admissible under the decisions of our appellate courts.

Other similar acts of a defendant charged with a sex offense have been held to be admissible where such acts were committed with the same person involved in the charge for which the defendant is on trial. *People v. Cox*, 102 Cal.App.2d 285, 227 P.2d 290; *People v. LaMantain*, 89 Cal.App.2d 699, 201 P.2d 598; *People v. Jewett*, 84 Cal.App. 2d 276, 190 P.2d 330. Proof of such other acts was relevant in the present case to show a common plan, scheme or design. *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924; *Peo-*

ple v. Westek, 31 Cal.2d 469, 190 P.2d 9; People v. Sykes, 44 Cal.2d 166, 280 P.2d 769.

Appellant cites the recent case of *People v. Buchel*, 141 Cal.App.2d 91, 296 P.2d 113, in support of his contention, but that case is not in point for in that case the prosecution introduced evidence of other acts of the defendant committed with persons other than the boy with whom defendant was charged with having performed acts in violation of Penal Code section 288. The present case involves proof of other acts of appellant with Charles Hopkins, the participant in the crime charged in Count II of the information.

Appellant's final contention is that the court erred in denying appellant's motion for a new trial. He points to statements of the trial judge during the trial that he would not believe Stinson and Hopkins under oath as they were perverts themselves and could have "framed" appellant. Appellant argues that such being the state of mind of the trial judge, he was required by law to grant the motion for a new trial on grounds of insufficiency of the evidence, and his failure to do so constituted an abuse of discretion.

The record shows that at the time of denying appellant's motion for a new trial the court stated:

"I have listened to enough argument in this case, I know what I am going to do. I am satisfied that the offense was committed. I am satisfied that though the evidence was very, very slight, it may be sufficient to constitute corroboration."

[4] It is hardly necessary to cite authority for the well settled rule that the trial judge has broad discretion in passing on a motion for new trial on the ground that the verdict is contrary to the evidence, and his action, whether in denying or particularly in granting the motion, will not be disturbed on appeal unless it clearly appears that he abused such broad discretion. *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934; *People v. Richard*, 101 Cal.App.2d

631, 225 P.2d 938; *People v. Alexander*, 41 Cal.App.2d 275, 106 P.2d 450, 916.

[5] The evidence amply supports the conviction of appellant and no prejudicial errors were committed.

Pronouncing of judgment having been suspended and no judgment having been entered, the purported appeal therefrom is dismissed. The order denying the motion for a new trial is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



145 Cal.App.2d 513

**The PEOPLE of the State of California,
Plaintiff and Appellant,**

v.

**YET NING YEE, Defendant and Respondent.
Cr. 3184.**

District Court of Appeal, First District,
Division 1, California.

Oct. 30, 1956.

Rehearing Denied Nov. 14, 1956.

Hearing Denied Nov. 28, 1956.

An information was filed charging defendant with possession of heroin. The Superior Court, County of San Mateo, Edmund Scott, J., entered an order dismissing the information on ground of an unlawful search and seizure, and the People of the State of California appealed. The District Court of Appeal, Bray, J., held that where federal narcotics agent, who had a warrant to search laundry and proprietor for opium, went to laundry where he found proprietor, defendant, and another, and no public offense was committed in presence of agent, and there was nothing to indicate to officers that defendant was anything other than a casual visitor, and, while agent was engaged with defendant, who had aroused agent's suspicions because he was moving around and playing with a top, other officers found opium derivative, which proprietor

admitted was his, and search of defendant's person disclosed bindles of heroin, search of defendant and seizure of heroin was illegal.

Order affirmed.

1. Indictment and Information ☞133(5)

A motion to set aside the information is the proper way to determine whether a commitment is based entirely upon incompetent evidence. West's Ann.Pen.Code, § 995.

2. Searches and Seizures ☞3(1)

Where federal narcotics agent, who had a warrant to search laundry and proprietor, for opium, went to laundry where he found proprietor, defendant, and another, and no public offense was committed in presence of agent, and there was nothing to indicate to officers that defendant was anything other than a casual visitor, and, while agent was engaged with defendant, who had aroused agent's suspicions because he was moving around and playing with a top, other officers found opium derivative, which proprietor admitted was his, and search of defendant's person disclosed bindles of heroin, search of defendant and seizure of heroin was illegal. West's Ann.Pen.Code, §§ 817, 836 and subd. 3, 995; West's Ann. Health & Safety Code, § 11500.

3. Arrest ☞71

In absence of reasonable cause, a search either before or after arrest cannot be justified merely because it revealed that defendant was in fact guilty of a felony.

4. Arrest ☞63(4)

Generally, "reasonable cause" or "probable cause" which will justify an arrest and search and seizure without a warrant, means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that person accused is guilty.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause" and "Reasonable Cause".

1. As defendant concedes the propriety of the issuance of the search warrant we

5. Searches and Seizures ☞3(1)

Where officer did not have information, which would have justified arrest of defendant, before officer searched defendant, no evidence discovered after the search could make legal a search which was illegal.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for appellant.

James Martin MacInnis, San Francisco, for respondent.

BRAY, Justice.

On the ground of an unlawful search and seizure under the rule of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, an information charging defendant with violation of section 11500, Health and Safety Code (possession of heroin), was dismissed. Plaintiff appealed.

Question Presented.

Under the circumstances here, did a search warrant authorizing search of described premises and of one Jack Yee authorize search of defendant (another person than Jack Yee) present there?

Record.

[1] Federal Narcotics Agent Prziborowski filed in a municipal court of San Mateo County an affidavit that he had reasonable cause to believe, and did believe that Jack Yee, who resided and maintained a business establishment at described premises known as Five Points Laundry, had in his possession or in or upon said premises opium, opium pipes and other paraphernalia used in the preparation, possession, use and sale of opium.¹ Armed with a search warrant issued upon said affidavit authorizing the search of the entire premises "and of every thing and place in or on said premises, and of the person of Jack Yee," Agent Prziborowski and four law enforcement officers entered the Five Points Laundry. The business establishment was divided into

deem it unnecessary to detail the allegations of the affidavit.

two sections. The front section consisted of the business office with a cash register and business counter. The rear section consisted of a laundry workroom. Also located in the rear part of the building were a bedroom and a bathroom. On entering, the officers found no one in the front section. As they proceeded towards the rear they met a man at the swinging door between the sections who told them he was the operator of the laundry. (He was later identified as Gee Yee, also known as Jack Yee, the owner of the premises (apparently the man named in the warrant).) The officers proceeded into the rear section where there were two other Chinese, one being defendant. Prziborowski told all three that he had a search warrant to search the building and was looking for a man named Yee. All three said they were named Yee. The officer did not know nor ask which one was Jack Yee. Prziborowski noticed that defendant was "milling around playing with a top or a Yoyo after I said I had a search warrant so I became suspicious of him and I went to him and I asked him if his name was Yee and he said yes, his name was Yee." Prziborowski then searched defendant and found in his watch pocket a small bindle which defendant admitted was heroin. Prziborowski then placed defendant under arrest, and upon further search, found another bindle of heroin underneath the stocking on defendant's right leg. After the search defendant said his name was "Frank Yee." At no time did he say it was Jack Yee nor was he asked if he owned or rented the premises. He later gave his name as Kim Yut Yee and Yet Ning Yee. While Prziborowski was occupied with defendant

other officers found on a table in the rear of the premises bottles which gave off the odor of and contained an opium derivative. Jack Yee admitted owning and using it. After being held to answer at the preliminary examination, defendant moved in the superior court under section 995, Penal Code, to dismiss the information.²

Was the Search and Seizure Illegal?

[2-4] We believe it was. In *People v. Soto*, 144 Cal.App.2d 294, 301 P.2d 45, 48, this court discussed the various cases applying the rule of *People v. Cahan*, supra, 44 Cal.2d 434, 282 P.2d 905, and pointed out: "The real criterion as to the reasonableness of a search is whether or not there has been the commission of a public offense in the presence of a police officer, or whether, under the facts, the police officer has reasonable grounds to believe that the defendant may have committed a felony." Here, there is no contention that prior to the search of defendant's person any public offense was committed in the presence of the officers.³ See *People v. Brown*, 45 Cal.2d 640, 642, 290 P.2d 528, supra. Therefore, we are confined to the question of whether, under the facts, the officers had reasonable grounds to believe that defendant may have committed a felony. "Reasonable or probable cause has been discussed in many cases. Generally speaking, it means "'such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.'"" *People v. Soto*, supra, 144 Cal.App.2d at page 298, 301 P.2d at page 48.⁴ At the moment of search the only fact bearing on the question

2. A motion to set aside the information is the proper way to determine whether a commitment is based entirely upon incompetent evidence. *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23; *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929.

3. Also, in the absence of "reasonable cause," a search either before or after an arrest cannot be justified merely because it revealed that defendant was in fact guilty of a felony. *People v. Simon*,

45 Cal.2d 645, 648, 290 P.2d 531; *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528.

4. As pointed out by plaintiff, Prziborowski was a federal agent and not a "peace officer" justified to make an arrest under section 836, Penal Code, as he is not included in the definition of "peace officer" in section 817. Section 836, subdivision 3, provides that a private person may make an arrest "When a felony has in fact been committed, and he has

was that defendant was on premises which the officers had reason to believe contained opium. That fact alone would not justify either his arrest or a search of defendant's person. *People v. Kitchens*, 46 Cal.2d 260, 294 P.2d 17; *People v. Soto*, supra, 144 Cal. App.2d at page 299, 301 P.2d at page 49. There was nothing to indicate to the officers that defendant was anything other than a casual visitor to the room. As said in *People v. Schraier*, 141 Cal.App.2d 600, 297 P.2d 81, 83: "There was neither knowledge of appellant's having a criminal record, nor of his being addicted to the use of narcotics. That he actually did at the time have a narcotic cigarette in his pocket cannot justify the search by the officer. * * * [A] mere suspicion does not justify the arrest or search of a person present under such circumstances. He bore no evidences of a criminal character; he had committed no act that would reasonably indicate a readiness to violate any law; he had no criminal record; no reliable informant had reported a fact or such a suspicious circumstance as would reasonably have warranted action by the law-enforcing agencies."

Plaintiff contends that defendant's "furtive conduct" constituted reasonable cause for the search. The sole basis for this claim of furtive conduct is the following testimony by Prziborowski: "* * * I noticed the defendant Frank Yee *milling around playing with a top or a Yoyo* after I said I had a search warrant so I became suspicious of him and I went to him and I asked him if his name was Yee and he said yes * *." (Emphasis added.) Just what was meant by the phrase "milling around" is difficult to determine. Generally, the term is used with reference to a group or crowd. Presumably when applied to an individual it means he was moving rapidly around the room, in this case playing with a top or yoyo while doing so. The officer did not claim that such conduct might have been caused by the

use of a narcotic or that it was in any way indicative of such use. We fail to see anything in defendant's action that would reasonably cause a person to suspect that he had narcotics in his possession.

In *People v. Kitchens*, supra, 46 Cal.2d 260, 294 P.2d 17, there is an intimation that where an officer in good faith mistakes another person for one whom the officer has reasonable grounds to believe is guilty of a felony, and searches the other person, finding on him evidence of the commission of a felony, the search and the consequent arrest is legal. Such rule, however, is not applicable here, as the officer does not claim he mistook defendant for the person named in the search warrant. There were three Yees present and the officer made no effort to find out which one was Jack, named in the warrant. Again, he knew, because he so stated in his affidavit for search warrant, that Jack was the owner of the laundry and the tenant of the premises. Moreover, he had already been told by the first person he encountered that he was the laundry owner. Thus he must have known that defendant was not the person mentioned in the search warrant.

Although the principles of *People v. Soto*, supra, 144 Cal.App.2d 294, 301 P.2d 45, apply here, the facts are different. There, before going to the room where the defendant was, the officer among other matters had reasonable grounds to believe that narcotics parties had been going on there for two weeks, and immediately before entering met a narcotic user coming therefrom who told him that he had just used narcotics therein. On entering the room the officer found the tenant asleep in bed and the defendant with his shoes off. Thus, the officer had reason to believe that the room was used for narcotics parties, that the use of narcotics therein had just taken place, and it was reasonable to assume that the only awake occupant in the room had some connection with that use,

reasonable cause for believing the person arrested to have committed it." At least two of the men accompanying Prziborowski qualified as "peace officers" under that section. The question still remains

whether any of the peace officers or Prziborowski as a private person had reasonable cause to believe defendant had committed or was committing a felony.

and was concerned in it. In our case, while the agent's affidavit stated that the room had opium in it, there was no statement nor information that the room was used for the use of narcotics nor for the sale thereof. There was nothing to justify the assumption that any one other than Jack Yee, who was alleged to be the possessor of any narcotics in the room, had any knowledge of their presence.

The most serious question in the case is whether the discovery of the opium derivative constituted probable cause which would have justified the officers in arresting and searching the three persons then on the premises, and if so, whether such fact would have eliminated the taint of illegality in the original search of defendant. On a table in the back of the laundry bottles were found. A jug was found in a shelf or compartment under the table. The bottles smelled of opium derivative. The jug was half full of a liquid which smelled similarly. Gee Yee (Jack Yee) admitted ownership of the bottles and said the "Yen Shee Shuey" was his. Two of the bottles and the jug contained considerable quantities of opium derivative. In the living quarters there was a smell of opium. (There was no evidence that defendant had been in the living quarters.) Prziborowski stated in the affidavit for search warrant that he had been advised by a reliable person that the latter had made purchases of opium from Jack Yee and that Jack kept and possessed opium at the laundry premises. Defendant was in the room where this contraband was, and his action "milling around" and playing with a yoyo or top, might justify a belief that his presence in the room had not been momentary but of some duration, and therefore might justify a reasonable suspicion that he had some connection with the contraband that was visible in his immediate presence. This might have justified an arrest of all three men, including defendant. Assuming that it would, such fact would not legalize the preceding illegal search. It has been held that where an arrest for a felony committed in the presence of an officer is lawful, a search incidental to such arrest is not un-

lawful merely because the search *preceded* rather than *followed* the arrest. *People v. Boyles*, 45 Cal.2d 652, 655, 290 P.2d 535; *People v. Simon*, *supra*, 45 Cal.2d 645, 649, 290 P.2d 531. However, that rule is based upon the requirement that "the officer had reasonable cause *before the search* to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. See, *United States v. Rabinowitz*, 339 U.S. 56, 60-64, 70 S.Ct. 430, 94 L.Ed. 653." *People v. Simon*, *supra*, 45 Cal.2d at page 648, 290 P.2d at page 533; emphasis added. As further said in the *Simon* case, 45 Cal.2d at page 648, 290 P.2d at page 533: "Thus, *if the officer is entitled to make an arrest on the basis of information available to him before he searches*, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest." (Emphasis added.)

[5] As we have pointed out hereinbefore, the officer did not have information before he searched defendant which would have justified an arrest. Thus, no evidence discovered after the search could make legal a search which was illegal. See *People v. Brown*, *supra*, 45 Cal.2d 640, 290 P.2d 528 and cases therein cited, to the effect that "a search, whether incident to an arrest or not, can not be justified by what it turns up", 45 Cal.2d at page 643, 290 P.2d at page 530, and "If, therefore, it is necessary to rely on the search to justify the arrest, the conclusion is inescapable that a search that cannot be justified by what it turns up cannot justify the arrest." 45 Cal.2d at page 644, 290 P.2d at page 530.

The order dismissing the information is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

145 Cal.App.2d 509

**KERLEY CHEMICAL CORPORATION, a
California Corporation, doing business as
Southwest Fertilizer and Chemical Co. of
California, Plaintiff and Appellant,**

v.

Troy COLBOCH, Defendant,

**Tom C. Benson, Third-Party Claimant and
Respondent.**

Civ. 5255.

District Court of Appeal, Fourth District,
California.

Oct. 29, 1956.

Rehearing Denied Nov. 20, 1956.

Hearing Denied Dec. 24, 1956.

Action wherein plaintiff attached certain aircraft on theory that it was property of defendant. Another filed third-party claim alleging that he owned chattel mortgage on airplane. Upon hearing, the Superior Court of Orange County, Robert Gardner, J., entered order finding that third-party claim was valid, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that where chattel mortgage was stamped as received by Civil Aeronautics Administration on February 14, and as received by administration and records branch of C.A.A. on February 15, mortgage was, on February 15, filed for recordation, within federal statute putting others on notice of mortgage if filed for recordation, though, in response to request of mortgagee for return of mortgage for purposes of local recording, administrator returned original so that mortgagee could submit required certified copy in such case, and though mortgage was received second time on March 4 and recorded on March 9, after attachment of aircraft on March 2.

Order affirmed.

1. Aviation ⇨14

Where seller who obtained chattel mortgage on aircraft which he had sold requested that Civil Aeronautics Administrator, to whom instrument had been sent for recordation, return original "if possible" for local recording purposes, request was not condition to instrument's being filed for

recordation, and did not constitute withdrawal of request for filing already made, and did not affect time at which mortgage had been filed for recordation, within federal recording statute affecting aircraft. Civil Aeronautics Act of 1938, § 503, 49 U.S.C.A. § 523; West's Ann.Civ.Code, § 2958a.

2. Aviation ⇨14

Chattel mortgage, which seller of aircraft sent to Civil Aeronautics Administrator for recordation, was filed for recordation, within federal statute relating to recording conveyances and mortgages of aircraft, when it was stamped as received by administration and records branch of Civil Aeronautics Administration. Civil Aeronautics Act of 1938, § 503, 49 U.S.C.A. § 523; West's Ann.Civ.Code, § 2958a.

3. Aviation ⇨14

Chattel Mortgages ⇨150(1)

Where chattel mortgage was stamped as received by Civil Aeronautics Administration on February 14, and as received by administration and record branch of Civil Aeronautics Administration on February 15, mortgage was, on February 15, filed for recordation, within federal statute putting others on notice if mortgage is filed for recordation, though, in response to request of mortgagee for return of mortgage for purposes of local recordings, administrator returned original so that mortgagee could submit required certified copy, and though mortgage was received second time on March 4, and recorded on March 9, after attachment of aircraft by third person on March 2. Civil Aeronautics Act of 1938, §§ 1, 503, 49 U.S.C.A. §§ 401, 523; West's Ann.Civ.Code, § 2958a; West's Ann.Code Civ.Proc. § 689.

4. Aviation ⇨14

Where aircraft chattel mortgage was stamped received by administration and records branch of Civil Aeronautics Administration on certain date, it would be assumed that record thereof had been kept by Civil Aeronautics Administration, despite fact that administrator returned original to mortgagee for purpose of submitting

certified copy in lieu of administrator's retention of original. Civil Aeronautics Act of 1938, § 503, 49 U.S.C.A. § 523; West's Ann.Civ.Code, § 2958a.

Winthrop O. Gordon, Santa Ana, for appellant.

No appearance for respondent.

BARNARD, Presiding Justice.

This appeal is presented on a settled statement, the facts being undisputed. On March 2, 1955, the plaintiff brought this action and on the same day attached a certain Piper aircraft on the theory that it was the property of the defendant. Thereafter, Tom C. Benson filed a third-party claim alleging that he is the owner of a chattel mortgage on the airplane securing a note for \$7,158, and asking for proper relief. A hearing to determine title was held, in accordance with Section 689 of the Code of Civil Procedure, at which certain letters and certified copies of certain documents material to the matter were received as exhibits. After argument the matter was submitted, and the court entered an order finding that Benson's third-party claim is valid. The plaintiff has appealed from that order.

On February 9, 1955, Benson sold this airplane to Colboch and executed a bill of sale which recited that it was subject to a chattel mortgage, dated February 8, 1955, for \$7,158 in favor of Benson. On February 9, Colboch executed a chattel mortgage on this airplane in favor of Benson for \$7,158. On February 9, Benson's attorneys mailed this bill of sale and chattel mortgage to the Civil Aeronautics Administration in Washington, D. C. with a letter stating that the certificate of registration should be returned to the new owner, and also stating "Please record the chattel mortgage as a lien against this air craft and return, if possible, the chattel mortgage so that it may be recorded in Pinal County, Arizona." The bill of sale is stamped by the Civil Aeronautics Administration as received on February 14, 1955, and as re-

corded on February 18, 1955 at 9:56 A.M. The chattel mortgage is stamped as received on February 14, 1955; as received by "Admin. & Records Branch" on February 15, 1955, at 8:45 A.M.; again as received by Admin. & Records Branch on March 4, 1955 at 2:41 P.M.; and as "recorded" on March 9, 1955, at 4:00 P.M. It was also recorded in Pinal County, Arizona on March 28, 1955.

The reason why this chattel mortgage was received by the Admin. & Records Branch of the C.A.A. on February 15 and again on March 4, is explained by a letter written by the chief of that branch to Benson's attorneys dated February 23, 1955. This letter admits the receipt of "documents covering Piper air craft" and check for filing fees, and states that this aircraft was registered in the name of Colboch on February 18, 1955, and certificate of registration forwarded to him on that date. The letter then goes on to reply to the request that the chattel mortgage itself be returned to the attorneys by stating that when the return of such a conveyance is desired a certified copy must accompany the original instrument; that "after recordation is completed" the certified copy will be retained in that office and the original returned; and that they are returning the original mortgage therewith in order that it might be resubmitted together with the certified copy.

Section 2958a of the Civil Code provides that the mortgage of any aircraft registered and licensed under Federal laws is void as against outside persons unless the mortgage is registered or recorded in accordance with the Federal laws. Section 523 of Title 49 of the U.S.Code Annotated, provides that the administrator shall maintain a system for recording any conveyance which affects the title to, or any interest in, any civil aircraft; that no conveyance the recording of which is thus required shall be valid as against outsiders until such conveyance "is filed for recordation in the office of the Administrator"; that each conveyance thus recorded "shall from the time of its filing for recordation be valid as to all persons without further or other recor-

dation"; and that the administrator shall keep a record of the time and date of the filing of conveyances with him, and also of the time and date of recordation thereof. In Section 401 of Title 49, the definition of a conveyance includes a mortgage or other instrument affecting the title to or an interest in the property.

The appellant contends that when it attached this airplane on March 2, 1955, this chattel mortgage was not of record with the C.A.A. as required by law, and hence was void as to the rights of appellant and the third party claim was therefore invalid. It is argued that the requirement of the Federal statute that the conveyance be "filed for recordation" before it is valid should be construed not only as requiring that the instrument be received in the Federal office with the intent that it be recorded, but also that the instrument be permanently retained in that office as a public record; that in this case the mortgage was offered for filing only subject to the condition that the original could be returned after it was recorded; that since this could not be done, under the rules of the department, the mortgage was not "filed for recordation" but was returned in order that a proper request for filing could later be made; and that it follows that this mortgage is void as to appellant's rights, since it had not been filed for recordation when the airplane was attached on March 2. The appellant relies on such cases as *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501; *Leeper v. Ginsberg*, 58 Cal.App.2d 591, 139 P.2d 859; *In re Estate of Carroll*, 190 Cal. 105, 210 P. 817, in which it has been stated that a paper is said to be filed when it is delivered to the proper official with the intention that it shall be retained in that office as a part of the official record.

The Federal statute contemplates a delay between filing such a document for recordation in the office of the administrator, and the actual recordation thereof. The exhibits here indicate that such a delay normally occurs in practice since the certificate of registration by which title to the airplane

passed to Colboch is stamped as received on February 14 and as recorded on February 18; and the chattel mortgage was received the second time on March 4 and is stamped as recorded on March 9. Apparently it was because such a delay was to be expected, and to prevent that delay from affecting the time at which the conveyance or lien should take effect, that the statute specifically provided that the instrument should be valid from "the time of its filing for recordation".

[1-3] This mortgage was on February 9 sent to the department with the request that it be recorded as a lien against this aircraft, and it was received by the department on February 14 and by the Records Branch on February 15. The request that the instrument be returned to the attorneys after recordation "if possible" was not a condition to its being filed for recordation. It did not constitute a withdrawal of the request for filing already made, and it did not affect the time at which the mortgage had been "filed for recordation". The department recorded the bill of sale and five days later wrote the letter of February 23 stating that if the return of the original document was desired a certified copy must be sent, sending the original mortgage so that this could be done, and stating that they were retaining the filing fee pending the return to them of the mortgage with a certified copy. It rather clearly appears that the department had received and accepted the mortgage as being "filed for recordation", and that the original was returned merely to accommodate the mortgagee by enabling him to substitute a certified copy after the recordation should be completed, and not because the mortgage had not already been filed for recordation. The mortgage was sufficiently "filed for recordation" on February 15; under the terms of the statute it was valid from that time; and the evidence supports the court's finding and order to that effect.

[4] The appellant further argues that if it had examined the record in the office of the C.A.A. it would have found only the

record of the bill of sale, which stated that the mortgage to Benson for \$7,158 was dated February 8, 1955, and that it would have found no record of such a mortgage to Benson for \$7,158 dated February 9, 1955. The mortgage in question having been filed for recordation at least on February 15, 1955, it must be presumed that a record thereof was kept since the statute requires the administrator to keep in his office a record not only of the time and date of recordation of an instrument but also the time and date of the filing of the same for recordation.

The order appealed from is affirmed.

GRIFFIN, J., concurs.



145 Cal.App.2d 401

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

George Albert THOMAS, Defendant and
Appellant.

Cr. 1213.

District Court of Appeal, Fourth District,
California.

Oct. 24, 1956.

Defendant was convicted of armed robbery. The Superior Court of Fresno County, Edward L. Kellas, J., entered judgment and an order denying a new trial, and the defendant appealed. The District Court of Appeal, Griffin, J., held that evidence that defendant entered liquor store with his hand in his jacket pocket and with the handle of a gun visible to attendant of liquor store, and that defendant demanded money and a loaded army automatic, which attendant had under the counter, and that defendant took the automatic and threatened to shoot the attendant if he moved, justified jury in finding that

the robbery was committed by means of a deadly weapon and that the perpetrator intended to use it as a deadly weapon, if necessary.

Judgment affirmed.

1. Criminal Law Ⓒ566

In prosecution for armed robbery, fact that there were allegedly discrepancies in the testimony of prosecution witnesses pertaining to weight, height, and clothing of defendant went to the weight of the testimony of the witnesses and did not make their testimony, per se, unbelievable. West's Ann.Pen. Code, §§ 211, 211a.

2. Robbery Ⓒ24(5)

In prosecution for armed robbery, evidence that defendant entered liquor store with his hand in his jacket pocket and with the handle of a gun visible to attendant of liquor store and demanded money established that attendant did not voluntarily part with the money and that the money was taken by means of force or fear. West's Ann.Pen.Code, §§ 211, 211a.

3. Robbery Ⓒ24(1, 2)

In prosecution for armed robbery, evidence that defendant entered liquor store with his hand in his jacket pocket and with the handle of a gun visible to attendant of liquor store and demanded money and a loaded army automatic, which the attendant had under the counter, and that defendant took the automatic and ordered attendant to lie down on the floor and threatened to shoot him if he moved, justified jury in finding that robbery was committed by means of a deadly weapon and that the perpetrator intended to use it as a deadly weapon, if necessary. West's Ann.Pen.Code, §§ 211, 211a.

4. Criminal Law Ⓒ763(9)

In prosecution for armed robbery, trial court did not, by intimation, instruct jury that the degree of the crime was unquestionably of the first degree, because trial court informed jury that if defendant committed the offense as charged, it would

be first degree, that is, perpetrated with a dangerous or deadly weapon, and that all other kinds were of the second degree, and that it was the duty of the jury to fix the degree. West's Ann.Pen.Code, §§ 211, 211a.

5. Criminal Law §1170(2)

In prosecution for armed robbery of liquor store, it was not prejudicial error for the trial court to preclude the defense from showing the disposition of several prior arrests of defendant in connection with a prior robbery of the liquor store, where defendant later brought out by his testimony that he had previously been accused of robbery of the liquor store and that later someone else had been convicted of the crime.

George Albert Thomas, in pro. per.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was convicted by a jury of the crime of armed robbery (first degree) of one William Koussa on January 25, 1956. He admitted a prior conviction of robbery (first degree) on April 25, 1951, and service of a sentence in a State prison. On appeal, defendant argues insufficiency of the evidence to support the verdict of guilty of robbery in the first degree; error in instructions, and in not admitting certain evidence; and that the verdict was a miscarriage of justice.

A robbery took place at Dan's Liquor Store in Fresno, at 10:15 p. m. on Wednesday, January 25, 1956. Defendant was identified by an employee of the store from whom he took \$100 in business money and \$36 in personal money. He entered the liquor store with his hand in his jacket pocket. The handle of a gun was seen by the attendant. He demanded the money and a gun (45 caliber loaded army automatic) which the attendant had under the counter. He took it and ordered him to

lie down on the floor, face up, and threatened to shoot him if he moved. Later, defendant left by the main door and was seen by another witness who was just coming into the store. This witness recognized defendant and followed him after being informed that he had just robbed the employee. He had seen him in his place of business just around the corner a few minutes before. His testimony was corroborated by another witness who also saw defendant between 9 and 10 o'clock that evening in the same place with a man named White. White testified he met defendant on the street that evening and drove him to the vicinity of that place of business and defendant later left him. Defendant was apprehended and was identified by two of these witnesses in a police lineup.

The gist of defendant's defense was an alibi claiming he caught a freight train in Fresno about noon on Wednesday, January 25th and went to Sacramento on personal business; that he arrived there about 7:30 p. m. and ate in the Bee Coffee Shop on Third Street that Wednesday evening and remained in Sacramento until the next morning; that he then caught a train to Stockton; that about 4 o'clock in the afternoon he rented a room in the Taft Hotel under the name of Richard Patterson and later visited some relatives; and that he then returned to Fresno to join his wife and children whom he left because of some argument.

His relatives testified to receiving a telephone call from defendant in Stockton on January 25th and the next day defendant visited them. On rebuttal the owner of the Bee Coffee Shop testified that her shop was always closed on Wednesdays and accordingly defendant could not have been eating there on that day. The landlady of the hotel testified defendant rented a room in Stockton on the morning of the 26th of January, at 8 a. m.

[1-3] Defendant related a story to the officers somewhat in conflict with his testimony given on the witness stand. He

attacks the testimony of the various witnesses for the prosecution for certain claimed discrepancies pertaining to his weight, height, the clothing he was wearing, etc., but this went to the weight of their testimony and would not make their testimony, per se, unbelievable. *People v. Garrow*, 130 Cal.App.2d 75, 82, 278 P.2d 475. He also claims the victim voluntarily parted with the money and that the evidence did not show it was taken by means of force or fear. We see no merit to this argument. *People v. Gardner*, 128 Cal. App.2d 1, 274 P.2d 908. It is then contended that the evidence did not show defendant was armed with a deadly weapon nor that he intended to use one. In fact the evidence shows that he was possessed of one, the handle of which was seen by the complaining witness. He also had possession of the one taken from the complaining witness when he was told to lie down and if he moved defendant would shoot him. The jury was justified in finding that the robbery was committed by means of a deadly weapon and that the perpetrator intended to use it as a deadly weapon, if necessary. *People v. McKinney*, 111 Cal. App.2d 690, 693, 245 P.2d 24; *People v. Wallace*, 36 Cal.App.2d 1, 97 P.2d 256.

[4] The next argument is that the court instructed the jury, by intimation, that the degree of the crime was unquestionably of the first degree. This conclusion arose when the jury returned for clarification of an instruction given as to the duty of the jury to fix the degree of the crime. The court informed it that defendant was charged with "Armed robbery which in itself is robbery in the first degree. The information could have charged him with just robbery. But since he is charged with armed robbery, under the definition I gave you, that constitutes rob-

bery in the first degree. However, the jury must fix the degree of the crime, and that is the reason the blank is left. I will read the definition." Then follows the definition of robbery as set forth in the Penal Code, §§ 211 and 211a. We perceive no justification for the claim. The court informed the jury that if defendant committed the offense as charged (armed robbery) it would be first degree, i. e., perpetrated with a dangerous or deadly weapon, and that all other kinds were of the second degree. It specifically stated that it was the duty of the jury to fix the degree. No possible prejudicial error resulted. *People v. Collier*, 113 Cal.App.2d 861, 869, 249 P.2d 72.

[5] Lastly, defendant contends that the court erred in refusing to admit certain evidence indicating that this charge stemmed from some past accusation. Defendant, on direct examination, testified to having been arrested on numerous occasions, including one in connection with an incident involving this same store. The defense was precluded, on objection by the people, from showing the disposition of these several arrests. Later, defendant brought out by his testimony that he was accused of robbery of this place once before and later someone else was convicted of that crime and he claimed that someone was "putting the finger" on him. We perceive no prejudicial error in this ruling. *People v. Spreckels*, 125 Cal.App.2d 507, 514, 270 P.2d 513. No miscarriage of justice resulted from the verdict. *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243. The record discloses that no motion for new trial was made. The attempted appeal therefrom is dismissed.

Judgment affirmed.

BARNARD, P. J., concurs.

145 Cal.App.2d 466

James M. DOBBINS, Plaintiff,

v.

Lillian R. DANDINI, Defendant and Appellant.**REMILLARD BRICK COMPANY, a corporation, Intervenor and Appellant,**

v.

W. C. THOMPSON and Concrete Materials Co., a corporation, Defendants in Intervention and Respondents,**James M. Dobbins, Defendant in Intervention.****No. 16924.****District Court of Appeal, First District,
Division 1, California.****Oct. 29, 1956.**

Action to recover for gravel allegedly wrongfully removed from property wherein defendant claimed an offset for paving, sewer and electrical work. From an adverse judgment in the Superior Court, County of San Mateo, Edmund Scott, J., the intervenor appealed. The District Court of Appeal, Agee, J. pro tem., held that the evidence justified the trial court in concluding that any claim to removal of gravel was satisfied by the execution and delivery of a deed to the property from the defendant to the intervenor.

Judgment affirmed.

1. Work and Labor ☞26

In action to recover for gravel removed from property owned by the intervenor, defendants claiming an offset for paving sewer and electrical work performed for the intervenor had the burden of proving the offset.

2. Accord and Satisfaction ☞26(3)

In action to recover for gravel allegedly wrongfully removed from the property of intervenor, evidence established that any claim as to removal of gravel was satisfied by execution and delivery and acceptance of a deed to the property executed by the defendant to the intervenor.

Johnson & Harmon, San Francisco, for appellants.

Carr, McClellan, Ingersoll & Thompson, Burlingame, for respondents.

AGEE, Justice pro tem.

Appellant Lillian R. Dandini is the sole stockholder of appellant Remillard Brick Company, a corporation, and the two are treated as one in this litigation. Respondent W. C. Thompson and his wife are the sole stockholders of respondent Concrete Materials Company, a corporation, and are likewise treated herein as one. The judgment appealed from is based upon findings and conclusions that appellants owe respondent Thompson \$9,615 for certain paving, sewer and electrical work and that respondents owe appellants \$4,528.72 for gravel wrongfully removed by respondents from property owned by appellant Remillard Brick Company, leaving a balance of \$5,086.28 owing from appellants to respondent Thompson. The sole ground of appeal is that the offset allowed was not enough.

By written lease, Remillard Brick Company leased to Concrete Materials Company some 160 acres of land near Pleasanton for the purpose of removing gravel. The rental was based upon the amount of gravel removed, with a minimum rental of \$300 a month.

Between the land leased and the county road running between Pleasanton and Livermore was a strip of land owned by Remillard Brick Company which was not included in the lease. Without permission or right, respondents removed or caused to be removed from this strip a quantity of gravel. The amount so removed is the sole question in dispute, both sides agreeing that the valuation of 25¢ per ton is fair.

The gravel was removed from two excavations, referred to as the East Pit and the West Pit. The West Pit was an excavation dug by Thompson. One end of it extended into the unleased strip. The East Pit was dug by one Armstrong and was entirely on the unleased strip. Armstrong removed gravel only from the East Pit,

under an agreement with Thompson to pay him for it according to the tonnage removed. Armstrong testified that he removed approximately 18,000 tons from the East Pit. Two invoices from Thompson to Armstrong for 7,514.5 tons and 10,599.4 tons, respectively, were admitted in evidence and Armstrong testified that these covered all of the gravel removed by him from the unleased property. It was on this basis that the trial court, computing the offset at 25¢ per ton, reached the figure of \$4,528.72, a mathematical error of 24 cents.

Armstrong was also questioned about two other invoices for 775.95 tons and 274.80 tons, respectively, but he stated that the gravel covered by these invoices was not taken from the unleased property. As against this, appellants produced a civil engineer who made certain calculations from the size of the two excavations and concluded that a much larger quantity of gravel must have been removed than that acknowledged by Armstrong and Thompson. However, this merely presented a question of fact to be determined by the trial judge, who quite evidently believed Thompson and Armstrong as to the amount removed by them from the East Pit.

[1,2] It must be kept in mind that appellants had the burden of proving their offset and that their case depended largely upon the testimony of the civil engineer, of whom the trial judge said: "I frankly can't give that young man's testimony much weight, because he was so indefinite."

Armstrong did not remove any gravel from the West Pit but it appears that Thompson did. However, the trial court made no allowance to appellants for this. Respondents assert that this was proper because any claim that appellants had was settled and satisfied by the deeding of a piece of land in Hillsborough to appellants. Respondent Thompson testified as follows: "I wasn't positive, but what my foreman

might have encroached on her line a little but [bit], taken a little bit out of there, but I didn't go to the expense of having a survey made." Accordingly, he stated that he told appellant Dandini: "'Well, if you think for a minute that I have taken any gravel out of there, or I owe anything, I will be glad to donate this piece of property to you, in payment for anything you think I might have, might have taken,' because, I said, 'the property runs along Remillard Drive and is too small for a lot and too shallow.'" He testified further: "I gave it to her, and she accepted it, and I thought that was the end of it, and it was for quite a time afterwards." The property deeded was approximately 100 feet in length and adjoined other property owned by appellants. There was no testimony as to its value. Appellant Dandini did not deny that respondent Thompson made the offer of settlement and she admitted that she accepted the deed. Her version is somewhat equivocal, as will appear from the following:

"Mr. Kleefisch [counsel for respondents]: Isn't it a fact that Mr. Thompson, at about that time, had a conversation with you, and stated to you that, because you had some idea that he had taken some of your gravel, if you wouldn't consider accepting that piece of property and calling it quits between you?

"The Witness: Well, I never agreed to it. He might have offered it, but I never agreed to it. * * *

"Q. You recorded the deed? A. Because I really didn't care."

Under this state of the record, the trial court was justified in concluding that any claim as to the West Pit was settled and satisfied by the execution, delivery and acceptance of the deed.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

145 Cal.App.2d 428

Cite as 302 P.2d 629

In the Matter of the ESTATE of
Loreen E. PALMER, deceased.

Herbert A. PALMER, etc., et al.,
Defendant and Appellant,

v.

Katharine Ann McBRIDE, Deanna McBride
and Norman L. McBride, III, by their
Guardian ad litem, Norman L. McBride,
Jr., Contestants and Respondents.

Civ. 21468.

District Court of Appeal, Second District,
Division 3, California.

Oct. 25, 1956.

Rehearing Denied Nov. 14, 1956.

Hearing Denied Dec. 19, 1956.

Action to revoke probate of will. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered judgment revoking probate of will and proponent appealed. The District Court of Appeal, Shinn, P. J., held that where proponent's appeal from judgment revoking probate of will was based on claim that findings of undue influence were without substantial support in evidence and proponent's brief contained statements of evidence favorable to proponent and completely ignored evidence adverse to proponent, brief was flagrant violation of settled practice in reviewing courts.

Affirmed.

1. Appeal and Error §757(3)

On proponent's appeal from judgment revoking probate of will, in advancing contention that evidence and inferences most favorable to contestants did not furnish substantial support for findings of exercise of undue influence by proponent, it was incumbent upon proponent to point out claimed weakness of evidence which necessitated a fair statement of evidence either in brief or in a supplement.

2. Appeal and Error §757(3)

Where proponent's appeal from judgment revoking probate of will was based on claim that findings of exercise of undue influence were without substantial support in evidence and proponent's brief contained statements of evidence favorable to pro-

ponent and completely ignored evidence adverse to proponent, brief was flagrant violation of settled practice in reviewing courts.

3. Appeal and Error §1010(1)

A claim of insufficiency of evidence to justify findings, consisting of mere assertion without fair statement of evidence, is entitled to no consideration, when it is apparent that a substantial amount of evidence was received on behalf of respondents.

4. Appeal and Error §758(3)

An appellant is not permitted to evade or shift his responsibility by brief which is mere challenge to respondents to prove that court was right and which is an attempt to place upon reviewing court burden of discovering any weakness in argument of respondents.

5. Appeal and Error §757(3)

When an appellant makes an obviously one sided and unfair statement of evidence which he claims to be insufficient to support findings, court will not make an independent study of record.

6. Wills §166(1)

In action to revoke will, evidence was sufficient to justify a finding that proponent accomplished execution of will through and by means of exercise of undue influence.

7. Wills §314

Where contestants did not deny that they understood that depositions to be taken were those of husband and wife who were friends of testatrix and contestants did not assert that they were unaware of fact that wife was known by given name used by proponent in applying for commission and did not suggest that they were misled by use of wrong name, deposition of wife was improperly excluded on ground that it was not deposition of person named in commission.

8. Appeal and Error §1026

A litigant should not be penalized for mere error of procedure which misled or harmed no one.

9. Appeal and Error ⇨1039(13)

Variances between pleading and proof are to be disregarded unless they mislead adverse party to its prejudice. West's Ann.Code Civ.Proc., § 469.

10. Action ⇨66
Pleading ⇨400

Errors and defects in pleadings and proceedings which do not affect the substantial rights of parties must be disregarded in every stage of the action. West's Ann.Code Civ.Proc., § 475.

11. Wills ⇨400

Where deposition of husband in action to revoke will was far more comprehensive and explicit than was deposition of wife and deposition of wife was but a repetition of some statements of husband, error in excluding wife's deposition was not prejudicial. West's Ann.Code Civ. Proc., § 475.

Frederick G. Stoehr, Pasadena, for appellant.

Calvin L. Helgoe and John K. Ford, Los Angeles, for respondents.

SHINN, Presiding Justice.

Loreen E. Palmer was the surviving wife of Norman L. McBride. On or about November 16, 1947, she went to Yuma with Herbert A. Palmer where she was married to him. She died December 8, 1949, at the age of 58. On July 23, 1948, she executed a will in which she made certain bequests to her mother, Elizabeth Thornton Bernin, to Katharine Ann McBride, and to Hugh Kingsbury, and the remainder of her estate she left to trustees for the support and maintenance of her mother during her lifetime. Upon the death of the mother the trust was to terminate and the corpus remaining was to go to Katharine Ann McBride, Deanna McBride and Norman L. McBride, III (erroneously mentioned in the will as Norman L. McBride, Jr.), grandchildren of the deceased husband. There was also a bequest of \$4,000 of the trust estate to be used upon certain conditions for the education of a nephew of the

deceased husband of testatrix. Elizabeth Thornton Bernin predeceased testatrix and the three McBride children first named claim the interests which they were to receive under the will. The 1948 will recited: "Fourth: I am intentionally making no provision in this my Will for my husband Herbert A. Palmer, for the reason that all of the property comprising my estate is my separate property, the same having been acquired prior to my marriage to Herbert A. Palmer." Mrs. Palmer made another will September 30, 1949. It recited that she had no children of her own. She left three paintings to Hugh Kingsbury, another painting to Mrs. Oreena O'Neill, an emerald ring to Katharine Ann McBride and the remainder of her estate to her husband provided that if he failed to survive her by 180 days the same was to go to Katharine, Deanna and Norman McBride III; if Herbert A. Palmer and said children did not survive distribution, the estate was to go to the daughters of Herbert A. Palmer, residents of Pleasantville, New York. The will contained a clause disinheriting any beneficiary who might oppose the will. Herbert A. Palmer was named as executor to act without bond. Upon his petition the will was admitted to probate and he was appointed executor. Katharine, Deanna and Norman III filed a petition to revoke the will. They allege (1) nonexecution; (2) incompetency of testatrix; (3) the exercise of undue influence by Herbert A. Palmer through advantage taken of his confidential relationship toward decedent; (4) the actual exertion of undue influence upon testatrix by Herbert A. Palmer; (5) the making of false accusations and representations to testatrix by said Palmer concerning the contestants by which she was induced to execute a will in his favor to the exclusion of contestants. Herbert A. Palmer answered. The action was tried to the court; findings were against the contestants except as to the third and fourth grounds of contest. The court found that a confidential relationship existed between testatrix and Herbert A. Palmer; that he un-

duly profited by the will of September 30, 1949, was active in its preparation, that he solicited the execution of the document, took advantage of the illness from which his wife was suffering, dominated her mind and will so as to bring about its execution and that but for the conduct of said Herbert A. Palmer she would not have executed the will. Judgment was entered revoking probate of the will. Herbert A. Palmer appeals.

We shall discuss the grounds of appeal in order.

The first ground is "There is no evidence of undue influence at the time the will was executed"; the second ground "Circumstantial evidence which might raise a suspicion is insufficient to prove undue influence"; the third ground "Contestant's evidence establishes there was no confidential relationship between testatrix and proponent"; the fourth "The evidence does not support the finding that a confidential relationship existed between Herbert A. Palmer and Loreen E. Palmer" and the fifth "Appellant has exerted no pressure to overpower the will of testatrix." Other points will be discussed separately. The foregoing five grounds of appeal add up to a claim that the findings of the exercise of undue influence are without substantial support in the evidence.

[1-5] The opening brief of appellant contains what is captioned "Statement of Facts." It consists of nine pages devoted exclusively to a statement of the evidence that was favorable to appellant. It completely ignores the evidence that was adverse to him and favorable to the respondents. Ten witnesses testified on behalf of respondents. Their testimony covers some 360 pages or considerably more than half of the reporter's transcript. In advancing the contention that the evidence and the inferences most favorable to respondents did not furnish substantial support for the findings of the exercise of undue influence by appellant, it was incumbent upon appellant to point out the claimed weakness of the evidence which, of course, necessitated a fair statement of it either in the brief or

in a supplement. Appellant has made no attempt to do this. He has done little more than relate the testimony of the attorneys who prepared the will and the circumstances of its execution, although he has incorporated statements laudatory of himself and assertions disparaging of contestants. In his reply brief we find the following statement: "Appellant has heretofore refrained from commenting on the unsubstantial character of the mass of respondents' hearsay and irrelevant testimony which is contrary to documentary evidence, and testimony which was introduced by means of eliciting affirmative answers to leading questions propounded by Respondent's attorney. The unsubstantial character of respondents' evidence; the theory urged and adopted by the trial court for its admission; its misuse by respondents, and errors committed by the trial court furnish separate and cumulative grounds for reversal of the judgment." The presentation made by appellant is in flagrant violation of settled practice in the reviewing courts. A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner. We repeat a statement we made in *Goldring v. Goldring*, 94 Cal.App.2d 643, 645, 211 P.2d 342, 344: "* * * [w]e do now give notice that henceforth it will be the practice of this court to disregard claims of insufficiency of the evidence even though that be the only ground of appeal, where the appellant has failed to make a satisfactory statement in the opening brief, or a supplement thereto, of the evidence claimed

to be insufficient, with transcript references. Counsel who ignore the rule may expect affirmation of the judgment or order appealed from in proper cases." We have not held appellants to strict account where there has been an attempt, even though a poor one, to make a fair statement of the evidence, with transcript references, but this is not such a case. Where there is a finding of the use of undue influence which is challenged for insufficiency it is necessary that each member of this court should have a thorough knowledge of the material evidence. In what may be a close case the question is not one to be answered without a careful study of the entire evidence. Briefs are not a substitute for such a study, but without proper briefs, with appropriate transcript references, the work of the court is made more difficult. Time is a constant factor in the court's work. It is of concern to all litigants who are awaiting a hearing. We therefore take time to reaffirm our statement in the Goldring case, which we are applying here. When an appellant makes an obviously one-sided and unfair statement of the evidence which he claims to be insufficient to support the findings we shall not feel that we have a duty to make an independent study of the record. We must either adopt that course or tolerate practices which are contrary to first principles of appellate procedure and which place undue burdens upon the court.

[6] The next points urged by appellant are four in number and read as follows: "VI. Beneficiary's presence while will is being executed is not evidence of undue activity"; "VII. No presumption of undue influence arises from the facts that the later will is at variance with a previously expressed testamentary intention"; "VIII. Appellant is the natural object of testatrix' bounty"; "IX. Appellant does not unduly profit by the will admitted to probate." The brief arguments made under these points contain only fragmentary references to the evidence touching a few isolated facts which it is argued were favorable to the appellant. None of these points is deserving of further attention. We therefore hold that

the evidence was sufficient to justify the findings that appellant accomplished the execution of the will through and by means of the exercise of undue influence.

The next point, No. X, is that appellant's demurrer to the third cause of action of the contest should have been sustained for the reason that it did not contain sufficient facts to state a cause of action for undue influence. This demurrer was by motion to exclude evidence under the third cause of action. The third cause of action purported to allege the existence of a confidential relationship between testatrix and appellant, activity on the part of appellant in the preparation of the will and domination of testatrix in the procurement of its execution. It is unimportant whether the facts alleged were sufficient. The fourth cause of action elaborated upon the allegations of undue influence. Appellant evidently deemed them to be sufficient, since his demurrer was not addressed to that cause of action. His brief does not undertake to show insufficiency of the facts therein alleged.

[7-10] The final point is that the court committed error in excluding the deposition of Racheline Tolman taken on behalf of appellant. Mrs. Tolman and Norman Halstead Tolman were residing in Anchorage, Alaska. Under due proceedings had a commission issued to take the deposition of Norman Tolman and Helen Tolman upon oral interrogatories. The depositions were taken, the questions being propounded by appellant's attorney, no one appearing on behalf of respondents. When Mrs. Tolman was sworn she stated that her name was Racheline Tolman and that she was the wife of Norman H. Tolman. She also answered that she was the same person whose name was inadvertently written as Helen Tolman. Upon objection of respondents that the deposition was not that of Helen Tolman it was excluded. The circumstances indicated that Racheline was sometimes called Helen. It is evident that appellant knew her as Helen or he would not have made use of that name in applying for the commission. It appeared in the deposition of Mr. Tolman that for 18 months he and

his wife had lived in a house in the rear of the Palmers' home. Respondents undoubtedly knew that it was appellant's intention to take the deposition of the Tolmans who had been tenants of Mrs. Palmer and that these were Norman Tolman and his wife who had moved to Anchorage and were living there. In his deposition Mr. Tolman made frequent references to his wife. Although the commission named Mrs. Tolman as Helen she appeared at the appointed time and gave her deposition. She evidently knew she was the person whose deposition was to be taken and that "Helen" was not some other person. So far as appears there was no other Helen Tolman. In urging their objections to the deposition respondents did not deny that they understood that the depositions were to be those of the Mr. and Mrs. Tolman who were friends of Mrs. Palmer. They did not assert that they were unaware of the fact that Mrs. Tolman was known as Helen and that she was the wife of Norman Tolman. Nor did they pretend that the person who gave the deposition was some one other than the person whose deposition they expected would be taken. They did not even suggest that they had been deceived or misled in any way. Under these circumstances the objection was without merit. It should have been overruled. In the law pertaining to court procedure, or in its traditional administration in our own jurisdiction, there is nothing to be found that would give authority to a court to penalize a litigant for a mere error of procedure which misled or harmed no one. Even variances between pleading and proof are to be disregarded unless they mislead the adverse party to his prejudice. Code Civ. Proc., § 469. Errors and defects in pleadings and proceedings which do not affect the substantial rights of the parties must be disregarded "in every stage of the action" Code Civ. Proc., § 475. Contrary to the uninformed assertions of some critics of current procedure, courts consistently place substance above form and are guided in their decisions by considerations of common sense, justice and fair play, uninflu-

enced by frivolous technicalities. The trial court based its ruling upon the case of *Smith v. Westerfield*, 88 Cal. 374, 26 P. 206. In material respects the case was factually different. The parties who successfully objected to a deposition of James M. Thompson taken under a commission to take the deposition of Jno. Thompson had no knowledge or information that they were one and the same person; the names indicated they were different persons; the objectors had no reason to believe their adversaries were taking the deposition of the person who actually gave it. To this extent they were deceived. The facts of the case at bar which we have related are the opposite of those of the cited case in these important particulars.

[11] The error in excluding the deposition was not prejudicial. The deposition of Mr. Tolman was read in evidence. It was far more comprehensive and explicit than was the deposition of Racheline. The latter touched upon the observations of the witness as to Mrs. Palmer's mental condition, statements that she intended to make another will in favor of appellant, that she was clear-headed and competent to make a will, that she was fond of children, and similar matters. Mr. Tolman's deposition comprises 22 pages of the reporter's transcript; that of Mrs. Tolman covers 6 pages. It was but a repetition of some of the statements of Mr. Tolman. The court believed that during the time she was under observation by the Tolmans, Mrs. Palmer was clear-headed, intelligent and competent. The court so stated during the reading of Mr. Tolman's deposition, but also stated that while the facts related by Mr. Tolman had a bearing upon the state of mind of testatrix they had only a remote, if any, bearing upon the question of undue influence. We are convinced that had the deposition of Mrs. Tolman been received in evidence the court's factual conclusions would have been the same.

The judgment is affirmed.

PARKER WOOD, and VALLÉE, JJ.,
concur.

145 Cal.App.2d 445

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Chris COSTA, a/k/a Chris Costo, Defendant
and Appellant.

Cr. 2649.

District Court of Appeal, Third District,
 California.

Oct. 25, 1956.

Rehearing Denied Nov. 5, 1956.

Defendant was convicted of robbery in the second degree. The Superior Court, Madera County, Stanley Murray, J., entered an order denying motion for new trial and judgment on the verdict, and defendant appeals. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that denial of request for a continuance made by defendant at outset of trial to enable him to make a substitution of attorneys was not reversible error, in absence of showing of prejudice.

Judgment and order affirmed.

1. Criminal Law ☞589(1)

The granting or refusal of request for a continuance made by defendant at outset of trial to enable him to make a substitution of attorneys rested within the discretion of trial court.

2. Criminal Law ☞1166(8)

Where defendant was represented by counsel whom he had selected and retained and had made one substitution of attorneys prior to trial, denial of request for a continuance made by defendant at outset of trial to enable him to make another substitution of attorneys was not reversible error, in absence of showing of prejudice.

3. Criminal Law ☞720(8)

In prosecution for robbery, district attorney was entitled to mention in argument to jury articles concerning the possession of which at time and scene of robbery witnesses had testified, though such articles had not been received in evidence.

4. Criminal Law ☞721(1)

Comment by district attorney in argument to jury upon failure of defendant to

testify in prosecution for robbery was proper.

5. Criminal Law ☞1171(6)

In prosecution for robbery, reference to defendant in district attorney's argument to jury as a "raffish cur" with the "courage of a jackal" was improper but did not constitute prejudicial error, in view of the evidence of guilt.

6. Criminal Law ☞1120(1), 1122(1)

Record on appeal from conviction for second degree robbery did not disclose error in rulings on admissibility of evidence or in instructions given jury.

C. K. Curtright, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order denying a motion for a new trial and from a judgment entered upon the jury's verdict which found appellant guilty of robbery in the second degree.

After appellant filed his opening brief in propria persona, this court upon his application appointed an experienced and able member of the Bar to represent him on appeal. Counsel so appointed thereafter advised appellant and this court that a thorough examination of the record and a research of the law in relation to the facts disclosed no meritorious grounds of appeal. Upon appellant's request counsel so appointed was relieved of his assignment, and appellant was permitted to file a closing brief.

After reviewing the entire record and considering the contentions made by appellant, we are in complete agreement with counsel's conclusion that there is no meritorious ground of appeal in this case.

Appellant was arrested shortly after a passerby saw him fleeing from the scene of the robbery. At that time and at his trial he was positively identified by the victim as

the person who forcibly took from his person a wallet which contained \$16.44. The evidence need not be detailed, as appellant concedes that it is sufficient to support the jury's finding that he was guilty of the crime charged. His contentions are that he was denied his constitutional rights and deprived of a fair and impartial trial due to errors of the trial court and prejudicial misconduct of the district attorney. These contentions cannot be sustained.

[1,2] At all stages of the proceedings appellant was represented by counsel whom he had selected and retained. However, he claims that he was denied the right to counsel of his choice by reason of the fact that the trial court refused a request for a continuance to enable appellant to make a substitution of attorneys. The request was made at the outset of the trial, and the granting or denial thereof rested within the discretion of the trial court. In the absence of a showing of prejudice, and he makes none, the ruling complained of cannot serve as the basis for reversal of the judgment. *People v. Shaw*, 46 Cal.App.2d 768, 773-775, 117 P.2d 34. It appears that appellant prior to the time of trial had made one substitution of attorneys. In *People v. Head*, 9 Cal.App.2d 647, 650, 50 P.2d 832, 833, it was stated:

"* * * The right to change counsel at any time is a right that is to be reasonably exercised, and there is nothing in the record before us which shows any prejudice to the appellant by the refusal of the court to allow a substitution of attorneys, * * *."

[3-5] Appellant asserts that the district attorney was guilty of prejudicial misconduct in that during argument he mentioned articles which had not themselves been received in evidence. It appears that witnesses had testified to the possession of these same articles at the time and at the scene of the robbery. Therefore, the prosecuting attorney was entitled to mention them in argument. Appellant also assigns as misconduct the district attorney's commenting upon his failure to testify. Such comment

was proper. *People v. Sutic*, 41 Cal.2d 483, 496-497, 261 P.2d 241. During argument the district attorney referred to the defendant as a "raffish cur" with the "courage of a jackal". Such argument indicates a lack of confidence in the strength of the cause being argued and in the intelligence of the jurors to whom the argument is addressed. We do not condone it, but we think that prejudice cannot be ascribed to the prosecuting attorney's misconduct, basing our ruling on the strength of the evidence of appellant's guilt and a higher respect for the intelligence of the jurors than the prosecuting attorney apparently had.

[6] Appellant assigns as error a number of rulings overruling objections to evidence and also claims misinstruction of the jury. It is unnecessary to discuss these assignments in detail. It is sufficient to say that they are not borne out by the record.

The judgment and the order appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.



145 Cal.App.2d 520

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frances HOLGUIN, Defendant and
Appellant.

Cr. 5708.

District Court of Appeal, Second District,
Division 1, California.

Oct. 30, 1956.

Rehearing Denied Nov. 9, 1956.

Hearing Denied Nov. 28, 1956.

Defendant was convicted of unlawful possession of heroin. The Superior Court of Los Angeles County, Louis H. Burke, J., entered judgment, and defendant appealed. The District Court of Appeal, Fourth, J., held that where police officers received information from one of their confidential

informers that there was a girl peddling heroin out of a certain cafe, that the girl was wearing a brown sweater and levis, that she had the appearance of a boy, and that she was called "Frankie," and officers went to the cafe where they found defendant dressed in a brown sweater and levis and otherwise fitting the description given by the informer, and defendant stated that she was called "Frankie", officers had reasonable cause for believing that defendant had committed a felony, and that therefore arrest, allegedly without a warrant, was valid.

Judgment affirmed.

1. Criminal Law ☞394

Defendant makes a prima facie case of unlawful arrest when he establishes that the arrest was made without a warrant, and burden then rests on the prosecution to show proper justification.

2. Criminal Law ☞1141(2)

Error will not be presumed on appeal.

3. Criminal Law ☞322

In absence of evidence to the contrary, it must be presumed that arresting officers regularly and lawfully performed their duties. West's Ann.Code Civ.Proc., § 1963, subds. 1, 15, 33.

4. Criminal Law ☞322

Where record of prosecution for unlawful possession of heroin did not disclose that officers, who arrested defendant, did so without a warrant, and defendant did not raise in the trial court the question whether the officers had a warrant for her arrest, the District Court of Appeal on appeal would presume that the arresting officers regularly and lawfully performed their duties. West's Ann.Health & Safety Code, § 11500.

5. Arrest ☞63(4)

Where police officers received information from one of their confidential informers that there was a girl peddling heroin out of a certain cafe, that the girl was wearing a brown sweater and levis, that she had the appearance of a boy, and that she was called "Frankie," and officers went to the cafe where they found defend-

ant dressed in a brown sweater and levis and otherwise fitting the description given by the informer, and defendant stated that she was called "Frankie", officers had reasonable cause for believing that defendant had committed a felony, and therefore arrest, allegedly without a warrant, was valid. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836, subd. 3.

Gladys Towles Root, Eugene V. McPherson, Los Angeles, Joseph A. Armstrong, Bell Gardens, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information defendant was charged with violation of section 11500 of the Health and Safety Code, a felony in that on or about October 26, 1955, in the County of Los Angeles, she unlawfully had heroin in her possession. Trial by jury was waived. The People offered oral and physical evidence. The defendant presented no witnesses. The court found the defendant guilty as charged and sentenced her to a term of imprisonment in the California Institution for Women. This appeal is from the judgment.

A resume of the facts is as follows: Before noon, on October 26, 1955, the officers of the Police Narcotics Division received information from one of their confidential informers that there was a girl peddling heroin by the capsule out of the Tip Top Cafe on south Main Street in Los Angeles. The informer said the girl was wearing a brown sweater and levis, that she had the appearance of a boy, and that they called her "Frankie". About noon, on October 26, 1955, acting on the information, Officers McDermott and Pilkington proceeded to the cafe where they saw the defendant dressed in a brown sweater and levis, and otherwise fitting the description which they had received. They asked her if she was called Frankie, and she stated she was. She was placed under arrest, put

in a police car and driven to the parking lot of the Police Administration Building. While at the parking lot, the police asked her to empty her pockets. She thereupon reached into her right pocket and produced a capsule wrapped in cellophane. The next day a chemist analyzed the capsule and found that it contained heroin.

[1] Appellant contends that the arrest was unlawful and therefore, the search incident to the arrest was unlawful and unreasonable, and the evidence obtained therefrom should have been excluded. Appellant claims that since the People introduced evidence tending to show the reasonableness of the search and seizure, the officers are precluded from relying on the presumption that they acted legally. It is true, as stated in *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23, 25: “* * * the defendant makes a prima facie case when he establishes that an arrest was made without a warrant * * *, and the burden then rests on the prosecution to show proper justification.” However, in the case before us a reading of the record does not disclose that the officers made the arrest without a warrant. The question of whether the officers had a warrant was never asked, nor raised in the trial court. Appellant had ample opportunity to make the simple inquiry, but she apparently chose not to do so.

[2-4] As was said in *People v. Farrara*, 46 Cal.2d 265, 294 P.2d 21, 23, “to reverse the judgment it would be necessary to presume that the officers acted illegally and that the trial court erred in admitting the evidence so obtained. It is settled, however, that error will not be presumed on appeal [citing cases], and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. Code Civ. Proc. § 1963 (1, 15, 33); [citing cases].” And as stated in *People v. Citrino*, 46 Cal. 2d 284, 294 P.2d 32, 34, “The record, however, is silent as to whether the officers had a search warrant, and in the absence of any evidence showing the illegality of the search, we must presume that the officers

regularly and lawfully performed their duties.” We believe that the presumptions above set forth apply under the facts of this particular case.

[5] The People contend that even if the appellant had made the necessary prima facie showing that the officers arrested her without a warrant, the officers had reasonable cause for believing that the appellant had committed a felony, and therefore the arrest was valid as being within the scope of Penal Code, section 836, subd. 3. The appearance of the appellant at the bar coincided exactly with the description given by the informer, and that, in and of itself, was some evidence of the reliability of the information provided by the informer. In *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36, the identity of the informer was unknown, and the police had no previous experience with him to indicate that his information was reliable. The information given to the police was that a large book-making operation was in progress in a certain bar; that a certain waitress would be found standing near the telephone, and she took bets from customers. When the police arrived they found the circumstances to be precisely as the informer had described them. The waitress was standing by a pad and pencil and had slips of paper in her hand. When asked what was in her hand, she sought to conceal it. The court, in deciding the case, among other things, said, 46 Cal.2d at page 295, 294 P.2d at page 39:

“Although petitioner’s conduct observed by Officer Sunday in the bar would not of itself constitute reasonable cause to believe she was committing a felony, it was sufficient to justify Officer Sunday’s reliance on the information given her of petitioner’s book-making. Under these circumstances the evidence before the magistrate was sufficient to justify the conclusion * * * that Officer Sunday had reasonable cause before the search and seizure to believe that petitioner was guilty thereof, and that therefore the search, seizure, and arrest were lawful.”

In the case before us the informer was not an unknown or mere anonymous "tipster", but, as the officer testified, was a "confidential informer of ours (the police)".

The situation confronting the police reasonably appeared to be one which required immediate action. Appellant was apparently a visitor at a public bar, and the prospects of her not being there in a few hours, or when the police arrived, was great.

In our opinion the record justifies the presumption that the officers were acting lawfully in the performance of their duty, and in any event, there was reasonable cause for the officers to believe the appellant had committed a felony.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



145 Cal.App.2d 443

Sam WAHYOU, Joe Sun, Low Ling, Bill Wong, Andrew Low, K. C. Chuck, Tom Lee and Chew Sin, co-partners doing business under the fictitious firm name and style of Daylite Market, Plaintiffs and Respondents,

v.

Charles KIERNAN, Individually and doing business under the fictitious firm name and style of Tavern Waffle Shop, Defendant and Appellant.

Civ. 8872.

District Court of Appeal, Third District,
California.

Oct. 25, 1956.

Rehearing Denied Nov. 19, 1956.

Hearing Denied Dec. 19, 1956.

Action upon open book account for cost of meat sold to a restaurant allegedly owned by defendant. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment for sellers and defendant appealed. The District Court of Appeal,

Peek, J., held that evidence, including testimony that a sales tax permit for restaurant, and an on-sale liquor license for an adjoining tavern were in defendant's name, was sufficient to support a finding that defendant was the principal and owner of the restaurant and had merely delegated duties of management and operation to an agent who had purchased the meat.

Judgment affirmed.

1. Principal and Agent ⇨19

Agency is a fact, and the burden of proving such fact rests upon the party affirming existence of agency.

2. Principal and Agent ⇨145(1), 146(1)

Where one deals with another whom he believes to be principal, but subsequently learns that the other is an agent of the undisclosed principal, he may recover from either.

3. Principal and Agent ⇨23(5)

In action upon open book account for cost of meat sold to restaurant allegedly owned by defendant, evidence, including testimony that a sales tax permit for the restaurant, and an on-sale liquor license for an adjoining tavern were in defendant's name, was sufficient to support a finding that defendant was the principal and owner of the restaurant and had merely delegated duties of management and operation to an agent who had purchased the meat.

Chargin & Briscoe, Stockton, for appellant.

Forrest E. Macomber, Stockton, for respondents.

PEEK, Justice.

This is an appeal from a judgment in an action upon an open book account for the cost of meat sold by plaintiffs to defendant.

For many years the defendant Kiernan owned and operated a bar in Stockton called the Tavern. It was located in the same building and immediately adjoining a

restaurant commonly known during the period here in question as the Tavern Waffle Shop. A doorway at the rear of the building connected the kitchen of the restaurant with the bar, through which food was served to both establishments. Kiernan had never personally operated the restaurant, but he did own the furniture and equipment. The state sales tax permit for the restaurant and bar was in his name, and the on-sale liquor license was also in his name. He was billed directly for the utilities for both businesses. In 1951 a Mr. Hemley took over the operation of the restaurant, paying the former operators for the merchandise and stock on hand and agreeing with defendant to pay him 5% of the gross receipts of the restaurant. In addition, Hemley agreed to pay Kiernan the sales tax and utility costs relating to the operation of the restaurant. Thereafter these amounts were computed monthly and paid to Kiernan, who in turn made payment to the State and to the concerns furnishing the utility services. One of plaintiffs' salesmen solicited and obtained the meat account of the Tavern Waffle Shop from Hemley. The defendant did not participate in this transaction and he was never billed nor did he ever pay for meat supplied to the restaurant. Hemley made all payments on the account from his own funds. In the early part of June, 1952, approximately one year after credit was first extended, the credit manager for plaintiffs investigated and ascertained that the sales tax permit for both the restaurant and bar, as well as the on-sale liquor license, stood in the name of defendant. At that time the balance of the account was in the sum of \$2,189.22. Plaintiffs made no attempt to contact defendant in regard to the outstanding balance and continued to extend credit in excess of \$10,000. In the latter part of 1954, Hemley vacated the restaurant premises on demand of defendant because of his failure to pay defendant the agreed 5% of the gross receipts of the restaurant. At the suggestion of Kiernan some creditors retook merchandise sold to Hemley and did not look to defendant for payment of

the balance owing on the accounts carried in Hemley's name.

Thereafter plaintiffs brought action against defendant for the sum of \$3,359.01, the balance then due on the account. The complaint alleged, and the trial court found, that the defendant was doing business under the fictitious firm name and style of Tavern Waffle Shop. The case was tried on that theory, and the court impliedly found that Hemley incurred the indebtedness to plaintiffs as the agent of defendant. It is defendant's contention that since he did not manage or supervise the operation of the restaurant, or hire, fire or pay its employees, and since he was not authorized to sign checks drawn on its commercial account, there was an insufficiency of evidence to support the implied finding of agency; and the fact that the sales tax permit and on-sale license were at all times in Kiernan's name was insufficient to support a finding that he was the principal and owner of the restaurant.

[1-3] We cannot agree with defendant's contention. The evidence introduced supports the implied finding of agency. It is true, as noted by defendant, "Agency is a fact, the burden of proving which rests upon the party affirming its existence." *Ewing v. Hayward*, 50 Cal.App. 708, 715, 195 P. 970, 974. But it is also true, as stated in *Imperial Valley Box Co. v. Reese*, 105 Cal.App.2d 401, 403, 233 P.2d 629, 630, "The general rule is well settled that where one deals with another whom he believes to be the principal, but subsequently learns that the other was an agent of an undisclosed principal, he may recover from either." Here the record amply supports the inference that Kiernan had delegated to Hemley the duties of management and operation of the restaurant. How those duties were to be carried out is wholly immaterial under the circumstances. Again, here as in the *Ewing* case there was no intervening circumstances such as was present in *Rigney v. De La Salle Institute*, 10 Cal.App.2d 492, 52 P.2d 579, which would warrant a conclusion by this court that

credit had been extended exclusively to Hemley, and it is only by such a circumstance that the defendant can escape liability under the general rule previously set forth.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



145 Cal.App.2d 418

Arnold L. INGRAM, Plaintiff and Appellant,
v.

Rex Randolph Philip GLISSMAN and United
Pacific Insurance Company, a corpo-
ration, Defendants,

United Pacific Insurance Company, a cor-
poration, Respondent.

Civ. 17215.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1956.

Action on a surety bond, filed by a real estate broker, to recover damages allegedly sustained by prospective buyer because of failure of broker to close the escrow with result that seller rescinded agreement. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., sustained demurrer to amended complaint and, on buyer's failure to amend, dismissed complaint and buyer appealed. The District Court of Appeal, Draper, J. pro tem., held that to charge the surety buyer must show that claims arose when the bond was in effect.

Judgment affirmed.

1. Appeal and Error ⇨854(3)

Where plaintiff declined to amend complaint, although granted leave to do so, he was required to stand upon his pleadings

as against all grounds of demurrer and if complaint was vulnerable to any of grounds stated in demurrer, judgment based on order sustaining demurrer could not be disturbed.

2. Brokers ⇨4

To charge surety on broker's bond, it was essential for prospective buyer to show that claim based on broker's alleged failure to properly close escrow with result that seller rescinded agreement arose during time bond was in effect.

3. Brokers ⇨4

Where bond furnished by real estate broker was not retroactive by its terms, retroactive effect was not to be implied.

4. Brokers ⇨4

Where prospective buyer's complaint against surety on real estate broker's bond alleged that buyer had delivered \$3,000 to broker as buyer's agent but did not allege purpose or on what conditions money was delivered to broker and alleged that by reason of the broker's failure to obey instructions to close escrow seller rescinded agreement but did not allege what acts if any the broker did during time bond was in force which resulted in any loss to buyer and did not allege whether the contract employing broker was oral or written, the complaint did not state a cause of action against surety. West's Ann.Code Civ.Proc., § 430, subd. 10.

5. Pleading ⇨34(4)

Plaintiff's failure to amend complaint compelled conclusion that allegations to eliminate uncertainties of his pleading would be adverse to him.

John E. Troxel, San Francisco, for appellant.

Thomas E. Davis, San Francisco, for respondent.

DRAPER, Justice pro tem.

Defendant United Pacific Insurance Company demurred generally and specially to the amended complaint. The demurrer

was sustained with leave to amend. The order sustaining the demurrer did not specify the grounds upon which the court based its ruling. Plaintiff declined to amend and, after notice, judgment of dismissal was entered. Plaintiff appeals.

Respondent was the surety upon a bond filed by defendant Glissman, who is not a party to this appeal, as a real estate and business opportunity broker. This bond was not filed until March 7, 1955, although Glissman had acted as such a broker for some time before that date. It appears that the bond remained in effect about sixty days.

Appellant alleges that he employed Glissman in November of 1954 to locate and negotiate for the purchase of a bar and restaurant by appellant. On December 2 a seller had been found. Glissman prepared and appellant executed escrow instructions which provided that the escrow was to be closed and the purchase completed "after the issuance to plaintiff of an on-sale general liquor license." The signed instructions, with "several promissory notes in blank and various other documents" were delivered by appellant to a corporate escrow holder. "Plaintiff had, prior to * * * March 7, 1955, delivered the sum of Three thousand dollars (\$3,000) to defendant Glissman * * * as plaintiff's agent."

The liquor license was issued to appellant "in February, 1955." It is then alleged that "on or about March 17, 1955" appellant instructed Glissman to deliver the \$3,000 to the escrow holder and "to take the necessary steps to close the said escrow and complete the said purchase," and that Glissman "disobeyed" this instruction "and failed" to close the escrow or complete the sale. It is also alleged that "at a time unknown to plaintiff," but "subsequent to" an occurrence which apparently is the December 2 execution of the escrow instructions, Glissman "without authority" obtained from the escrow holder the "blank promissory notes" and "filled them in" for a "cumulative amount" of \$11,500, \$4,500 of which were made payable to the seller

of the business and were delivered to the seller by Glissman "on or about March 10." Appellant further alleges that "by reason of" Glissman's failure to obey instructions to close the escrow, the seller rescinded the agreement of purchase and sale. Damages claimed are the \$3,000 paid to Glissman, \$4,000 in bills incurred by appellant while operating the bar pending completion of the sale, attorney's fees, and \$200 which appellant "was required" to pay to the seller "on account of" the promissory notes "filled in" and delivered by Glissman.

The foregoing summary involves a considerable rearrangement and simplification of the complaint and, confusing as it may seem, is, we think, more understandable and more favorable to appellant than the pleading itself.

Defendant surety demurred. In addition to the general demurrer, grounds of uncertainty, ambiguity and unintelligibility were specified. Among the stated grounds were the failure of the complaint to state what acts, if any, Glissman did after March 7 which resulted in any loss to plaintiff; whether Glissman had any monies belonging to plaintiff when the bond became effective; or whether plaintiff's contract employing Glissman was oral or written.

[1] Appellant declined to amend, although granted leave to do so. He must, then, stand upon his pleading as against all the grounds of demurrer. If the complaint is vulnerable to any of the grounds stated in the demurrer, the judgment must be affirmed. *Metzenbaum v. Metzenbaum*, 86 Cal.App.2d 750, 195 P.2d 492; *Evarts v. Jones*, 104 Cal.App.2d 109, 231 P.2d 74; *Hendricks v. Osman*, 72 Cal.App.2d 465, 164 P.2d 545.

[2, 3] There is room for grave doubt as to the sufficiency of the allegations to constitute a cause of action against respondent. Of course, a cause of action is stated against Glissman. But to charge respondent, it is essential for appellant to show that the claims arose during the short period after March 7 when the bond was in effect. The bond, which is pleaded in the amended

complaint, is not retrospective by its terms, and the law is clear that retrospective effect is not to be implied. *Anaheim U. W. Co. v. Parker*, 101 Cal. 483, 35 P. 1048; *Palmer v. Continental Casualty Co.*, 205 Cal. 34, 269 P. 638.

[4] In any event, it is clear that the special demurrer is well taken. The allegations as to the \$3,000 do not show for what purpose or on what conditions the money was delivered to Glissman or whether it was delivered to him in his capacity as a real estate or business opportunity broker. If the payment were made to Glissman for use in this purchase, there is no allegation as to when, either under plaintiff's contract with Glissman or under the escrow instructions, it was to be paid into the escrow or to the seller. In view of the brevity of the effective period of the bond, these uncertainties become substantial. They are aggravated by the fact that appellant refused to allege whether his agreement with Glissman, upon which this action against Glissman's surety is founded, was oral or written. Code Civ. Proc., § 430, subd. 10. There is no direct allegation that Glissman was obligated to pay the money to the seller. If this obligation be assumed, there is no allegation as to the date it was to be performed. The allegation of demand upon Glissman on March 17 is not helpful, since there is nothing to show that Glissman's duty to pay arose at the time of demand. In this respect, the case is clearly distinguishable from *Coover v. Cox*, 95 Cal.App. 1, 272 P. 343, where a deposit receipt required payment only on demand. For all that appears here, performance may very well have been due, and the obligation breached, long before the bond became effective. There is ample room to infer that this is the fact, for issuance of the liquor license, which was the condition precedent to the sale and purchase, is alleged to have occurred well before execution of the bond.

All that is said above applies equally to the alleged misappropriation of the notes. As to these, there is the further fact that they are alleged to have been delivered to

a corporate escrow holder, and there is nothing to show that Glissman acted under or used his broker's license to misappropriate them from that holder. Also, it is affirmatively alleged that they were "obtained" from the escrow-holder at a time unknown to plaintiff. The claimed loss resulting from appellant's operation of the business is attributable to Glissman only by reason of the latter's failure to close the escrow by payment of the money and proper delivery of the notes. Thus this claim falls if the allegations as to the money and notes are vulnerable to demurrer.

Appellant argues at length that he need not establish conversion in order to recover upon the bond. In this he may well be correct. The bond is conditioned upon Glissman's compliance with all obligations assumed by him under his real estate and business opportunity licenses. But, however broad may be the obligation of the surety as to the nature of the breach protected against, it is abundantly clear that the time of coverage is strictly limited. It is incumbent upon appellant to bring his claim within the period of the bond.

[5] Here he was given full opportunity to clear up the obvious uncertainties of his pleading. Many, if not all, of the facts sought by the special demurrer were clearly within his knowledge. Nonetheless he refused to amend. In such circumstances, it is by no means unfair to apply the rule that "Doubtful language in a pleading * * * will be construed against the pleader." 41 Am.Jur. 335. Appellant's failure to amend compels the conclusion that allegations to eliminate the uncertainties of his pleading would be adverse to him. The rule would be much different if the demurrer had been sustained without leave to amend. But here appellant was given every opportunity to cure the defects, and he alone must accept the consequences of his failure to do so.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph MARTINEZ, Defendant and
Appellant.

Cr. 3179.

District Court of Appeal, First District,
Division 1, California.

Oct. 24, 1956.

Rehearing Denied Nov. 8, 1956.

Hearing Denied Nov. 21, 1956.

Defendant was convicted of illegal possession of heroin. Thereafter the defendant made motions to vacate the judgment. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered orders denying the motions, and the defendant appealed, and motion was made to dismiss the appeal. The District Court of Appeal, Fred B. Wood, J., held that where defendant on the 59th day after filing of information objected to a continuance beyond the 60th day, but he did not follow up with the objection after the lapse of 60 days, and he participated throughout the trial proceedings, neither voicing any objection nor interposing a motion to dismiss after the lapse of 60 days, he waived his right to have the prosecution dismissed after the lapse of 60 days.

Orders affirmed and motion to dismiss appeal denied.

1. Criminal Law §1111(1)

On appeal by defendant from order denying his motion to vacate judgment of conviction, on ground that he was denied a speedy trial, absence of an entry showing good cause for continuance of the prosecution after 60 days from date of filing of information did not demonstrate absence of good cause. West's Ann.Code Civ.Proc. § 473; West's Ann.Pen.Code, §§ 1050, 1237, 1382; West's Ann.Rules on Appeal, rules 34(1) (e), (2, 3), 52.

2. Criminal Law §615

Provision of the Penal Code that court shall enter in its minutes the facts proved which require continuance is directory and

not mandatory. West's Ann.Pen.Code, § 1050.

3. Criminal Law §576(5)

Right of defendant to dismissal of prosecution, where he is not brought to trial within 60 days after filing of information, and constitutional right to a speedy trial may be waived. West's Ann.Pen.Code, § 1382.

4. Criminal Law §576(5)

Where defendant on the 59th day after filing of information objected to a continuance beyond the 60th day, but he did not follow up with the objection after the lapse of 60 days, and he participated throughout the trial proceedings, neither voicing any objection nor interposing a motion to dismiss after the lapse of 60 days, he waived his right to have the prosecution dismissed after the lapse of 60 days. West's Ann.Pen.Code, §§ 1050, 1382.

5. Criminal Law §641

Mere fact that public defender who represented defendant did not assign defendant the same deputy at every stage of the prosecution, so that one deputy represented defendant at preliminary examination and until commencement of trial, and another deputy during the trial, and a third deputy after entry of judgment, did not show ineffective aid of counsel.

6. Criminal Law §998

Allegation of defendant, on motion to vacate judgment of conviction, that officers violated defendant's constitutional rights when they broke into apartment without a search warrant, and secured evidence to secure a conviction, was not a sufficient allegation, since the search and seizure may have been legal without a search warrant.

Wilfred J. Harpham, Albany, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

On June 3, 1954, judgment was entered against defendant Joseph Martinez¹ for illegal possession of heroin. He did not appeal.

On May 25, 1955, he filed and on June 17 the court denied a motion to vacate the judgment for the alleged reason that his rights to a speedy trial and to be brought to trial within 60 days of the filing of the information had been violated. On July 12, 1955, the court permitted the filing of an amendment (and then denied the amended motion) which presented the additional grounds that defendant's "court appointed" counsel (the public defender and his deputies) rendered him "ineffective assistance" at the trial, also that the arresting officers illegally seized evidence which should not have been presented in support of the charge against him. Defendant has appealed from each of these two orders of denial. We treat each appeal as effective. Neither party has suggested that the order allowing the amendment operated to vacate the first denial.

Defendant claims his motion is sanctioned by section 473 of the Code of Civil Procedure (authority of a court to "set aside any void judgment or order"); his right of appeal, by section 1237 of the Penal Code (an "order made after judgment, affecting the substantial rights of the party").

The record² upon this appeal furnishes us nothing by which to consider the two additional points posed by the amendment to the motion. Nor does it appear that the judge who heard and decided the motion (one who had not presided at the trial) had a reporter's transcript or other record by which to consider and determine those two additional points.

Normally, in the absence of some exceptional factor or circumstance, none of the three points here presented would be avail-

able for consideration in such a proceeding as this, for they could have been considered upon an appeal from the judgment, if such an appeal had been taken.

Defendant contends that each of these three points presents an issue concerning the infraction of a fundamental constitutional right, a point which can be presented in a collateral proceeding. Even if so, an appropriate record must be made available for judicial consideration.

The clerk's transcript of the trial does show that defendant was not brought to trial within 60 days of the filing of the information. Specifically, the court's minutes show: (1) defendant made a motion to dismiss (grounds not stated) on the 7th day after the filing of the information; heard and denied on the 9th day, whereupon defendant pleaded "not guilty" and the cause was continued to the 38th day "with consent of counsel"; (2) on the 38th day the cause was continued to the 59th day, the record being silent as to whether defendant was present and consenting; (3) on the 59th day (defendants and their counsel being present) the court with consent of the district attorney continued the cause for trial to the 75th day, "said continuance being ordered over the objections of both defendants," and not a word as to whether good cause therefor was shown or proof offered or made that the ends of justice required a continuance or that any such question was presented to or considered by the court (see Penal Code, §§ 1382, and 1050); (4) the trial commenced on the 74th day and proceeded through three consecutive days, with no entry concerning consent or objection by the defendant except that upon the return of the jury's verdict "the court discharged the jury and the court with consent of counsel, continued the cause for judgment to" the 77th day; (5) on the 77th day this defendant made a motion for new trial and the

1. There were two defendants. The other defendant is not a party to this appeal.

2. It consists of the clerk's and the reporter's transcript of the hearing of the

motions to vacate, and the clerk's transcript of the trial, from the filing of the information to and including the rendition of the judgment. There is no reporter's transcript of the trial.

court continued the cause to the 83rd day for the hearing of the motion and to a later date for a presentence report on the other defendant "with the consent of respective counsel"; and (6) on the 83rd day defendant's motion for new trial was denied and "the court with consent of counsel, ordered the cause continued for pre-sentence report to June 3rd, 1954," the 97th day, on which day judgment was rendered.

[1,2] If we were to consider only the record of what transpired on the 59th and the 74th days, it would appear that defendant was not brought to trial within 60 days after the filing of the information, and that the pivotal postponement was not made upon his application, indeed was made over his objection; and we might infer or conclude that no good cause was shown for not bringing him to trial within the 60 days and no proof was offered or made that the ends of justice required this continuance.³

[3,4] In such a case the trial court "must order the action to be dismissed". Pen.Code, § 1382. But the right of dis-

missal thus accorded a defendant, and the constitutional right to a speedy trial, may be waived. *People v. Tenedor*, supra, 107 Cal.App.2d 581, 583, 237 P.2d 679. Here, defendant's objecting, on the 59th day, to a continuance beyond the 60th day was a proper method of making his position known. A motion for dismissal on the 59th day would have been premature. But he should have followed it up after the lapse of 60 days. He did not do so. Thereafter, he participated throughout the trial proceedings, neither voicing any objection nor interposing a motion to dismiss. It is not the policy of the law to permit a person thus to keep his silence, take his chance on getting a favorable verdict and, if he loses, at some later time (perhaps after the statute of limitations has run) come in and void the judgment by raising a point which if timely raised would have allowed the filing of a new information before the running of the statute and while the state's witnesses were still available.

If any authorities need be cited, the following should suffice: *People v. Newell*, 192 Cal. 659, 669, 221 P. 622, application for dismissal for failure to bring to trial

3. Such an inference or conclusion may not be permissible.

It is true that the first sentence of Rule 52 of the Rules on Appeal declares that if the record does not contain all of the papers, records and oral proceedings but is certified by the judge or clerk or stipulated to by the parties "it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal."

However, this is an appeal from an order denying a motion, not from the judgment of conviction; hence, the "reporter's transcript of the oral proceedings incident to the order appealed from", not that of the oral proceedings at the trial, would be a normal part of the record. Rule 34(1) (e) and 34(2). The reporter's transcript of the oral proceedings at the trial could become a part of this record as an exhibit "admitted in evidence at the proceedings incident to the order", Rule 34(3), but no such exhibit was introduced or considered at the hearing of the motion here involved.

Nor does the second sentence of Rule 52 seem to be of avail. It says that on

an appeal on the judgment roll alone, or on a partial or complete clerk's transcript, the above mentioned presumption does not apply "unless the error claimed by appellant appears on the face of the record." Appellant herein invokes the clause just quoted, upon the theory that the absence of an entry showing good cause for the continuance demonstrates the absence of good cause "upon the face of the record."

That is a nonsequitur for two reasons: (1) this is not a judgment roll or any appeal from the judgment of conviction; and (2) the requirement that "the court shall enter in its minutes the facts proved which require the continuance" is made by section 1050 of the Penal Code and is directory, not mandatory, *Ray v. Superior Court*, 208 Cal. 357, 359, 281 P. 391; *Zamloch*, *For and on Behalf of Cowan v. Municipal Court*, 106 Cal.App.2d 260, 263, 235 P.2d 25 and cases there cited; *People v. Tenedor*, 107 Cal.App.2d 581, 583, 237 P.2d 679, so that the absence of such an entry would not necessarily show "no good cause" upon the face of the record.

within 60 days must be made in the trial court and if not made before the trial begins the right to dismiss is waived; *Ex parte Apakean*, 63 Cal.App. 438, 440, 218 P. 767, the court is under no duty to dismiss unless the defendant demands it, a motion for dismissal after the jury has been impanelled and sworn comes too late.

Defendant argues that an objection to a belated trial date is sufficient; that he need not also move to dismiss, to preserve his right. We need not decide that question, because defendant herein neither objected nor moved to dismiss after the expiration of the 60 days.

[5] The burden of defendant's complaint that he lacked effective aid of counsel during the trial, seems to stem from the fact that he was represented by the public defender who did not assign him the same deputy at every stage of the proceeding, i. e., that one deputy represented him at the preliminary examination and until the commencement of the trial; another deputy, during the trial; and a third deputy after entry of judgment. That of itself does not spell ineffective aid of counsel, in the absence of a record of the oral proceedings at the trial. We note, also, that in his amended motion defendant narrates occurrences during the trial which allegedly disturbed him concerning the manner in which his counsel was conducting it but he does not state or suggest that he indicated to any of the deputies assigned him, or to the court, that he desired a different deputy or other counsel to represent him.

[6] As to the alleged illegal seizure of evidence used against him, his amended motion merely states that the officers violated his constitutional rights "when they broke into the apartment, without a search war-

rant, and secured evidence to secure a conviction." That is not a sufficient allegation. The search and seizure may have been legal without a search warrant. Moreover, we are dealing here with a rule of evidence which was changed after the judgment became final. Also, an error, if any, in the admission of evidence might render a judgment irregular and thus voidable upon appeal; not void and subject to collateral attack. We are mindful of the holding that the rule against the admissibility of evidence will not be reviewed in the absence of a proper objection in the trial court, is not applicable to appeals based on the admission of illegally obtained evidence in cases tried before the decision in the *Cahan* case, *People v. Kitchens*, 46 Cal.2d 260, 294 P.2d 17; *People v. Maddox*, 46 Cal.2d 301, 294 P. 2d 6. But those were "appeals," each from the judgment of conviction and from an order denying a new trial. We are unaware of any decision which extends and applies that doctrine to the case of a collateral attack made after the judgment has become final, especially one which became final before (in this case, ten months before) the rendition of the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905.

The attorney general interposed a motion to dismiss the appeal upon various grounds. In view of the conclusions we have reached upon the merits and perceiving no lack of jurisdiction of this appeal, there is no need to give further consideration to the motion except to deny it.

The orders are affirmed and the motion to dismiss is denied.

PETERS, P. J., and BRAY, J., concur.

145 Cal.App.2d 214

Cite as 302 P.2d 647

Theodore BRUNSON, Plaintiff-Respondent,
v.

Jerrell BABB, Executor of the Estate of David Brunson, Deceased, et al., Defendants-Appellants.

Civ. 21522.

District Court of Appeal, Second District,
Division 1, California.

Oct. 22, 1956.

Rehearing Denied Nov. 19, 1956.

Hearing Denied Dec. 19, 1956.

Action by deceased's brother against executor under deceased's will and devisees and legatees under such will to impress a trust on deceased's property for the value of services rendered to deceased by brother. The Superior Court, Los Angeles County, George A. Dockweiler, J., entered judgment for brother, and defendants appealed. The District Court of Appeal, White, P. J., held that under the circumstances any defects in the complaint were not prejudicial.

Judgment affirmed.

1. Pleading Ⓒ408, 428(4)

Failure to file a demurrer does not waive the right at a trial to challenge the sufficiency of a complaint to state a cause of action, but a motion to exclude evidence based on insufficiency of a complaint is in the nature of a general demurrer and may be sustained only if the allegations of the complaint, deemed true for such purpose, are totally insufficient to support a judgment for plaintiff. West's Ann.Code Civ. Proc., §§ 430, 434.

2. Pleading Ⓒ204(1)

A demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection. West's Ann.Code Civ. Proc., § 430.

3. Pleading Ⓒ1

The office of pleadings is to outline the issues so that the parties may know what is involved in the litigation, and while they should be made as clear as possible, they are not intended to serve as a trap for the inexperienced or the unwary.

4. Appeal and Error Ⓒ1170(3)

Any defects in complaint to have a trust impressed on deceased's property for the value of services rendered to deceased, filed by deceased's brother who allegedly performed such services on deceased's promise to pay brother out of his property while living or out of the property of deceased at the time of his death, were not prejudicial, where no demurrer was interposed before trial and the cause was tried with full knowledge of the issues. West's Ann.Code Civ.Proc., §§ 430, 434; West's Ann.Const. art. 6, § 4½.

5. Executors and Administrators Ⓒ224

Witnesses Ⓒ133

Where one seeks to recover from the representative of an estate, specific property alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, and is not required to present a claim as a creditor, and his action is not founded upon a claim or demand against the estate, within meaning of statute rendering incompetent as witnesses, parties to an action against an executor upon a claim against the estate of a deceased person. West's Ann.Code Civ.Proc., § 1880, subd. 3.

6. Witnesses Ⓒ133

Where decedent's brother was not seeking to enforce a debt of the decedent against decedent's property, but to obtain from deceased's executor and beneficiaries of decedent's estate, money and property, upon the ground that it did not belong to the estate, but was in fact brother's own property, his action was not founded on a claim against the estate and brother was a competent witness under the dead man's statute to testify to matters or facts occurring prior to the demise of decedent. West's Ann. Code Civ.Proc., § 1880, subd. 3.

7. Frauds, Statute of Ⓒ144

The doctrine of estoppel to invoke the statute of frauds will be used to prevent fraud that would result from refusal, in certain circumstances, to enforce oral contracts. West's Ann.Civ.Code, § 1624.

8. Frauds, Statute of Ⓒ144

Where deceased's brother, in reliance upon deceased's promises to take care of him from his property either before or after his death, changed his position and if the oral contract between brother and deceased for payment for services rendered by brother were not enforced, brother would suffer unconscionable injury, while other beneficiaries of deceased's estate would be unjustly enriched should they escape the obligations of such contract made by decedent, beneficiaries of deceased's estate would be estopped from invoking the statute of frauds to prevent enforcement of such contract. West's Ann.Civ.Code, § 1624.

9. Executors and Administrators Ⓒ224

Where deceased's brother filed an action against executor under deceased's will and devisees and legatees under will to recover money or property allegedly held in trust by defendants, such action was not a claim or demand against deceased's estate, and therefore brother did not have an adequate remedy at law, and it was not necessary for brother to file a claim against the estate as a prerequisite to maintenance of such action. West's Ann.Prob.Code, § 707.

10. Liens Ⓒ7

Where deceased's brother brought an action seeking intervention of equity to prevent executor under deceased's will and beneficiaries of deceased's estate from retaining and enjoying benefits of property acquired by alleged fraudulent acts of decedent, court upon entering judgment declaring defendants trustees of the property in the amount of the judgment rendered, was justified in encumbering assets of deceased's estate with an equitable lien in brother's favor.

11. Liens Ⓒ7

Equity courts look with favor upon equitable liens when employed to do justice and equity.

12. Interest Ⓒ39(4)

In action by deceased's brother against executor under deceased's will and beneficiaries under such will to impress a trust on deceased's property for value of services

rendered to deceased by brother on deceased's fraudulent promises to take care of brother out of deceased's property either during his lifetime or after his death, trial court did not abuse its discretion in allowing interest to accrue on the judgment from the date of deceased's death since the action was based on fraud within purview of statute providing for interest on damages awarded on noncontractual obligations. West's Ann.Civ.Code, § 3288.

Jerrell Babb, Los Angeles, for appellants.

A. Marburg Yerkes, Belle Silverman, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Plaintiff instituted this action against the above named Executor under the Last Will and Testament of David Brunson, and the other above named defendants, as devisees and legatees under the aforesaid will.

Plaintiff's complaint is entitled, "For Restitution—Constructive Fraud, Actual Fraud; To Impress a Trust; To Impose an Equitable Lien; To Quiet Title; For Money" and contains six causes of action. In the first cause of action it is alleged that during the lifetime of decedent there existed between him and plaintiff, "the most confidential relationship"; that plaintiff "reposed the greatest confidence and trust in the decedent David Brunson and advised with decedent with respect to his business affairs, and plaintiff believed that the decedent would deal justly and fairly with him in all things. That commencing in the year 1919 plaintiff was discharged from the armed forces of the United States and returned to the city of Los Angeles to live with decedent David Brunson at the family home and was told by the said decedent that the decedent owned the family home in the city of Los Angeles and that plaintiff had no right to any property or money in the estate of James Polk Brunson, the deceased father of plaintiff and of decedent, and that plaintiff had no right in the family residence in the city of Los Angeles; that plaintiff would have to seek a place to

live elsewhere, but that decedent would take care of plaintiff. That on or about March 29, 1919 decedent employed plaintiff until about March 22, 1922, at the rate of \$2.00 per day. That for this work and labor decedent owed plaintiff the sum of \$1,860, but paid plaintiff only approximately \$900. That from time to time plaintiff asked decedent for payment of the balance due and was assured that he "would be paid from the property then owned by decedent or thereafter to be acquired by decedent". That because he relied "upon such representations and promises, plaintiff did not assert any claim against David Brunson" during the lifetime of the latter. It is then alleged that from on or about February 1, 1937 to March 25, 1947 plaintiff "attempted to conduct a business and maintain employment in the city of Los Angeles and was repeatedly urged by decedent David Brunson to leave his business and abandon his employment to work from time to time for the decedent David Brunson at many types of manual labor as from time to time requested by decedent David Brunson: that decedent David Brunson repeatedly represented to Plaintiff that he would pay to Plaintiff the reasonable value of Plaintiff's services therefor out of decedent's own property or that if he did not do so he would see that Plaintiff was taken care of out of his property at the time of his death in that whatever property David Brunson owned at the time of his death would be left to Plaintiff in payment of the obligations then and there owing from decedent David Brunson to Plaintiff as hereinbefore alleged." That in reliance upon the aforesaid representations and promises of decedent, plaintiff engaged in work and labor for the former, all of which is specifically set forth in the complaint. That said services were of the reasonable value of \$3,120, but that notwithstanding repeated promises to pay, decedent failed to compensate plaintiff. It is then alleged that from about October 1, 1943 to June 1, 1947 decedent owned a ranch in Riverside County; that plaintiff was induced by decedent "to leave his shoe shining shop for

hours or days, as the case might be, and engage in work and labor for decedent on said ranch. That during said period Plaintiff did leave his shop and work for decedent". Then follows a detailed account of the services performed and the allegation that the reasonable value thereof was \$3,594. It is then alleged that decedent "repeatedly assured plaintiff that plaintiff need have no concern or worry on the time and manner and mode of payment to him of sums due from decedent; that decedent would pay plaintiff out of his property during the decedent's lifetime or if not paid during the lifetime of decedent David Brunson, the Plaintiff would receive David Brunson's property at David Brunson's death." Then follows the allegation, "That during the period of time from 1918 to date Plaintiff has been partially disabled from physical injuries received in World War I in the armed services of the United States; that during the entire period of time from 1919 to date of this action Plaintiff has been a resident of the county of Los Angeles, state of California; that on numerous occasions during the period of time from 1919 to the date of the death of decedent David Brunson in 1953, decedent David Brunson assured Plaintiff that as Plaintiff's older brother he would take care of Plaintiff and requested Plaintiff to always consult decedent and accept decedent's advice on personal, business and family matters, and subsequent to Plaintiff's divorce, in the year 1936, decedent further represented to plaintiff that, if Plaintiff did not remarry, decedent would leave all his property Plaintiff in fulfillment of the obligations of decedent David Brunson to Plaintiff as hereinbefore alleged in this Complaint; that Plaintiff did not marry from 1936 to the present time and has continuously since said year 1936 remained unmarried." That because he relied implicitly upon the promises and representations of his deceased brother, "Plaintiff at no time required from the decedent David Brunson any writing, or security in writing, or evidence securing obligations of the decedent to Plaintiff, and relied upon the decedent David Brunson's

oral promise to plaintiff that decedent would pay Plaintiff out of decedent's property or leave to Plaintiff all decedent's property at the time of decedent's death. That decedent David Brunson did not leave his property to Plaintiff at the time of his death, but that by the terms of the Last Will of David Brunson heretofore admitted to probate, as hereinabove alleged, Plaintiff does not receive any of decedent David Brunson's property."

In his second cause of action plaintiff incorporates the allegations contained in the first cause of action and then alleges the falsity of decedent's representations and the latter's knowledge of such falsity, and that decedent "had no intention of paying to Plaintiff any sums of money or property as payment to Plaintiff for monies owing from decedent or for services rendered to decedent David Brunson, or as payment to Plaintiff, for Plaintiff's change of position and rendition of service as from time to time requested by decedent David Brunson as hereinbefore alleged."

After alleging his reliance upon decedent's representations and promises, plaintiff avers that he refrained from enforcing any claim he had against decedent during decedent David Brunson's lifetime "for services rendered, for claim to decedent's property, for loss of profits, for loss of earnings, and did in fact repeatedly change his position, to his detriment as hereinbefore alleged." Then follows an allegation that in the will of decedent, "Plaintiff is given no interest whatsoever in the estate of the decedent and is not mentioned in said Will in any respect whatsoever so as to accomplish restitution for money, change of position, value or property heretofore parted with in reliance upon the decedent David Brunson's representations and conduct."

In his third cause of action, plaintiff alleges that defendants other than defendant Executor, have been unjustly enriched as successors in interest of decedent and that they hold the monies and property of the estate as trustees for plaintiff.

The fourth cause of action seeks to impress a lien upon the property of the estate as "security to plaintiff for restitution to plaintiff of the value of his claims."

The fifth cause of action alleges that plaintiff is the owner of three parcels of real property now held by defendant Executor, and that neither decedent's estate or any of the defendants have any right, title or interest in said properties.

The sixth and final cause of action alleges that upon the death of decedent the defendants, other than the defendant Executor, became indebted to plaintiff in the sum of \$7,674 by reason of the foregoing services allegedly performed by plaintiff at the special instance and request of decedent; that such defendants "severally promised and agreed to deliver and pay to Plaintiff such money or property as they may have acquired by reason of the death of David Brunson, Deceased.", but have refused so to do.

The prayer is that it be adjudged that defendants have no right, title or interest whatever in the property owned by David Brunson prior to his death, and that plaintiff be adjudged the owner thereof, and that defendants be declared trustees for plaintiff of all property now owned or hereafter acquired pursuant to the decree of distribution in the estate of decedent; and that plaintiff "may have restitution by a judgment in his favor in the sum of Seven Thousand Six Hundred Seventy-Four Dollars (\$7,674.00) jointly and severally against all defendants herein claiming any interest in the property of David Brunson, Deceased."

By their answers, defendants denied generally the allegations of plaintiff's complaint, and as separate defenses alleged that, (1) plaintiff's complaint in its entirety does not state facts sufficient to constitute a cause of action; (2) that each count of plaintiff's complaint is barred by the provisions of Section 336; Subdivision (1) of subsection 2 of Section 337; Subdivision (2) of subsection 2 of Section 337 of the Code of Civil Procedure; Subdivision (3) of subsection 2 of Section 337; Subsection

4 of Section 338; Subsection 1 of Section 339; and Section 343 of the Code of Civil Procedure. It was further alleged that plaintiff's complaint and each count thereof was barred by the provisions of Section 1624, subsection 1 of the Civil Code in that the alleged agreement set forth in the complaint was not to be performed within a year from the making thereof; and finally, that because the agreement, by its terms, was not to be performed during the lifetime of the promissor, decedent herein, and allegedly devises or bequeaths property to plaintiff or makes provision for the latter by will, not being in writing, is barred by the provisions of subsection 6 of Section 1624 of the Civil Code.

The cause proceeded to trial before the court sitting without a jury, resulting in a judgment for plaintiff decreeing that defendant Jerrell Babb, as Executor of the Last Will of David Brunson, deceased, pay to the plaintiff the sum of \$10,000 "with simple interest thereon from the 16th day of May, 1953, at the rate of 7% in the amount of \$1,337.36". It was further adjudged that plaintiff has a lien upon all assets of the estate of decedent in the possession of said Executor, and a lien upon all right, title and interest of all defendants in and to the property of said decedent. That defendant Executor pay to plaintiff all sums set forth in the judgment in due course of administration. It was further ordered, "That upon non-payment to plaintiff by Jerrell Babb, Executor, of said sums in due course of administration, the plaintiff may foreclose the lien imposed herein according to law by public sale by the Sheriff of the County in which said assets are located and that the proceeds arising from the foreclosure sale be applied to the satisfaction of this Judgment by payment to plaintiff of the full sum then payable to him under this Judgment together with interest and costs accruing after Judgment." From such judgment all defendants prosecute this appeal.

The trial, which extended, with interruptions and continuances, over a period of

several months, resulted in a Reporter's Transcript of more than 1,800 pages.

For the purpose of giving consideration to the issues raised on this appeal we deem it unnecessary to set forth a detailed narrative of the voluminous testimony received at the trial. On this appeal, defendants do not contend that the evidence, if legally admissible upon the trial, is insufficient to support the findings. They rely for a reversal upon the claimed erroneous rulings of the trial judge. An examination by us of the voluminous transcript impresses us that unless the rulings on questions of law arising during the trial were erroneous, the judgment must be affirmed because, while the testimony adduced is in conflict, there is contained therein evidence of sufficient substantiality to support the conclusions arrived at by the duly constituted arbiter of the facts. We shall therefore epitomize the findings of the court below, in which is to be found the factual background surrounding this litigation.

Insofar as here material and pertinent the court found in accordance with plaintiff's complaint, "That it is true that plaintiff, during the lifetime of the decedent David Brunson, was the younger brother of said decedent, and at all times prior to his death, commencing in childhood of plaintiff, the most confidential relationship existed between the plaintiff and the decedent David Brunson; and it is further true that plaintiff reposed the greatest confidence and trust in the decedent David Brunson and advised with decedent with respect to his business affairs, and further that plaintiff believed that the decedent would deal justly and fairly with him in all things. That it is true that commencing in the year 1919 plaintiff was discharged from the armed forces of the United States and returned to the City of Los Angeles to live with decedent David Brunson at the family home and was told by said decedent that decedent David Brunson owned the family home in the City of Los Angeles and that plaintiff had no right to any property or money in the estate of James Polk Brunson, the deceased father

of plaintiff and of decedent, and that plaintiff had no right in the family residence in the City of Los Angeles; that plaintiff would have to seek a place to live elsewhere, but that decedent would take care of plaintiff * * *

"That it is true that from the period of time from on or about February 1, 1937 to on or about March 25, 1947, plaintiff resided with decedent David Brunson in the City of Los Angeles and paid board and room in full for said residential quarters during the entire period of time of said residence; that during the said full period of time from 1937 to 1947 plaintiff attempted to conduct a business and maintain employment in the City of Los Angeles and was repeatedly urged by decedent David Brunson to leave his business and abandon his employment to work from time to time for the decedent David Brunson at many types of manual labor as from time to time requested by decedent David Brunson; that David Brunson repeatedly represented to plaintiff that he would pay to plaintiff the reasonable value of plaintiff's services therefor out of David Brunson's property or that if he did not do so he would see that plaintiff was taken care of out of David Brunson's property at the time of David Brunson's death in that whatever property David Brunson owned at the time of his death would be left to plaintiff in payment of the obligations then and there owing from decedent David Brunson to plaintiff * * * That it is true that in reliance upon said representations and promises of decedent David Brunson, from the year 1937 to 1947, plaintiff engaged in the following work and labor for decedent David Brunson, to wit:

"During the period of time from on or about October 1, 1937, to on or about October 1, 1943, plaintiff, at the request of decedent David Brunson, did assist said decedent in decedent's business of hauling sand, gravel and related materials by loading and unloading said decedent's trucks and driving said trucks, and by assisting decedent in any other manner as requested by him and doing any work for decedent as re-

quested by said decedent. It is true that during said period plaintiff was engaged in the shoe shining business in the City of Los Angeles, State of California, and that decedent did frequently request plaintiff to leave his said business to perform said work and labor for decedent and plaintiff did so leave his business and perform said work. It is true that said services of plaintiff were required by decedent during said period on an average of twenty hours a week and that plaintiff rendered to decedent David Brunson for said period services of a value of Three Thousand One Hundred Twenty Dollars (\$3,120.00). It is true that David Brunson, deceased, at no time paid plaintiff for said services, and it is further true that decedent repeatedly assured plaintiff that he would be paid for his work and services rendered to decedent David Brunson.

"It is further true that during the period of time from on or about October 1, 1943, to on or about June, 1947, decedent David Brunson owned and operated a ranch located at Riverside County, State of California; and it is true that plaintiff was induced by decedent David Brunson to leave his shoe shining shop and engage in work and labor for decedent on said ranch. That during said period plaintiff did leave his shop and work for decedent; that said work included manual labor of an agricultural type, operating and maintaining farm implements and equipment, feeding livestock and cattle, harvesting of grain, gathering eggs and bringing them to Los Angeles for sale, of taking care of the chickens and diverse other tasks necessary to be done on said ranch; that said employment during the entire period of time from 1943 to 1947 required plaintiff's services on an average of 25 working hours per week throughout the calendar year, except that each year in said years, during the three months period of harvesting covering the months of July to October, plaintiff's services were required by decedent David Brunson to the extent of 45 hours a week; that in fact plaintiff did perform services totaling 45 hours a week during the three

months harvesting season of each of said years 1943 to 1947, an average of 62 days during said season; that it is true that plaintiff performed all of said services and was assured by decedent his services were worth Six Dollars (\$6.00) a day for each day he worked for decedent, that the full value of the services rendered to decedent David Brunson by plaintiff for said period was Three Thousand Five Hundred Ninety-Four Dollars. That it is true that decedent David Brunson at no time paid plaintiff for the services rendered by plaintiff for decedent between the years 1937 to 1947; and it is further true that decedent David Brunson repeatedly assured plaintiff that plaintiff need have no concern or worry on the time and manner and mode of payment to him of the sums due from decedent; that decedent would pay plaintiff out of his property during the decedent's lifetime, or, if not paid during the lifetime of decedent David Brunson, the plaintiff would receive David Brunson's property at David Brunson's death.

"That it is true that during the period of time from 1918 to date plaintiff has been partially disabled from physical injuries received in World War I in the armed services of the United States; that during the entire period of time from 1919 to the date of this action plaintiff has been a resident of the County of Los Angeles, State of California; that on numerous occasions during the period of time from 1919 to the date of the death of decedent David Brunson in 1953, decedent David Brunson did assure plaintiff that as plaintiff's older brother he would take care of plaintiff and decedent requested plaintiff to always consult him and accept decedent's advice on personal, business and family matters, and subsequent to the year 1936, decedent further represented to plaintiff that, if plaintiff did not remarry, decedent would leave all his property to plaintiff in fulfillment of the obligations of decedent David Brunson to plaintiff as hereinbefore alleged in this Complaint; that in reliance upon said promise plaintiff did not marry from 1936

to the present time and has continuously since said year 1936 remained unmarried.

"That it is true that during all the period of time hereinbefore alleged, from 1919 to 1953, plaintiff repeatedly at the instance and request of decedent, his brother, David Brunson, relinquished employment elsewhere, relinquished the opportunity to maintain his business, and the opportunity to go into other businesses including the hotel and rooming house business, and relinquished enforcement of any and all claims plaintiff had against decedent, in reliance upon the conduct and representations of decedent David Brunson to plaintiff herein set forth, and because of the confidential relationship existing as aforesaid plaintiff relied solely upon decedent David Brunson's declarations, promises, and representations to him hereinabove mentioned, and believed that the decedent's representations were made in truth and in sincerity and that the decedent David Brunson would conscientiously abide thereby; and it is true that plaintiff at no time required from the decedent David Brunson any writing or security in writing, or evidence securing obligations of the decedent to plaintiff, and relied upon the decedent David Brunson's oral promise to plaintiff that decedent would pay plaintiff out of decedent's property or leave to plaintiff all decedent's property at the time of decedent's death. That it is true that decedent David Brunson did not leave his property to plaintiff at the time of his death, but that by the terms of the Last Will of David Brunson heretofore admitted to probate, plaintiff does not receive any of decedent David Brunson's property."

The court further found that by reason of the "happenings, occurrences, events * * * and the oral representations" of the decedent, that plaintiff would own all of the decedent's property upon the death of the latter, and that by reason of his conduct as aforesaid decedent during his lifetime was unjustly enriched. That the defendants other than defendant Executor, as successors in interest of decedent, have

been unjustly enriched in money and property, which they will receive under the provisions of decedent's last will; "in that said defendants have not * * * paid any consideration to decedent or to plaintiff for any interest they may receive or be entitled to receive under the last will of David Brunson, Deceased, and defendants and each of them, have been unjustly enriched by properties owned by David Brunson at the time of his death, which, in fairness, justice and equity are owned by plaintiff, and that defendants and each of them hold said monies and properties as Trustees for plaintiff.

"That the allegations of Paragraph II of plaintiff's Fourth Cause of Action are true; that repeatedly and continuously during the period of time from 1919 to the date of his death, decedent David Brunson did orally promise to plaintiff that the value of all services performed by Plaintiff for decedent David Brunson would be secured by payment to Plaintiff of the value thereof out of decedent David Brunson's property at the time of the death of decedent; that defendants who claim any interest in the property of David Brunson, whether by Will or succession, or who may acquire any property of the decedent, whether by Will or by succession, acquire the same subject to plaintiff's prior lien in the sum of Ten Thousand Dollars (\$10,000), including interest at the rate of 7% per annum from May 16, 1953, to secure restitution to Plaintiff out of said money or property." The court also found that plaintiff was not the owner of any of the real property held by decedent at the time of his death, but that the defendant's interest in said real property is "subject to plaintiff's Superior Lien thereon in the sum of \$10,000.00."

The court further found "That all the allegations and denials of each of the defendants contained in the answers are untrue and it is not true that the plaintiff is barred by the provisions of: Section 336, Subdivision (1) of Subsection 2 of Section 337, Subdivision (3) of Subsection 2 of Section 337, Subsection 4, of Section 338, Subsection 1 of Section 339, or by Section

343, of the Code of Civil Procedure of the State of California; or any of the said Sections.

"And further, it is not true that plaintiff is barred by the provisions of Subsection 1 of Section 1624 of the Civil Code of the State of California; and it is not true that plaintiff is barred by the provisions of Subsection 6 of Section 1624 of said Civil Code; and it is not true that plaintiff is barred by the provisions of Section 1880(3) of the Code of Civil Procedure."

Appellants' first ground for reversal of the judgment is that the court erred in overruling their objection to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action. In that regard the record reflects that at the commencement of the trial defendant Executor was called as a witness under Section 2055 of the Code of Civil Procedure. After affirmatively answering a question as to whether he was the duly qualified Executor under the last will of decedent, and when the next question was asked, objection was made to the same "on the ground that it is irrelevant, incompetent and immaterial and on the further ground that the pleadings do not state—that all the pleadings, including all the counts, do not state facts sufficient to constitute a cause of action in this case * * * And I want to add to that objection: I object to the introduction of any evidence in this case on the same grounds."

Without citation of any supporting authorities appellants urge that "The entire theme of the complaint is that plaintiff performed services for the deceased, and that he was not paid therefor, and then pleads the reasonable value of the services, and the whole complaint amounts to nothing more than a breach of contract and a case in law seeking to recover the reasonable value of services rendered to deceased during his lifetime.

[1-3] "The complaint wholly fails to state a cause in equity, in that the allega-

tions therein pertaining to equity are mere conclusions, and the complaint shows on its face that it is nothing more than a breach of contract, that plaintiff has an adequate remedy at law, and furthermore, the complaint nowhere alleges or attempts to allege the acts and conduct on the part of David Brunson, deceased, towards his brother, Theodore Brunson, were unconscionable, it being necessary that the acts and conduct of the deceased be unconscionable before a case in equity would arise." Much of appellants' argument on this point is directed to claimed uncertainty as to the meaning of many allegations in plaintiff's complaint and the charge that other allegations amounted only to conclusions. All these contentions furnished grounds for a special demurrer and not having availed themselves of this remedy, Code Civ.Proc., Sec. 430, such objections will be deemed to have been waived, Code Civ.Proc., Sec. 434. Failure to file a demurrer does not of course waive the right at the trial to challenge the sufficiency of the complaint to state a cause of action, but a motion to exclude evidence based on insufficiency of the complaint is in the nature of a general demurrer and may be sustained only if the allegations of the complaint, deemed true for this purpose, are totally insufficient to support a judgment for plaintiff. And, a demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection, *Lord v. Garland*, 27 Cal.2d 840, 850, 168 P.2d 5. We have examined the complaint, the substantial allegations of which are hereinbefore set forth, and are persuaded that since no demurrer was interposed before trial, and the cause was tried with full knowledge of the issues, any defects in the complaint were not prejudicial. As was said in *Horton v. Horton*, 115 Cal.App.2d 360, 367, 252 P.2d 397, 401: "The office of pleadings is to outline the issues so that the parties may know what is involved in the litigation. They should, of course, be made as clear as possible, but are not intended

to serve as a trap for the inexperienced or the unwary."

[4] We have come to the conclusion that to reverse the judgment herein on the ground of insufficiency of the complaint to state a cause of action would unreasonably subordinate substance to form and would challenge the plain and meaningful words of Section 4½ of Article VI of our state Constitution. Weighed in the crucible of both law and reason the ruling of the trial court was correct.

[5, 6] Appellants' second ground for reversal is that the court erred in overruling their objections to testimony pertaining to matters and things happening prior to the death of decedent. This claim is based on contentions that the alleged agreements between decedent and plaintiff were all oral and therefore in violation of the statutes pertaining to wills, the Statute of Frauds and the so-called "Dead Man's Statute", Code Civ.Proc., Sec. 1880, subd. 3. In the instant proceeding the court found that appellants were holding certain monies and property as trustees for respondent. As was said in *Estate of Dutard*, 147 Cal. 253, 256, 81 P. 519, 520, "It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate, within the meaning of the probate law. The decisions are clear and conclusive upon the proposition that, where one seeks to recover from the representatives of an estate specific property alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, is not required to present a claim as a creditor, and is not a 'creditor of the estate.' His action is not founded upon a claim or demand against the estate. [Citing cases.]" See also *Holland v. Bank of Italy*, 115 Cal.App. 472, 484, 1 P.2d 1031; *Porter v. Van Denburgh*, 15 Cal.2d 173, 176, 99 P.2d 265. Since respondent herein was not seeking to enforce a debt of the decedent against his property but to obtain from the Executor and benefici-

aries of the estate money and property, upon the ground that it did not belong to the estate, but was in fact his own property, respondent was a competent witness to testify to matters or facts occurring prior to the demise of decedent. Furthermore, the record is replete with testimony of disinterested witnesses establishing a confidential relationship upon which respondent's restitutionary rights were predicated. We perceive no prejudicial error in the ruling of the trial court.

[7, 8] As to appellants' reliance upon the statute of frauds, we are satisfied that they are estopped from relying thereon. The courts have consistently applied the doctrine of estoppel to invoke the statute of frauds to prevent fraud that would result from refusal, in certain circumstances, to enforce oral contracts. The instant case is replete with testimony that respondent changed his position in reliance upon, or in performance of, the contract, that if the contract were not enforced respondent would suffer unconscionable injury, while appellants would be unjustly enriched should they escape the obligations of such contract made by decedent. The case at bar is strikingly similar to the factual situation present in *Monarco v. Greco*, 35 Cal.2d 621, at pages 623, 624, 625, 220 P.2d 737, and the holding therein strongly impresses us that the trial court was correct in concluding that appellants were foreclosed from seeking refuge by resort to the statute of frauds. Civil Code, Sec. 1624; Code Civ.Proc., Sec. 1973. See also *Potter v. Bland*, 136 Cal.App.2d 125, 132, 133, 288 P.2d 569; *Wilk v. Vencill*, 30 Cal.2d 104, 107, 180 P.2d 351.

[9] Appellants' next assignment of error is that the court erred in refusing to grant their motion for non-suit on the grounds that the alleged agreements were in violation of the statute of frauds. This contention we have herein decided adversely to appellant, as we have also done with regard to appellants' claim with regard to the applicability of Section 1880, subd. 3, of the Code of Civil Procedure. With ref-

erence to appellants' contention that respondent failed to invoke an adequate remedy at law by filing a proper claim against the estate, we are satisfied it was not necessary for respondent to first file a claim against the estate of decedent as a prerequisite to maintaining this action. Being an equitable action to recover money or property allegedly held in trust by appellants, it is not a claim or demand against an estate and, accordingly, it is not necessary to file the claim required by Section 707, Probate Code. *Back v. Farnsworth*, 25 Cal.App.2d 212, 220, 77 P.2d 295; *Potter v. Bland*, supra, 136 Cal.App.2d at page 134, 288 P.2d 569. Appellants' contention that the motion for a non-suit should have been granted because of the insufficiency of the complaint is hereinbefore answered by the conclusion we have arrived at as to the correctness of the action of the court in overruling appellants' objection to the introduction of any evidence. As to the sufficiency of the evidence to justify a denial of appellants' motion for a non-suit there can be no question. In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579.

[10, 11] Appellants next urge that the court erred in encumbering the assets of the estate with an equitable lien. Appellants misconceive the theory of respondent's action. The latter is not asserting a claim against the decedent's estate, but claimed an interest in decedent's property by reason of the promises and representations made by the latter to respondent. This is an action whereby respondent sought the intervention of equity to prevent appellants from retaining and enjoying the benefits of property acquired by alleged fraudulent or other wrongful acts of decedent, by declaring appellants trustees of the property, in the amount of the judgment rendered, for the benefit of respondent who, according to the judgment, would be entitled to it. Tested by the standard that equity courts look with favor upon equitable liens when employed to do justice and equity, and to prevent unfair results, we are satisfied that, under

the facts and circumstances present in the case at bar, the court was justified in finding that an equitable lien was created, *West v. Stainback*, 108 Cal.App.2d 806, 816, 817, 240 P.2d 366; *In re Estate of Henshaw*, 68 Cal.App.2d 627, 636, 157 P.2d 390; *Wagner v. Sariotti*, 56 Cal.App.2d 693, 698, 133 P.2d 430.

What we have hereinbefore stated furnishes sufficient answer to appellants' claim that the court erred in its findings of fact and conclusions of law and judgment, in that (a) the pleadings do not state facts sufficient to constitute a cause of action; (b) the plaintiff proved no case in law or in equity, or otherwise; and (c) the evidence is insufficient to support the findings of fact, conclusions of law and judgment.

[12] Appellants' final contention is that the court erred in allowing interest to accrue on the judgment from the date of decedent's death. It is appellants' contention that the only interest that can be legally charged in the instant action is that accruing from the date of the judgment. We have concluded that this case comes within the purview of Civil Code, Section 3288. The court found that appellants were trustees for respondent and that decedent received from respondent the benefit of money and labor contributed by the latter in reliance upon the promises of decedent that he "would deal justly and fairly with him (respondent) in all things"; that decedent represented to respondent that he (decedent) "would pay to plaintiff the reasonable value of plaintiff's services therefor out of David Brunson's property or that if he did not do so he would see that plaintiff was taken care of out of David Brunson's property at the time of David Brunson's death in that whatever property David Brunson owned at the time of his death would be left to plaintiff in payment of the obligations then and there owing from decedent David Brunson to plaintiff * * *". We are persuaded that under all the circumstances present in the case at bar, it cannot be said, as a

matter of law, that the court abused its discretion in awarding interest from the date of decedent's death. *West v. Stainback*, supra, 108 Cal.App.2d at page 819, 240 P.2d 366. The question presented to the trial court for determination was whether decedent would be held to his promises and pledges made to respondent that the former was holding the latter's property as trustee, or whether the decedent would be held to his alleged promise to leave all his property to respondent upon the former's death. The trial court adopted the first above-mentioned theory, and we are satisfied its determination is supported by substantial evidence.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



145 Cal.App.2d 481

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Manuel Lee GUY, Defendant and Appellant.
Cr. 5650.

District Court of Appeal, Second District,
Division 1, California.
Oct. 29, 1956.

Defendant was convicted of unlawful possession of heroin. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment, and the defendant appealed from the judgment and from the sentence. The District Court of Appeal, White, P. J., held that where police officer had been receiving information from time to time that defendant and her male companion were involved in the sale of narcotics, and about one hour prior to arrest of defendant and her male companion, the officer received information from a con-

fidential informant that defendant was in possession of a quantity of narcotics and that she would either have it in her possession or it would be in her bedroom, and officer went to defendant's home without a search warrant and found heroin in defendant's bedroom, the search was lawful, contemporaneous with, and incidental to, lawful arrest.

Attempted appeal from sentence dismissed, and judgment affirmed.

1. Arrest ◊63(4)

Reasonable cause to justify an arrest under section of the Penal Code providing that a peace officer may, without a warrant, arrest a person when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it, may consist of information obtained from others, and is not limited to evidence that would necessarily be admitted at the trial on the issue of guilt. West's Ann.Pen.Code, § 836.

2. Arrest ◊63(4)

The term "reasonable cause" within meaning of section of the Penal Code providing that a peace officer may, without a warrant, arrest a person when a felony has in fact been committed, and he has "reasonable cause" for believing the person arrested to have committed it, means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Criminal Law ◊394

In prosecution for possession of a preparation of heroin, wherein defendant made a motion to suppress the evidence because arresting officers did not have a search warrant, burden was on defendant to raise question of legality of search and seizure in the trial court either by establishing that arrest of defendant was made without a warrant, or that private prem-

ises were entered or a search thereof was made without a search warrant. West's Ann.Pen.Code, § 836; West's Ann.Health and Safety Code, § 11500.

4. Criminal Law ◊322, 1144(12)

On appeal from judgment of conviction for possession of a preparation of heroin, it would not be presumed by the District Court of Appeals on appeal that arresting officers acted illegally and that trial court erred in admitting evidence obtained by arresting officers, and, in absence of evidence to the contrary, it was required to be presumed that the officers regularly and lawfully performed their duties. West's Ann.Pen.Code, § 836; West's Ann.Health and Safety Code, § 11500; West's Ann.Code Civ.Proc., § 1963, subds. 1, 15, 33.

5. Criminal Law ◊394

In prosecution for possession of a preparation of heroin, wherein defendant made a motion to suppress the evidence because arresting officers did not have a search warrant, fact that no attempt was made to show the reliability of informant, on whose information the arresting officers acted without a search warrant, might go to the weight to be given the testimony but it would not entirely destroy the evidentiary value thereof. West's Ann.Pen.Code, § 836; West's Ann.Health and Safety Code, § 11500.

6. Arrest ◊63(4), 71

Where police officer had been receiving information from time to time that defendant and her male companion were involved in the sale of narcotics, and about one hour prior to arrest of defendant and her male companion, the officer received information from a confidential informant that defendant was in possession of a quantity of narcotics and that she would either have it in her possession or it would be in her bedroom, and officer went to defendant's home without a search warrant and found heroin in defendant's bedroom, the search was lawful, contemporaneous with, and incidental to, lawful arrest. West's Ann.Pen.Code, § 836; West's Ann.Health and Safety Code, § 11500.

7. Searches and Seizures \hookrightarrow 7(1)

The searches prohibited by the Fourth Amendment of the federal constitution are unreasonable searches. U.S.C.A.Const. Amend. 4.

8. Arrest \hookrightarrow 63(4), 71

Where belief of officer that defendant is guilty is based on reasonable cause, and a felony has been in fact committed, not only are the requirements of the provisions of the Penal Code dealing with an arrest by a peace officer without a warrant when a felony has been committed, satisfied, but search incident to an arrest thereunder is reasonable. West's Ann.Pen.Code, § 836, subd. 3.

9. Criminal Law \hookrightarrow 1158(4)

In prosecution for possession of a preparation of heroin, wherein defendant made a motion to suppress the evidence because arresting officers did not have a search warrant, wherein arresting officer testified that he asked defendant if it was all right to search her bedroom and that she stated that it was all right, and wherein defendant denied that she gave permission for the search without a search warrant, there was a conflict in the evidence for the trial court to resolve. West's Ann.Pen. Code, § 836; West's Ann.Health and Safety Code, § 11500.

10. Criminal Law \hookrightarrow 1166½(12)

Where there was evidence, in prosecution for unlawful possession of a preparation of heroin, that defendant had 47 capsules of heroin in her possession when arrested, statements made by trial court when sentence was pronounced that he was not inclined to place the defendant on probation because he thought she had been trafficking in heroin, and that any one who has 47 capsules of heroin, does not have them for her own personal use, did not show prejudice against defendant on part of trial court.

11. Criminal Law \hookrightarrow 1030(1)

Objections not presented at the trial cannot be raised for the first time on appeal.

12. Criminal Law \hookrightarrow 419(3)

In prosecution for possession of a preparation of heroin, wherein defendant made a motion to suppress the evidence because arresting officers did not have a search warrant, hearsay rule was not applicable to testimony of arresting officer that he had been informed that defendant was trafficking in narcotics before officer went to defendant's home without a search warrant. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen.Code, § 836.

13. Criminal Law \hookrightarrow 1023(10)

Appeal does not lie from sentence.

Matthews & Hill, John J. Hamilton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of a violation of Section 11500 of the Health and Safety Code in that on or about July 5, 1955, she unlawfully had in her possession a preparation of heroin. Defendant entered a plea of not guilty, a trial by jury was duly waived and, pursuant to stipulation, the People's case was submitted on the transcript of the testimony adduced at the preliminary examination, both sides reserving the right to offer additional evidence. When the cause was called for trial the court announced that he observed in the preliminary examination transcript that "there was a motion made to suppress the evidence here", and inquired of defendant's counsel whether he intended to "object to the evidence or make a motion to suppress it". Upon receiving an affirmative reply, the court stated, "All right. Before I rule on that motion, I will hear this testimony." Officer Gutierrez then testified concerning the arrest of defendant. Defendant's motion to suppress the evidence was denied, and following testimony offered on behalf of defendant, the court adjudged her guilty as

charged and sentenced her to imprisonment in the California Institute for Women for the term prescribed by law. Defendant filed notice of appeal "From the decision and judgment * * * and from the order of sentence * * *".

We regard the following as a fair epitome of the factual background surrounding this prosecution. On behalf of the People, Officer Gutierrez, attached to the Narcotic Detail of the Los Angeles County Sheriff's Office, testified that on July 5, 1955, at about 1:30 p. m., he received information that defendant was in possession of a quantity of narcotics. He had received similar information concerning the defendant on several previous occasions. The gist of "the information was to the effect that the defendant was involved in the trafficking of narcotics, that she was a source of supply." He was also informed of the defendant's name and address. That he also received information concerning a male companion of the defendant. This information was to the effect that "he was involved in the sale of narcotics also in combination with the defendant." Gutierrez had also received previous information concerning the defendant's male companion.

At approximately 2:30 p. m. on July 5, Officer Gutierrez, in company with Officers Ruskin, Fletcher and Stameison, drove to the defendant's residence at 12206 Alvera Street, Los Angeles.

Upon arriving at the defendant's residence Deputy Ruskin walked to the rear of the abode and Officer Gutierrez went to the front door. On receiving no response, Gutierrez walked along the side of the driveway and through an open gate into the back yard. The defendant's male companion, Mr. Matistick, was painting the garage. The defendant was reclining on a lawn swing, approximately thirty feet away. The officers first arrested Matistick, who was known to Officer Gutierrez. The latter then approached the defendant and informed her that she was under arrest on a narcotics charge. She requested that they enter the house because she was quite

upset and had to go to the bathroom. At that time Officer Gutierrez, Deputy Ruskin and the defendant entered the house. Gutierrez told the defendant that a matron was en route and that she would have to wait for the matron to arrive before she could enter the bathroom. He then asked the defendant "if it was all right to search her bedroom and she stated it was all right, and we proceeded to search the bedroom."

A search of the bedroom was effected in the presence of the defendant and revealed a green bottle containing forty-seven capsules which contained a brownish powder. The capsules were subsequently analyzed by Martin Klein, a chemist of the Sheriff's Crime Laboratory. In Klein's opinion, the powdery substance contained heroin.

Officer Gutierrez further testified that he displayed the green bottle containing the forty-seven capsules to the defendant, who stated that the capsules were hers; "that she had purchased them approximately four days prior to her arrest; that she had purchased at that time five grams; that this was the remainder of the five grams that she had purchased; that she purchased them for her own personal use." She also stated that her male companion, Mr. Matistick, "knew nothing about the narcotics and that they were only for her use." Gutierrez then looked at the defendant's arms. He observed thirteen puncture wounds along the radial vein of the left arm. He also observed eight puncture wounds along the radial vein of the right arm.

As a witness in her own behalf defendant testified that she was the owner and occupant of the premises at 12206 Alvera Street, in the city of Los Angeles. In answer to a question to "describe the premises as to whether or not it was enclosed on that day", defendant testified, "There is a fence around the back starting from the kitchen wall. There is a fence starting from the driveway side about six and a half feet that continues back to the end of the lot. My lot is 150 by 50 or 50 by 150, something like that. It is deeper than it is wide." That "There is a fence across the

driveway which takes in all the back yard and clear around to the other side * * * the back yard is enclosed * * *. The front yard is not enclosed; a portion of the driveway is enclosed. The back yard is enclosed * * *. The gate is attached to the house." As to the immediate circumstances surrounding her arrest defendant testified as follows: "Around 2:30, about that time, I was lying in the swing in the back yard and Stanley was painting the garage with his back to the gate, and all of sudden an officer—not this officer that testified—another officer ran up the drive. "When I knew anything, he was running up the gate, up the fence, and had landed down on his feet. He jumps up with a pistol in his hand and his badge and he says, 'Stanley, you are under arrest.'

"At that moment he hollered for help and this officer shows up. He tries to make the fence, the gate once, but he can't, so he goes back down again. He puts a pistol through the fence and he says to me, 'You over there, don't move.'

"Then he comes over the fence with another try. Another officer—there were four of them—another officer points his gun through the gate and says to me, 'Don't move over there.' while he is making himself come over, you know, while he is coming over there.

"Then the first officer that came over takes the piece of iron that closes the gate down like this, the two gates. There are two gates there and they close by a piece of iron and a chain and a lock. He takes the pistol and breaks the little lock, which doesn't take very much. We only had it there because we had a dog and we tried to keep him in the back yard because he knows nothing about cars. So he breaks the lock and lets the third officer in.

"The third officer goes through my back door and the fourth officer the front door. This officer says to me, 'You are under arrest.'

"And I said, 'How can you fellows break in my property without a warrant?'

"The first officer said, 'We don't need a warrant.' Then he says, 'Come on, let's go in the house.'

"He started searching my robe and I said, 'I have nothing on but the robe and you can't search me.'

"So he continues to go in my pockets anyway. Then noticing that I didn't have anything in the robe by pulling the robe apart, he said, 'Let's go in the house.'

"In the meantime the first officer had handcuffed the male fellow who was there. He brought him in behind me. I went in at this officer's request with a pistol, and then Stanley came in behind me.

"In the meantime, my mother was there. My mother had come to the back because she heard the racket. My mother was there already. She had been there the night before.

"So we all got inside. Then I asked to go to the bathroom because I had had dysentery for two years. He says to me, 'You can't go to the bathroom.'

"I says, 'You can't search me.'

"I asked again and I asked the first officer that came in, who is a little younger man, 'What about your warrant?'

"He says, 'We don't need one.'

* * * * *

"Q. Did the officer use any physical force at all? A. My arms. He took hold of my arms and the other officer handcuffed Stanley and brought him in handcuffed. This officer held onto my arms. Then he sent someone out to call the lady. The lady was not on arrival. I didn't have a phone. They sent someone to call the lady, and in the meantime they held me prisoner in my bedroom.

"Q. Did you have a gun on you all this time? A. There was one man that stood in the room while the rest of them gone by themselves, you know, about the house, and he had a gun on his person, yes.

"Q. Did you ever tell the officers to go ahead and search the house, the room? A. No, I didn't. They said they were going to search it and they started with my

bedroom and took me and Stanley into the bedroom.

"Q. Did you have any fear of the officers or the use of violence when you were taken into the house by the officers? A. I sure did. That was my first time to ever be pushed around by them.

"Q. Did you ever say, 'I give you permission to enter the house,' or words to that effect? A. I never asked him to come in; he told me I had to go in."

Mrs. Florence Thomas, mother of defendant, testified that she was sleeping on the premises, was awakened by "the noise, hollering". That "I saw an officer in the kitchen, the first thing I saw. I made for the back and they had this male character, searching him, I think, and then the next thing I remember seeing was the officer with my daughter coming into the house. That is all I know."

In urging a reversal appellant first contends that the search of her bedroom and the seizure of the forty-seven capsules of heroin were unlawful and that the court erred in refusing to grant her motion to suppress the allegedly illegally obtained evidence, obtained, it is asserted, by an unwarranted and illegal search of appellant's premises. The latter argues that the arresting officers effected the search without a valid warrant of arrest and without probable cause.

Penal Code, § 836, provides in part, as follows:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

* * * * *

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. * * *

[1] That reasonable cause to justify an arrest may consist of information obtained from others, and is not limited to evidence that would necessarily be admitted at the trial on the issue of guilt is now well settled. *Trowbridge v. Superior*

Court, 144 Cal.App.2d 13, 300 P.2d 222, and cases therein cited.

[2] "The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In *re McCarty*, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' *Ex parte Heacock*, 8 Cal. App. 420, 421, 97 P. 77." *People v. Novell*, 54 Cal.App.2d 621, 623-624, 129 P.2d 453, 454.

With the foregoing rules in mind we find that the record discloses that Officer Gutierrez, approximately two weeks prior to the arrest, received information to the effect that the appellant was involved in the trafficking of narcotics, "that she was a source of supply." From the time of receiving this information until the time of the arrest, Gutierrez had received similar information concerning the appellant on several occasions. Gutierrez had also received information that the appellant's male companion was "involved in the sale of narcotics * * * in combination with the defendant." Three or four days prior to the arrest Gutierrez had received information "to the effect that the defendant as well as another person (Mr. Matistick) was a source of supply, that either one of the two could arrange a sale of narcotics." The information concerning the appellant also included her name and address.

Approximately one hour prior to the arrest of the appellant and her male companion (Mr. Matistick), Gutierrez received information from a confidential informant that the appellant at that time was in possession of a quantity of narcotics. The confidential informant told Officer Gutierrez "that she would have it in her possession or that it would be in her bedroom."

It is also in evidence that the purpose of going to appellant's residence was to arrest her and her male companion. Upon entering the premises, appellant's companion, Mr. Matistick, was placed under arrest. Officer Gutierrez then walked some thirty feet to where appellant was reclining in a lawn swing and informed her she was "under arrest on a charge of narcotics".

[3, 4] While the record discloses that the officers did not have a search warrant, it is however, silent as to whether or not the officers were possessed of a valid warrant for the arrest of appellant. The burden rests upon an accused to raise the question of the legality of the search and seizure in the trial court. This he may do by establishing (1) that the arrest was made without a warrant, or (2) that private premises were entered or a search thereof made without a search warrant. As to the latter question appellant met the issue by establishing the fact that the officers did not have a search warrant. However, as to the first question there was no showing whatever. In *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23, 25, our Supreme Court said, "the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification [citations]." In the case at bar, as in the case of *People v. Farrara*, 46 Cal.2d 265, 294 P.2d 21, there is no such evidence concerning the possession of a warrant of arrest by the officers and, as stated in the case just cited, 46 Cal.2d at page 268, 294 P.2d at page 23, " * * * to reverse the judgment it would be necessary to presume that the officers acted illegally and that the trial court erred in admitting the evidence so obtained. It is settled, however, that error will not be presumed on appeal, *Vaughn v. Jonas*, 31 Cal.2d 586, 601, 191 P.2d 432; *People v. Gutierrez*, 35 Cal.2d 721, 727, 221 P.2d 22; *Lynch v. Birdwell*, 44 Cal.2d 839, 846-847, 285 P.2d 919; *People v. McManis*, 122 Cal.App.2d 891, 899, 266 P.

2d 134, and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. Code Civ.Proc. § 1963 (1, 15, 33); *People v. Serrano*, 123 Cal.App. 339, 341, 11 P.2d 81; see also *Vaughn v. Jonas*, supra, 31 Cal.2d 586, 601, 191 P.2d 432."

Appellant earnestly contends that "no attempt was made to show the reliability, if such there was, which should be attached to the hearsay testimony of the informant".

[5] We are satisfied that while this might go to the weight to be given the testimony it does not entirely destroy the evidentiary value thereof when it is remembered that the information received by the officers was not mere surmise or a bare suspicion that appellant possessed narcotics. The information was that appellant would have the contraband on her person or in her bedroom and the informant also supplied the officers with the name of appellant and her address. Furthermore, no inquiry was made at the trial by appellant in cross-examination of the officer as to the "reliability" of his informant.

[6] Since the recurring questions of the reasonableness of the officer's conclusion that a felony had been committed and the belief upon his part that appellant had committed it must find resolution in the facts and circumstances of each case, we are persuaded that, if it be conceded, in the case now engaging our attention, that the officers did not have a warrant of arrest, nevertheless, they were justified, under the facts herein narrated, in taking appellant into custody. Therefore, the search was lawful, contemporaneous with and incident to the lawful arrest.

[7] As was said in *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 432, 94 L.Ed. 653, 657-660:

"It is unreasonable searches that are prohibited by the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543, 39 A.L.R. 790. It was recognized by the framers of the Constitution that there were reasonable

searches for which no warrant was required. The right of the 'people to be secure in their persons' was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652, L.R.A. 1915B, 834, * * *. Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him.

* * * * *

"Decisions of this Court have often recognized that there is a permissible area of search beyond the person proper. Thus in *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145 [51 A.L.R. 409] this Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted."

"The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest. *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652, L.R.A.1915B, 834 * *. It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'un-

reasonable.' [Citing cases.]" (See also *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40; *People v. Dixon*, 46 Cal.2d 456, 296 P.2d 557; *United States v. Pisano*, 7 Cir., 193 F.2d 361, 363.)

[8] When, as in the instant case, the officer's belief of appellant's guilt is based on reasonable cause, and a felony has in fact been committed, not only are the requirements of Subdivision 3 of Penal Code Section 836 satisfied, but a search incident to an arrest thereunder is reasonable.

[9] Although we have concluded that under the facts of this case the consent of appellant to the search was not necessary, there is present the issue of whether the search of appellant's bedroom was with her consent. Officer Gutierrez testified that he "asked her (appellant) if it was all right to search her bedroom and she stated it was all right, and we proceeded to search the bedroom." As a witness in her own behalf, appellant denied that she gave permission for the search. This created a conflict in the evidence, which was for the trial court in the first instance, to resolve. *People v. Gorg*, 45 Cal.2d 776, 782, 291 P.2d 469. While it may be said that it is doubtful whether the People sustained their burden of proving that appellant freely consented to the search of her bedroom, we cannot hold as a matter of law that the trial judge, under the circumstances here present abused the discretion vested in him in holding that the search was not in response to an unlawful assertion of authority but was undertaken pursuant to appellant's consent and therefore, was not unreasonable. However, as stated above, in the instant case, that issue was not crucial. For the reasons advanced above, it must be held that appellant's second and third contentions that the decision and judgment of the court are contrary to law and contrary to the evidence cannot be sustained.

Finally, appellant urges that the court admitted testimony of unrelated matters and considered such matters, resulting in the violation of appellant's substantive rights. Claimed prejudice on the part of

the trial court is premised upon statements made by the court when sentence was pronounced. In that regard the record reflects the following:

"The Court: I am not inclined to place this defendant on probation. I think she is trafficking in heroin. Anybody who has 47 capsules of heroin, has them for some purpose other than her own. There isn't any question about that * * *

"I don't listen to any explanations of people that sell heroin * * *. I am satisfied, however, that she was selling it * *. There is no necessity to sell heroin so far as this Court is concerned."

Appellant argues that the foregoing expressions by the court were based on what she characterizes as the "hearsay" testimony of Officer Gutierrez who related the information relayed to him by his informant that appellant was "a source of supply" and was "trafficking in narcotics".

[10-12] It is argued that "Such hearsay testimony * * * should be * * * judged with extreme scrutiny, as it appears to be a matter of common knowledge that the stool pigeon very often is a nefarious and reprehensible character * * *". Appellant's contention lacks substance here. In the first place, no objection was made to the foregoing testimony of the officer when the same was offered. It is well settled that objections not presented at the trial cannot be raised for the first time on appeal. *People v. Rocha*, 130 Cal.App.2d 656, 663, 279 P.2d 836. Secondly, the challenged statements referred to were not offered in evidence to prove the truth of the matter asserted, but solely to establish that the officer had reasonable or probable cause to make the arrest and consequent search and seizure. The truth of the information given to Officer Gutierrez was not in issue, nor was it offered to prove any element of the offense charged against appellant. Viewed in the light of the limited purposes for which the statements in question were admitted in evidence, the hearsay rule does not apply. *People v. King*, 140 Cal.App. 2d 1, 294 P.2d 972. And lastly, the

statements made by the court were not uttered during the trial nor at the time the court rendered its decision finding appellant guilty. The remarks were made after the finding of guilt and when the court was considering appellant's application for probation and had before it the report of the probation officer, the contents of which are not before us. From a reading of the statements made by the court it is at once apparent that they were prompted by testimony that appellant had in her possession 47 capsules of heroin from which the trial judge concluded, as he said, that "she has them for some purpose other than her own".

[13] The attempted appeal from the sentence is dismissed. *People v. Millum*, 42 Cal.2d 524, 525, 267 P.2d 1039. The judgment is affirmed.

DORAN and FOURT, JJ., concur.



145 Cal.App.2d 423

Benjamin N. WYATT and Christine M. Wyatt, Plaintiffs and Appellants,

v.

CADILLAC MOTOR CAR DIVISION, General Motors Corp., Los Angeles Branch, et al., Defendants,

General Motors Corporation, a corporation, Defendant and Respondent.

Civ. 21645.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1956.

Rehearing Denied Nov. 9, 1956.

Buyers' action predicated upon (1) negligence in manufacture and assembly of automobile, (2) breach of warranty, and (3) rescission for breach of warranty. The Superior Court of Los Angeles County,

Bayard Rhone, J., rendered judgment of dismissal after sustaining a demurrer, and plaintiffs appealed. The District Court of Appeal, Fox, J., held that there could be no recovery on negligence count and that the causes of action for breach of warranty and return of purchase price were time-barred.

Affirmed.

1. Automobiles ⚡16

Automobile manufacturer's duty was confined to exercise of reasonable care to see that automobile was so manufactured and assembled as to be free from defects which might be reasonably expected to produce bodily injury or damage to other property, and there could be no recovery by buyers for damage allegedly resulting to vehicle from negligent assembly thereof.

2. Action ⚡27(2)

Cause of action for breach of express or implied warranty sounds in contract. West's Ann.Civ.Code, § 1735.

3. Pleading ⚡37

Plaintiffs' failure to allege whether express warranty was oral or written entitled trial court to presume, for purpose of testing complaint against demurrer, that warranty was not founded upon an instrument in writing. West's Ann.Civ.Code, § 1735.

4. Limitation of Actions ⚡95(1)

Two year statute of limitations against cause of action for breach of warranty started to run when buyers of vehicle became aware of its unsatisfactory performance. West's Ann.Civ.Code, § 1735; West's Ann.Code Civ.Proc., § 339, subd. 1.

5. Sales ⚡392

Buyer's right to return of purchase price after breach of seller's warranty is conditioned upon buyer's demand therefor made upon seller within a reasonable time after the breach.

6. Sales ⚡391(8)

Buyer's right to recover purchase price after breach of seller's warranty is based on theory of implied assumpsit, thereby constituting an obligation not founded up-

on an instrument in writing, regardless of whether warranty was written or oral.

7. Sales ⚡392

Where buyers' demand for return of purchase price was not made until two and three-quarter years after their alleged right to rescind arose, any cause of action for return of purchase money was barred. West's Ann.Code Civ.Proc., § 339, subd. 1.

8. Limitation of Actions ⚡37(2)

Three year statute was not applicable to buyers' action for return of purchase price after breach of warranty. West's Ann.Code Civ.Proc., § 338, subd. 4.

9. Appeal and Error ⚡102

Order sustaining demurrer to complaint without leave to amend was nonappealable.

Lloyd C. Griffith, Los Angeles, for appellants.

Lawler, Felix & Hall, J. Phillip Nevins, Los Angeles, for respondent.

FOX, Justice.

The demurrer of defendant General Motors Corporation to plaintiffs' fourth amended complaint was sustained without leave to amend. Plaintiffs appeal from the judgment of dismissal.

Plaintiffs purchased a Cadillac from defendant on December 7, 1951, for \$4,850.52. This action grows out of its unsatisfactory performance, which developed immediately following delivery.

Plaintiffs' first cause of action is on the theory of negligence. They allege that in the manufacture and assembly of the automobile defendant's employees, through mistake and negligence, caused a piece of brown industrial wrapping paper to be sealed in what is known as the breather pipe, thereby internally sealing this pipe and preventing adequate motor ventilation; that as a result thereof the car did not operate "up to the standard of performance of a Cadillac" but "operated in an unsatisfactory, substandard and mechanically in-

efficient manner at all times since the date of sale"; that commencing with the day following the delivery of the automobile, plaintiffs began a series of returns to the service department in an effort to get it put into proper operating condition; that they thus expended \$735.12 for parts and mechanical repairs; that defendant's efforts were unfruitful until April 5, 1954, when a service mechanic discovered and removed the paper from the breather pipe; that as a result of defendant's negligence and mistake in assembling the car and its failure to promptly discover the trouble, the car was completely ruined. They further allege demand that defendant put the automobile in condition to operate in accordance with established standards for Cadillac cars and that defendant refused to so repair and condition the vehicle.

For their second cause of action plaintiffs allege defendant warranted that the automobile was manufactured and assembled to perform according to established standards of Cadillac performance. This asserted warranty is not alleged to have been in writing. Plaintiffs also allege they relied upon the implied warranty of quality. They then allege the unfitness of the car by reason of the breather pipe being plugged by wrapping paper, and thus charge a breach of warranty.

For their third cause of action plaintiffs allege that after the refusal to repair and recondition the car they served a written notice of rescission of the contract of purchase and sale on defendant; offered to return the automobile, and demanded the return of the purchase price but that defendant rejected their notice of rescission. Attached to the complaint is a purported copy of this notice. It is dated in August, 1954.

It is thus apparent that plaintiffs have attempted to state a cause of action on the theory of (1) negligence in the manufacture and assembly of the automobile; (2) breach of warranty, and (3) for restoration of the purchase price.

Defendant demurred, inter alia, on general grounds and that each cause of action was barred by section 339, subdivision 1, Code of Civil Procedure, that is, by the two year statute of limitations. As previously noted, the court sustained the demurrer without leave to amend. We have concluded the ruling was correct.

First Cause of Action.

[1] Defendant's manufacture and assembly of the automobile manifestly preceded plaintiffs' ownership of it or any privity of contract between them. Under such circumstances defendant's duty was confined to the exercise of reasonable care to see that the car was so manufactured and assembled as to be free from defects which might be reasonably expected to produce bodily injury or damage to other property. *Nebelung v. Norman*, 14 Cal.2d 647, 654, 96 P.2d 327; *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481. The complaint alleges no breach of such duty, nor any injury or damage within the categories last mentioned. It is therefore plain that plaintiffs fail to state a cause of action on the theory of negligence on the part of the manufacturer.

Second Cause of Action.

[2-4] In this cause of action plaintiffs appear to be relying on both an express warranty and an implied warranty under Civil Code section 1735. In either case, of course, this cause of action is based upon an alleged breach of warranty and necessarily sounds in contract. *L. B. Laboratories, Inc., v. Mitchel*, 39 Cal.2d 56, 62, 244 P.2d 385; *Tremeroli v. Austin, etc.*, 102 Cal.App.2d 464, 475, 227 P.2d 923.

Plaintiffs' failure to allege whether the express warranty was oral or written entitled the trial court to presume, for the purpose of testing the complaint against defendant's demurrer, that the warranty was not founded upon an instrument in writing. *Bates v. Daley's, Inc.*, 5 Cal.App. 2d 95, 100, 42 P.2d 706.

According to the complaint, the alleged warranty was breached immediately after

delivery, since it did not "perform according to recognized and established standards" of Cadillac cars. Plaintiffs were at once aware of the car's unsatisfactory performance and thus the breach of the asserted warranty for they returned it the next day to be put in proper condition. The two year statute of limitations, Code Civ.Proc., sec. 339(1), then started to run. *Crawford v. Duncan*, 61 Cal.App. 647, 650-651, 215 P. 573; *Firth v. Richter*, 49 Cal. App. 545, 549-550, 196 P. 277. This action was not filed until August, 1954, approximately two years and nine months after the car was purchased and its unsatisfactory performance known to plaintiffs. The cause of action was therefore barred by the provisions of section 339, subdivision 1, Code of Civil Procedure.

Third Cause of Action.

[5-8] The buyer's right to return of the purchase price after breach of the seller's warranty is conditioned upon the buyer's demand therefor made upon the seller within a reasonable time after the breach. The buyer's right to recover the purchase price is based on the theory of implied assumpsit thereby constituting an obligation not founded upon an instrument in writing, regardless of whether the warranty was written or oral. *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 141, 46 P. 899; *d'Artenay v. Hansen*, 138 Cal.App. 39, 45, 31 P.2d 460.

What is deemed a reasonable time within which the buyer must make such demand has been uniformly held to be a period coincidental with that provided in the statute of limitations barring an action for enforcement of the demand which is the two year period imposed by subdivision 1 of section 339, Code of Civil Procedure. *Thomas v. Pacific Beach Co.*, supra, 115 Cal. at page 143, 46 P. at page 901.

Plaintiffs' demand not having been made until August, 1954, or approximately two and three-quarter years after their alleged right to rescind arose, any cause of action for return of the purchase money was barred. Code Civ.Proc., sec. 339(1).

From what has been said, it is clear there is no merit in plaintiffs' contention that the three year statute of limitations, Code Civ.Proc., sec. 338(4), is here applicable.

[9] In addition to plaintiffs' appeal from the judgment of dismissal, they have also attempted to appeal from the order sustaining defendant's demurrer without leave to amend to their fourth amended complaint. This order is nonappealable. The purported appeal from said order is therefore dismissed.

The judgment is affirmed.

MOORE, P. J., concurs.

ASHBURN, J., did not participate herein.



145 Cal.App.2d 354

Vera M. SHARPE, Plaintiff and Appellant,
and

John Costello, as Trustee in Bankruptcy in
the Estate of Lucas Milton Sharpe, Bank-
rupt, Complainant in Intervention,
v.

Ira BROTZMAN, Antonio Brotzman, Cali-
fornia Pacific Title Insurance Company, a
corporation, James Cagle and Arnold Slev-
eland, Defendants and Respondents.

Civ. 16868.

District Court of Appeal, First District,
Division 1, California.

Oct. 24, 1956.

Action against mortgagees to recover real and personal property sold under deed of trust and chattel mortgage thereon or reasonable value of plaintiff's interest therein wherein trustee in bankruptcy of estate of co-owner of mortgaged property filed a complaint in intervention. The Superior Court, Santa Clara County, John D. Foley,

J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that order made on March 26, continuing in effect to April 2d order issued on March 18, requiring defendants to show cause why a preliminary injunction should not be granted prohibiting sale of mortgaged realty pending trial did not continue in effect after March 26, temporary restraining order issued on March 18, prohibiting sale of the realty and that such restraining order was dissolved by operation of law and was not in effect at time of foreclosure sale of realty under deed of trust on March 31.

Judgment affirmed.

1. Evidence Ⓒ383(7)

In action against mortgagees to recover real and personal property or reasonable value of mortgagor's interest therein, findings that foreclosure sale of realty by trustee under deed of trust thereon was properly carried out was supported by recitals contained in trustee's deed.

2. Injunction Ⓒ150

A temporary restraining order is terminated automatically at the end of ten days unless a subsequent order is made continuing it in force. West's Ann.Code Civ. Proc., § 527.

3. Mortgages Ⓒ369(7)

Party challenging validity of foreclosure sale of realty under deed of trust thereon made more than ten days after issuance of temporary restraining order prohibiting sale of such realty on ground that foreclosure sale violated terms of restraining order had the burden of proving that restraining order was in effect at time of foreclosure sale. West's Ann.Code Civ. Proc., § 527.

4. Mortgages Ⓒ338

Order made on March 26, 1954, continuing to April 2, 1954, order issued on March 18, 1954, requiring defendants to show cause on March 26 why a preliminary injunction should not be granted prohibiting any sale of specified realty pend-

ing trial did not continue in effect after March 26 temporary restraining order, also issued on March 18, prohibiting sale of such realty, and such temporary restraining order was dissolved by operation of law and was not in effect at time of foreclosure sale of realty under deed of trust thereon on March 31, 1954. West's Ann.Code Civ. Proc., § 527.

5. Chattel Mortgages Ⓒ251 Mortgages Ⓒ335

Statement attached to formal notice of foreclosure sale, under chattel mortgage, demanding all unpaid balance plus taxes and percentages allowed under mortgage as foreclosure costs, constituted exercise of option given mortgagees by chattel mortgage, deed of trust on realty and note secured thereby to declare full amount of note immediately due upon default and gave mortgagors notice of exercise of such option.

6. Chattel Mortgages Ⓒ292(1) Mortgages Ⓒ369(7)

In action against mortgagees to recover real and personal property sold under chattel mortgage and deed of trust thereon or reasonable value of mortgagor's interest therein, finding that mortgagors were in default at time of foreclosure sales was supported by evidence that mortgagors had failed to pay past-due taxes and interest, were not properly maintaining the real and personal property, were not paying required insurance thereon, and had suffered attachments against the property.

7. Chattel Mortgages Ⓒ292(1) Mortgages Ⓒ369(8)

In action against mortgagees to recover real and personal property sold under chattel mortgage and deed of trust thereon or reasonable value of mortgagor's interest therein, inconsistencies in testimony of mortgagee were for trial court to weigh and consider and were not such as to render his testimony unworthy of belief as a matter of law, where such inconsistencies did not substantially affect the accuracy of payment book kept by mortgagee.

8. Chattel Mortgages ⚡292(1)**Mortgages** ⚡369(8)

In action against mortgagees to recover real and personal property sold under chattel mortgage and deed of trust thereon or reasonable value of mortgagor's interest therein, erroneous testimony of mortgagee as to amount of overpayment of past due obligations which resulted from transfer by mortgagor of other property to mortgagees did not render testimony of such mortgagee unworthy of belief as a matter of law, where payment book kept by such mortgagee demonstrated that mortgagors had been given full credit for the property transferred.

9. Chattel Mortgages ⚡252**Mortgages** ⚡335

Where mortgagors were in default and had been and remained unequal to perform their current obligations, mortgagees were justified in taking possession of and selling real and personal property under deed of trust and chattel mortgage thereon given to secure payment of note.

Barbagelata, Zief & Carmazzi, San Francisco, for appellant.

Rea, Jacka & Frasse, Edwin H. Williams, San Jose, for respondents.

PETERS, Presiding Justice.

Vera M. Sharpe appeals from a judgment adverse to her. The facts appear to be as follows: When the original complaint was filed on March 18, 1954, Vera M. Sharpe and her husband were co-owners of the property here involved, but the complaint was filed in the name of the wife alone. Later the trustee in bankruptcy of the estate of the husband came into the action by way of a complaint in intervention. On the date of the filing of the original complaint in Mendocino County the court issued a temporary restraining order preventing defendants from selling the property and ordering them to show cause on March 26, 1954, why they should not be so enjoined pending suit. It also appears

that defendants' motion for a change of venue to Santa Clara County was granted on April 5, 1954.

The record shows that the Brotzmans filed a cross-complaint, but no recovery was granted to them based on its allegations, and no appeal has been taken from such denial. During trial, by consent of the parties, defendants Sleveland and Cagle were dismissed as parties.

The case went to trial on the issues joined as to the first count of the second amended complaint, the other count of such pleading not being now involved. This first count alleged that plaintiff was the owner of an undivided one-half interest in a certain sawmill and its equipment; that on February 18, 1952, plaintiff and her husband and one Kirkwood (the latter having purchased the property with the two Sharpes, but later having conveyed his interest to the Brotzmans) executed and delivered to the Brotzmans a promissory note for \$34,369.42 secured by a deed of trust on the realty and a chattel mortgage on the personalty. It is then alleged that "on or about the 11th day of April, 1953, defendants Ira Brotzman and Antoine Brotzman wrongfully and without cause and without any authority or permission from plaintiff or said Milton Sharpe, took possession of all of the said real property and the said personal property hereinabove described, that on said 11th day of April, 1953, the said defendants Ira Brotzman and Antoine Brotzman had no legal title to either said real property or said personal property and plaintiff and the said Milton Sharpe at said time were each the owners of an undivided one-half interest in the said real and personal property; that thereafter defendants, Ira Brotzman and Antoine Brotzman without any authority or permission from plaintiff or Milton Sharpe placed defendants, James Cagle and Arnold Sleveland, in possession of the said real and personal property." It is then alleged that defendants in this fashion thus deprived plaintiff of the use of her property, and that she is entitled either to its return or the reasonable value of her interest therein in the amount of \$35,000.

To this complaint the defendants answered, denying its major allegations, and filed a cross-complaint. The defendants Cagle and Sleveland also answered, but they were later dismissed. On the issues thus formed the cause proceeded to trial.

The facts developed at the trial were that the sawmill and its appurtenances were sold by the Brotzmans to the Sharpes and Kirkwood in October of 1951 for \$40,000. Prior to February 18, 1952, the purchasers paid over \$6,000 on the purchase price. On this last date the purchasers executed and delivered to the Brotzmans a promissory note for \$34,369.42 for the balance of the purchase price, plus a few other uncontested charges. The note was secured by a deed of trust and chattel mortgage. The note provided for interest at 4 per cent payable monthly, and also required monthly accountings by the purchasers of the number of board feet cut at the mill, and required the purchasers to pay the Brotzmans \$4 per 1,000 feet cut. The payments were to be applied first to interest, then to principal, with not less than \$6,000 to be paid by September 1, 1952, with the entire balance due by August 13, 1954.

In July of 1952 the Brotzmans sent the purchasers a notice of default. This led to certain negotiations between the parties whereby Mr. Sharpe transferred his interest in a certain gasoline station to the Brotzmans for a \$12,000 credit on the mill obligation. In exchange for this equity in the gasoline station the Brotzmans waived all payments except interest from August, 1952, through June of 1953, if the monthly cuttings did not exceed 400,000 board feet a month, but, if they did, the Brotzmans were to be paid \$4 per thousand feet on the excess. For the months of July, August and September, 1953, the rate of payment was reduced to \$2.50 per thousand feet. An addendum to the written agreement provided that "All payments for balance of 1952 on cutout is hereby waived."

This written agreement was signed by Brotzman and Sharpe on September 4, 1952, at which time Brotzman also gave Sharpe

a bill of sale to a certain piece of sawmill equipment covered by the chattel mortgage.

The purchasers operated the sawmill until January 10, 1953, when they entered into a lease-purchase agreement with Davis and Sanderson, who operated the mill until April 10, 1953, when they were ousted from possession by the Brotzmans. During the period they were operating the mill Davis and Sanderson paid the Sharpes a \$1,000 down payment and about \$2,000 on the lumber cut by them.

After the gasoline station settlement was executed in September of 1952, Brotzman testified that he made no further demands on the Sharpes until January of 1953, at which time he demanded certain interest payments and certain taxes that he had paid. Sharpe then paid Brotzman \$434.56 for interest and taxes. About April 8, 1953, when the Sharpes were again delinquent on certain payments, Brotzman visited the sawmill. He discovered that conditions were bad and he so notified the Sharpes. Among other things, there were attachments and tax liens levied against the property, insurance in a large amount was about to expire, and the equipment of the mill was in poor repair and working badly.

Under these circumstances, the Brotzmans foreclosed on the chattel mortgage and bid in the personal property for \$3,500. About this same time the Brotzmans took over possession of the sawmill and on April 21, 1953, the Brotzmans put Cagle and Sleveland into possession. These tenants paid the Brotzmans \$100 a month rent, and later bought the mill for \$5,000.

The original complaint in the present action was filed March 18, 1954. On March 31, 1954, the Brotzmans had the trustee under the deed of trust sell the mill property, Brotzman buying it for \$3,450. The Brotzmans are still in possession of the property and collecting the rent therefrom.

On this evidence the trial court found that on April 10, 1953, and thereafter, the Sharpes were in default; that the Brotzmans then foreclosed the chattel mortgage and bought in the personal property at the sale; that this terminated the Sharpes' in-

terest in the personalty; that subsequently the trustee under the deed of trust conducted a valid sale of the realty, which was bought by the Brotzmans; that this terminated the Sharpes' interest in the realty. Based on these findings judgment was awarded defendants on the first cause of action of the second amended complaint. Mrs. Sharpe appeals.

[1] It is somewhat difficult to ascertain appellant's precise theory on this appeal. She does challenge the sufficiency of the evidence to support the finding that the real property was sold under the terms of the deed of trust or in accordance with law. It is urged that there is no evidence of the recording of the notice of default, of posting, of publishing, or notice of intention to sell, etc. Apparently, the trustee's deed was not introduced into evidence. This court, upon motion duly made, permitted the respondents to produce the deed as additional evidence. That deed, now part of the record, contains full and proper recitals that support the finding that the sale under the deed of trust was properly carried out.

Appellant also contends that the trustee's sale was in violation of the terms of the restraining order issued by the trial court. This presents the only really debatable issue on this appeal. The trial court, when the original complaint was filed in Mendocino County on March 18, 1954, issued its order to defendants to show cause on March 26, 1954, why a preliminary injunction should not be granted prohibiting any sale of the realty pending trial, and also issued an ex parte order restraining the sale of the property until that date. On March 26, 1954, the return date of the order to show cause, the Mendocino court made the following minute order: "The court does hereby make an order that the order to show cause why an injunction pendente lite should not be granted pursuant to the order to show cause issued out of this court on the 18th day of March, 1954 and filed herein on the 25th day of March, 1954, be and the same is hereby continued to April 2, 1954, at two P.M. No order is made respecting the temporary restraining order."

What effect, if any, did this order have on the restraining order? Did it amount to a dismissal of the restraining order, or did it continue it in effect? The answers to these questions are important because the trustee's sale of the realty occurred shortly after March 26, 1954. If the restraining order was still in effect, the validity of that sale would be open to serious question.

[2-4] The record does not show who appeared in court on March 26th, or who requested the continuance. All we have is the order above quoted. While it is possible that the trial court intended by that order to continue the restraining order in effect, this is not the most reasonable interpretation of the order. Of course, under section 527 of the Code of Civil Procedure such a temporary restraining order is terminated automatically at the end of 10 days unless a subsequent order is made continuing it in force. Moreover, it is the law that the burden was on the appellant to prove that the restraining order was in effect at the time of the foreclosure sale, *Agricultural Prorate Comm. v. Superior Court*, 30 Cal. App.2d 154, 85 P.2d 898; *Palm Springs, etc., Co. v. Kieberk Corp.*, 37 Cal.App.2d 642, 100 P.2d 346. It is of some significance that the original order is in two parts, an order to show cause and a restraining order. On March 26, 1954, the trial court saw fit to continue the order to show cause in effect by the use of express language, and then used no such language in respect to the restraining order. It is also significant that, although the burden was on appellant to show that the restraining order was still in effect at the time of the sale, she made no mention at all of the point in the trial court. Under these circumstances, the proper interpretation of the quoted order is that it did not continue the restraining order in effect after the 26th. Therefore, it was dissolved by operation of law, and not in effect at the time of the trustee's sale.

Appellant also argues that the finding that the purchasers were in default on April 10, 1953, is not supported. Appellant contends that the record shows that at the time of the foreclosure of the chattel mortgage the

purchasers were only in default in the amount of \$434; that at the foreclosure sale Brotzman bid \$3,500 which was credited to the purchasers' account so as to wipe out the default. The answer to these contentions is obvious. The purchasers were admittedly in default when the chattel mortgage was foreclosed. The promissory note, the chattel mortgage and the deed of trust all contained provisions that in the event of default the Brotzmans had the right to declare the full amount of the note immediately due. The record shows that attached to the formal notice of the foreclosure sale under the chattel mortgage was a statement which reads:

"Operators fighting—Joe's truck and car attached—their credit broke down to where the log supply was shut off—wage checks bouncing—mill attached for unemployment insurance department. Machinery going to hell—I took over—have control now and aim to keep same until the sale.

"I herewith demand of you all the unpaid balance plus taxes plus the percentages allowed me under the mortgage as foreclosure costs. I understand same may be paid any time before the sale.

"I am very sorry—this deal has been a torture mentally every [sic] since we went into it. I wouldn't be protected in taking it back—so had to foreclose."

[5, 6] The italicized portion was clearly an exercise of the option given under all the instruments to declare all payments due upon a default, and was notice to the purchasers of the exercise of that option. The trial court found that on the "10th day of April, 1953, and at all times subsequent thereto, the complainant Vera M. Sharpe and Milton Sharpe, her husband, were in default under the terms and provisions of said promissory note, deed of trust, and chattel mortgage"; that the chattel mortgage was then properly foreclosed and Brotzman bought the personal property in for \$3,500, and thus terminated the interest of the purchasers in the personal property. Later it is found that the trustee caused the real property to be sold in accordance with

the terms of the deed of trust and with the law; that Brotzman purchased at the sale; that this terminated the purchasers' interest in the realty. While the finding in reference to the sale of the realty does not expressly state the default upon which it is based, it necessarily refers back to the default upon which the foreclosure of the chattel mortgage was based. Moreover, the trustee's deed recites that the defaults leading to the sale of the realty were the failure to restore a destroyed building, the failure to deliver to the Brotzmans fire policies on many of the buildings on the property, the failure to pay past due taxes and the failure to pay past due interest on the note. Thus, the evidence shows that the purchasers were not only in default by failing to pay past due taxes and interest, but were not properly maintaining the machinery and mill, were not paying required insurance, had suffered attachments against the property, etc. Thus, the challenged finding is abundantly supported.

[7] The last major contention of appellant is that, as a matter of law, the testimony of Ira Brotzman is unworthy of belief. It is argued that he made inconsistent and contradictory statements; that he juggled the books; that he added or subtracted incorrectly and made double entries so as to benefit himself, and that, in fact, there was nothing due from the purchasers at the time of foreclosure. The point is without merit.

Inconsistencies in Brotzman's testimony were for the trial court to weigh and consider. Brotzman was closely cross-examined by counsel for appellant as to his entries in the payment book kept by him. It is true that on several minor matters he was crossed up, but these matters did not affect, substantially, the accuracy of the record book kept by him.

[8, 9] The contention that Brotzman did not give the purchasers full credit for the gasoline station when it was turned over to the sellers is without merit. While it is true that Brotzman testified that he thought the \$12,000 credit on the gasoline station

deal resulted in an overpayment of past-due obligations of about \$2,100, and that the evidence shows that such overpayment was in fact more than \$2,100, the record of payments shows conclusively that this error as to the amount of the overpayment did not affect the account between the parties. This is so because the payment book demonstrates that the purchasers were given full credit for the entire \$12,000 regardless of how much this overpaid past-due obligations. No substantial inaccuracies in the payment record were shown to have occurred, and Brotzman's testimony was not impeached, as a matter of law. There is abundant evidence that the purchasers were in default in April of 1954, and that they had been and remained unable to perform their contract obligations. Thus, respondents were justified in taking possession and selling the chattels and the real property.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



145 Cal.App.2d 405

Gall Theresa GARDNER, a minor, by Larue Wilson Atases, her guardian ad litem, and Larue Wilson Atases, individually, Plaintiffs and Appellants,

v.

The STONESTOWN CORPORATION, a corporation, Ira H. Larson Company, a corporation, Associated Plastering & Lathing Company, a corporation, City and County of San Francisco, a municipal corporation, et al., Defendants and Respondents.

Civ. 16900.

District Court of Appeal, First District,
Division 1, California.

Oct. 25, 1956.

Rehearing Denied Nov. 23, 1956.

Hearing Denied Dec. 19, 1956.

Nine year old child by her guardian ad litem brought action against owner of apartment building, general contractor, sub-

contractor, and the City and County of San Francisco for injuries sustained by the child in fall from ramp, which sub-contractor had constructed without permission over area, which was used by children as a playground at rear of apartment building. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., entered judgments of nonsuit as to all of the defendants and the child appealed. The District Court of Appeal, Bray, J., held that the City and County of San Francisco was not liable for alleged negligence of sub-contractor, but that questions of liability of other defendants were for jury.

Judgment in favor of the City and County of San Francisco affirmed and judgments in favor of the other defendants reversed.

1. Appeal and Error ⇐866(1)

Appeal by plaintiffs, after motion for new trial denied, from judgments of nonsuit entered in favor of all defendants, raised question whether there was any evidence, which would have supported a verdict in favor of plaintiffs against any one or all of the defendants, had the case gone to the jury. *See also* *People v. [illegible]*

2. Appeal and Error ⇐927(3)

On appeal by plaintiffs from judgments of nonsuit entered in favor of all defendants, the District Court of Appeal was required to consider the facts and reasonable inferences therefrom most strongly in favor of the plaintiffs.

3. Master and Servant ⇐315

The mere relationship of owner and independent contractor does not make the owner liable to a third party for the independent contractor's negligent acts in performing the details of the work contracted for.

4. Counties ⇐146

Municipal Corporations ⇐751(1)

Where the City and County of San Francisco contracted with contractor for construction of a fire house, and during construction of the fire house a child was

injured as result of alleged negligence of subcontractor, the City and County of San Francisco was not liable for the child's injuries.

5. Landlord and Tenant ⇨169(11)

Where owner of apartment building maintained in the rear of the building an area, which was commonly used as a play area by children living in the building, and subcontractor, which was doing the plastering work on building on adjoining lot, without permission but with knowledge of owner of apartment building built ramp above a portion of the area behind the apartment building, and child, who lived in apartment building, was hurt as result of fall from ramp, question whether owner of apartment building was negligent, so as to be liable for injuries sustained by child, was for jury in action by child for injuries.

6. Landlord and Tenant ⇨164(1)

Where owner of apartment building maintained in the rear of the building an area, which was commonly used as a play area by children living in the apartment building, and subcontractor, which was doing the plastering work on building on adjoining lot, without permission but with knowledge of owner of apartment building built ramp above a portion of the area behind the apartment building, owner of apartment building was under a duty to see that ramp was reasonably safe as to children who played in the area behind the apartment building.

7. Negligence ⇨136(18)

Where subcontractor, which was engaged in doing plastering work on fire house, constructed a ramp which extended over and above area where children played behind apartment building, and subcontractor knew or should have known that children in the apartment building played in the area, and child was injured while playing on ramp, question whether subcontractor was liable for child's injuries was for jury.

8. Negligence ⇨33(3)

Where subcontractor, which was engaged in doing plastering work on fire house, constructed a ramp which extended over and above area where children played behind apartment building, and subcontractor knew or should have known that children in the apartment building played in the area, fact that subcontractor constructed the ramp without permission of the owner of the apartment building and was therefore a trespasser, did not make child, who played on the ramp and who was injured, a trespasser, and did not prevent her from maintaining an action against the subcontractor for her injuries.

9. Negligence ⇨50

Where subcontractor, which was engaged in doing plastering work on fire house, constructed a ramp which extended over and above area where children played behind apartment building, and subcontractor knew or should have known that children in the apartment building played in the area, subcontractor had duty to protect from injury children, who customarily used the area behind the apartment building as a playground, and who might go on the ramp to play.

10. Master and Servant ⇨315

Generally, the rule of respondeat superior does not apply to cases in which injury results from the negligent acts of an independent contractor.

11. Master and Servant ⇨323

An independent general contractor, who is present and sees and realizes that a subcontractor is doing his work in an unlawful and dangerous manner, may be liable for an injury resulting directly to a third person from such unlawful and negligent conduct.

12. Master and Servant ⇨332(3)

Where a reasonable inference could be drawn that both foreman and watchman of general contractor had seen ramp constructed by a subcontractor and knew or must have known of its negligent construction, whether general contractor was liable

for injuries sustained by child while playing on ramp was for jury.

13. Master and Servant Ⓒ320

If mode and manner which constitute defect, which is created by subcontractor, and by which injuries of third person are occasioned, are inherent in the plan of the general contractor, then liability may attach to the general contractor.

14. Master and Servant Ⓒ332(3)

Where contractor had right and responsibility of notifying subcontractor when plastering work of subcontractor should and could be done, and there was evidence that when general contractor notified subcontractor to proceed with plastering work, other work was going on inside building, so as to prevent subcontractor from moving materials through the building, and required construction of a ramp over adjoining property, question whether general contractor was liable for injuries sustained by child in fall while playing on ramp was for jury.

15. Negligence Ⓒ136(29)

In action by nine year old child when she fell from ramp, which had been constructed by subcontractor over area used by children as playground in rear of apartment building, question whether child, who had been warned by her mother not to go onto the ramp, was contributorily negligent was for jury.

16. Negligence Ⓒ85(3)

A nine year old child cannot be held to the same standards of conduct as an adult.

17. Negligence Ⓒ32(4)

Rule that possessor of land has no duty toward persons who come on the land, to change method of operations carried on so openly as to be obvious to all observers, is not necessarily applicable to a child.

Hadsell, Murman & Bishop, San Francisco, for respondent Stonestown Corp.

Pelton, Gunther, Durney & Gudmundson, San Francisco, for respondent Ira H. Larson Co.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for respondent City and County of San Francisco.

BRAY, Justice.

[1] Plaintiffs' appeal, after motion for new trial denied, from judgments of nonsuit entered in favor of all defendants, raises the question of whether there was any evidence which would have supported a verdict in plaintiffs' favor against any one or all of the defendants, had the case gone to the jury.

General Facts.

[2] The facts referring to the negligence of the particular defendants will be discussed later. As we are required to do in nonsuits, the facts and the reasonable inferences therefrom most strongly in favor of plaintiffs will be given.

Plaintiff Gail, 9 years of age, lived with her mother in an apartment leased from defendant Stonestown Corporation (hereafter referred to as "Stonestown"). Adjacent to the property upon which the Stonestown apartment building sat is a lot owned by the defendant City and County of San Francisco (hereafter referred to as "San Francisco"). San Francisco had entered into a contract with defendant Ira H. Larson Company (hereafter referred to as "contractor") by which the latter was to construct a fire house on San Francisco's lot. Contractor had sublet to Associated Plastering & Lathing Company (hereafter referred to as "plasterer") the plastering work on the fire house. During the construction of the fire house contractor had built a wall 3 feet 6 inches high, along and one inch from the line dividing the fire house property from the Stonestown property. Separating this wall from the apartment building was an area 25 feet in width and consisting of lawn and a cement apron

Low & Duryea, San Francisco, for appellants.

Keith, Creede & Sedgwick, San Francisco, for respondent Associated Lathing & Plastering Co.

which led to the back door of the apartment building. This area was owned and maintained by Stonestown and was commonly used as a play area by the children living in the apartment building. When the fire house was substantially constructed contractor called on plasterer to perform its contract. This required plastering work to be done both inside and outside the fire house. Because water was available only at the front of the building, the plaster was mixed there and trundled in wheelbarrows to the point of application. The plastering on all of the exterior except the rear wall was completed without difficulty. However, to plaster that wall it became necessary to build a ramp over the above mentioned line wall for the wheelbarrows to run over. This ramp was built by plasterer and was about 25 feet long, rising from ground level to a height of approximately $4\frac{1}{2}$ feet at the upper end. It was made of 4" x 4" wooden uprights with crossbars nailed across them supporting three 2" x 8" planks abreast. The planks were lying loose on the crossbars. The tops of the upright stakes were rough and jagged as if driven into the ground by the blunt end of an ax. The planks which formed the walkway of the ramp were of rough lumber, and were grooved so as to present an irregular surface. They were covered with plaster and paint. The low end of the ramp started at or on the cement apron which extended out from the apartment house toward the wall, and ran almost parallel to the wall toward the fire house patio at the rear of the building. At the top of the wall there was a platform about the same size as the ramp.

On March 15, 1953, Gail, her sister, and another child were playing mud pies near the ramp. There were some other children on top of the ramp fighting over a wire. Gail went up the ramp, took the wire from them and threw it on the ground. As she walked back down the ramp she got her foot caught in the space between the planks and fell. She may have been walking backwards down the ramp. Gail did not remember what happened next, but her moth-

er heard her screams and took her in the apartment where she wiped off the blood and noticed that six permanent teeth had been knocked out. Gail had several bruises on her body, and her face was discolored and bruised around her mouth. Apparently, when Gail fell, she had struck her mouth on one of the 4" x 4" uprights of the ramp. The ramp was constructed on Stonestown property without permission of Stonestown.

The court granted nonsuits as to all defendants.

San Francisco.

[3,4] We fail to find any evidence that would support a verdict of liability on the part of San Francisco. Plaintiffs do not point to any evidence of negligence on its part, and at argument practically conceded that they had failed to make out a case against San Francisco. The mere relationship of owner and independent contractor does not make the owner liable for the independent contractor's negligent acts in performing the details of the work contracted for. *McDonald v. Shell Oil Co.*, 44 Cal.2d 785, 788, 285 P.2d 902; *Barrabee v. Crescenta Mutual Water Co.*, 88 Cal.App. 2d 192, 196, 198 P.2d 558.

Stonestown.

[5] As before stated, the area upon which the ramp was constructed was commonly used by the apartment building children for play, a fact well known to Stonestown employees. There was testimony that during the 5 days to a week that the ramp was there before the accident, its presence and the children playing in the area was observed by Stonestown employees. One Suojanen, a Stonestown tenant, complained on one occasion to Stonestown about the ramp and about children taking boards from it and an employee came to look at it. Thus, there was evidence from which the jury could have found that Stonestown, from the time of its construction, knew of the presence of the ramp in the area where it permitted children to play, even though it had not formally consented to its construction. More-

over, the jury could have found that Stonestown knew or should have known of the character of the ramp's construction and that children would and did play upon it. Such findings would be sufficient to place liability upon Stonestown for the accident, upon the principle that the children were, in effect, invitees of Stonestown on the play area, and therefore Stonestown was required to use ordinary care for their safety. Such care would not be met by permitting in the area a ramp which would attract children and which ramp was unsafe for them. Permitting a ramp with loose boards where it was reasonable to assume that children would go could be held to be lack of ordinary care. We are not dealing with the "attractive nuisance" principle. All the parties agree that that principle is not applicable here. The principle applicable here is that set forth in *Roberts v. Del Monte Properties Co.*, 111 Cal.App. 2d 69, 74, 243 P.2d 914. There a minor, living with his parents in the defendant's hotel, saw a pile of mattresses on the floor in the hall. While playing on the top mattress he accidentally tumbled backwards towards an open window behind the pile. The window screen gave way and the child fell down into a patio, receiving injuries. As does Stonestown here concerning Gail's going on the ramp,¹ the defendant contended that the minor when playing on the mattress pile was using it for an unintended and unpermitted purpose, and therefore became a trespasser or licensee to whom the defendant owed no duty except to refrain from overt or intentional acts. The reviewing court said, 111 Cal.App.2d at page 73, 243 P.2d at page 916: "This rule has expressly been held inapplicable to infant invitees attracted by dangerous objects in *Crane v. Smith*, 23 Cal.2d 288, 300, 144 P.2d 356, 363." It then said that to say that a child attracted by a dangerous object in a place where it was an invitee became a trespasser as to such object " * * * would be to extend the doctrine of the cases denying compensation to

one who has exceeded the scope of his invitation beyond their logical scope. Moreover, such reasoning would nullify the land occupier's duty to keep his premises free of natural or artificial conditions which involve an unreasonable danger to his business visitors when he has reason to believe that they will not realize the risk involved in the condition. Certainly, evidence shown by the present record justifies a finding that the child's act was one which a reasonably prudent person should have anticipated and guarded against.' And further, 23 Cal.2d on page 301, 144 P.2d on page 364: 'The childish propensity to intermeddle was the characteristic which the appellant should have taken reasonable precautions to guard against.'" Pages 73-74, 243 P.2d at page 916, quoting from *Crane v. Smith*, 23 Cal.2d 288, 144 P.2d 356. The court said also that decisions providing liability in such situations "are based on the general principle that the person in possession of premises must take such precautions for the safety of his business invitees as are reasonable under all the circumstances, considering their relation, the burden of the interference with his own affairs and the danger to the invitees to be anticipated, and that special caution is required in behalf of invitees of immature age whose inability to appreciate and propensity to ignore certain dangers he ought to consider. * * *

In each case the reasonableness of the conduct under all the circumstances is for the jury and accordingly it was also in this case correctly left to the jury." 111 Cal.App.2d at page 74, 243 P.2d at page 917.

In our case no contention is made that apart from the use of the ramp Gail was not a business invitee of Stonestown on the premises. In *Crane v. Smith*, supra, 23 Cal.2d 288, 144 P.2d 356, where a minor accompanied her mother into the defendant's store and was injured while meddling with a coffee mill, the court, although holding that the mill was attractive

1. The other defendants make the same contention.

to the child, pointed out that recovery was not had under the attractive nuisance doctrine, but on the theory that the child was an invitee to whom the store owner owed the duty of ordinary care, and that indulging in the childish propensity to intermeddle is a characteristic which the store owner should have taken reasonable precautions to guard against. So here, Gail was an invitee of Stonestown to the premises upon which it knew the ramp existed. The defendant should have known also of the childish propensity to climb upon a ramp and should have taken reasonable precautions to guard against Gail's injury therefrom, even though the ramp was constructed by another than Stonestown.

[6] Stonestown contends that there is no evidence that it had notice of the dangerous condition of the ramp nor of how long that condition existed. The evidence shows that the ramp was built with loose flooring. Gail's injury was caused by her getting her foot caught between two loose boards. While it is possible that the cracks between the loose boards may have varied in size from time to time, there is no contention that the boards were ever nailed. Thus, a reasonable inference is that the dangerous condition existed for the 5 days to a week that the ramp was there. Stonestown, knowing of the presence of the ramp in an area where it knew that children played, was under a duty to see that the ramp was reasonably safe, as it is presumed to know that children would play there. "A possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe." Restatement, Torts, § 360.

Plasterer.

[7-9] What we have said concerning the liability of Stonestown applies likewise to plasterer who constructed the ramp on premises where Gail was entitled to be. The jury could have found from the evidence that plasterer knew or should have known that the children were playing in the area where it built the ramp. The fact that plasterer, having constructed the ramp without permission, was a trespasser upon those premises, did not make Gail in using the ramp a trespasser. Plasterer, in placing an attractively dangerous object on the place where Gail had a right to be, was required to use ordinary care to protect the child from injury from the object with which plasterer reasonably should have known Gail would meddle.

Contractor.

[10] As early as *Boswell v. Laird*, 8 Cal. 469, it was held that, generally speaking, the rule of respondeat superior does not apply to cases in which injury results from the negligent acts of an independent contractor. This rule has continued. See *Luce v. Holloway*, 156 Cal. 162, 163, 103 P. 886; *George v. Trinity Church*, 176 Cal. 553, 556, 169 P. 69 (injury due to negligence of cement and stone subcontractor. The court held that the general contractor has no duty to inspect a scaffold built by the subcontractor.); *Green v. Soule*, 145 Cal. 96, 98-100, 78 P. 337 (negligence of plastering subcontractor); *Hard v. Hollywood Turf Club*, 112 Cal.App.2d 263, 274-275, 246 P.2d 716 (negligence of painting subcontractor); *Slyter v. Clinton Const. Co.*, 107 Cal.App. 348, 353, 290 P. 643 (negligence of plastering subcontractor).

[11,12] Plaintiffs contend that the following evidence takes the case out of the rule. Contractor's foreman testified: "My job for the general contractor is to see that everything is kept clear around that building as far as possible, and see that the work that is done right. So naturally I would be all around the building." He also testified that he saw the ramp im-

mediately after it was constructed but did not go on it, and that almost every night for five nights during the time the ramp was there, he stayed on the job until about 9 o'clock p. m. to keep children from tracking on fresh cement. Gail testified that before the accident she had seen a one-armed colored man walk up and down the ramp. Contractor's foreman testified that he employed a one-armed watchman but not until after the accident. The jury, of course, could have resolved this conflict. Thus, a reasonable inference could be drawn that both the foreman and the watchman having seen the ramp, knew or must have known of its negligent construction. From all this evidence, a jury could, although not required so to do, have found that contractor knew of the danger to the children playing, and who had a right to play in the ramp area. Such a finding would bring the case within the exception to the general rule, namely, "An independent general contractor, who is present and sees and realizes that a subcontractor is doing his work in an unlawful and dangerous manner, may be liable for an injury resulting directly to a third person from such unlawful and negligent conduct." *Rosenberg v. Schwartz*, 1932, 260 N.Y. 162, 183 N.E. 282, 283. In that case the general contractor engaged in building a church sublet the brick work to brick masons. The latter built a scaffold on the outside of the wall on one side of the church, which scaffold extended 25 feet above and 4 or 5 feet beyond the lot line between the church and property upon which the plaintiff, 12 years of age, lived. The plaintiff and another boy were standing on this property under the scaffold watching the work going on in and about the church building. Because of lack of suitable rails or screens on the scaffold, a brick fell or was knocked off the scaffold, injuring the plaintiff. As in our case the general contractor contended that he was under no duty to guard the scaffold and hence should not be held liable. The reviewing court reversed a judgment of nonsuit, pointing out, in effect, that it was a

question for the jury whether the quoted exception to the general rule of lack of liability applied. The above quotation was quoted with approval in *Schwartz v. Merola Bros. Construction Corporation*, 1943, 290 N.Y. 145, 48 N.E.2d 299, 302.

While we have been unable to find in California a case applying the above mentioned exception to the general rule, there are cases here holding that such exception applies where the acts of the subcontractor create a public nuisance and are known to the general contractor. See *MacLean v. City & County of San Francisco*, 127 Cal.App.2d 263, 273 P.2d 698. Logically there is no difference between a situation created by a subcontractor known to the general contractor and dangerous to third persons, which amounts to a public nuisance, and a similar situation which, while dangerous to third persons, does not amount to a public nuisance.

[13] There is another exception to the general rule which the evidence might have justified the jury in applying. This exception is expressed in *Williams v. Fresno C. & I. Co.*, 96 Cal. 14, 16, 30 P. 961, quoting from *Boswell v. Laird*, *supra*, 8 Cal. 469: "If the mode and manner which constituted the defect by which the injuries complained of were occasioned had been *inherent in the plan*, and this plan had been devised by Laird and Chambers, which the contractors were engaged to carry out, then liability would attach to Laird and Chambers."

[14] In our case the contractor had the right and the responsibility of notifying the subcontractor when the latter's work should and could be done. There was evidence that at the time contractor notified plasterer to proceed, certain work was going on inside the fire house building which prevented plasterer from moving materials through the building and required the construction of the ramp upon the adjoining property. Thus, by requiring plasterer to proceed at that time, contractor, in effect, was requiring plasterer to use the adjoining property and thus was dealing

with the mode and manner of subcontractor doing the work. Such fact would bring contractor within the exception above mentioned.

Gail's Status.

Stonestown says that, while it probably invited Gail to play in the area, it did not invite her to use the ramp. Contractor and plasterer say, nor did we invite her to use the ramp. However, as pointed out in *Crane v. Smith*, supra, 23 Cal.2d 288, 144 P.2d 356, and *Roberts v. Del Monte Properties Co.*, supra, 111 Cal.App.2d 69, 243 P.2d 914, 916, Stonestown in permitting to be placed in the area to which they had invited Gail, a ramp which was reasonably inviting to children, cannot now claim that it was not required to use reasonable precautions to guard against a child's "'propensity to intermeddle'". As to the other defendants, in placing and maintaining a structure inviting to children in their play area. they, too, would be responsible for not taking reasonable precautions to protect her.

[15-17] Both Gail and her mother testified that she was told not to go on the ramp. At the time of the accident there were two children on the ramp fighting over a wire. Gail went on the ramp to take the wire away from them to stop the fighting. It was as she was returning from doing this that she caught her foot between the loose boards and was injured. We cannot say as a matter of law that the warning changed her status. It was for the jury to determine as a matter of fact the effect of the warning. A 9 year old child cannot be held to the same standards of conduct as an adult. Nor is the rule stated in *Nagle v. City of Long Beach*, 113 Cal.App.2d 669, 672, 248 P.2d 799, and *Allen v. Jim Ruby Const. Co.*, 138 Cal. App.2d. 428, 291 P.2d 991, cited by Stonestown, concerning obvious dangers, necessarily applicable to a child. It was for the jury to determine whether a child would realize the danger of walking on loose boards. As said in *Roberts v. Del Monte Properties Co.*, supra, 111 Cal.App.2d 69,

74, 243 P.2d 914, 917: "In each case the reasonableness of the conduct under all the circumstances is for the jury and accordingly it was also in this case correctly left to the jury."

Judgment in favor of City and County of San Francisco affirmed. Judgments in favor of Ira H. Larson Co., Associated Plastering and Lathing Co., and The Stonestown Corporation, reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Clyde Robert MARSHALL, Defendant and
Appellant.*
Cr. 5647.**

**District Court of Appeal, Second District,
Division 3, California.**

Oct. 25, 1956.

Rehearing Denied Nov. 9, 1956.

Hearing Granted Nov. 21, 1956.

Prosecution for robbery. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction of violation of statute providing that any person who drives or takes a vehicle not his own without consent of owner and with intent to deprive owner of title or possession whether with or without intent to steal is guilty of a felony, and defendant appealed from nonexistent verdict and judgment. The District Court of Appeal, Vallée, J., held that where violation of such statute was not charged in information which charged robbery, court acted in excess of its jurisdiction in entering judgment of conviction for violation of statute, and

that where defendant appealed from non-existent verdict, appeal would be dismissed.

Appeal from nonexistent verdict dismissed and judgment reversed.

1. Indictment and Information ⇨189(1)

Test of whether an offense is included in another is whether greater offense cannot be committed without necessarily committing lesser offense. West's Ann.Pen. Code, § 1159.

2. Indictment and Information ⇨191(9)

Violation of statute providing that any person who drives or takes a vehicle not his own, without consent of owner, and with intent to either permanently or temporarily deprive owner of his title to or possession of such vehicle, whether with or without intent, to steal, is guilty of a felony, is not necessarily included in robbery, and robbery can be committed without necessarily violating that statute. West's Ann.Pen. Code, § 211; West's Ann.Vehicle Code, § 503.

3. Indictment and Information ⇨191(9)

Where violation of statute providing that any person who drives or takes a vehicle not his own without consent of owner, and with intent to either permanently or temporarily deprive owner of title or possession of vehicle, whether with or without intent to steal same, is guilty of a felony was not charged in information which charged robbery, court acted in excess of its jurisdiction in entering judgment of conviction of violating statute. West's Ann.Vehicle Code, § 503.

4. Criminal Law ⇨113(4)

Where jury trial in prosecution for robbery was waived and defendant appealed from nonexistent verdict, appeal would be dismissed.

VALLÉE, Justice.

By information defendant was charged with robbery, Pen.Code, § 211, in that on October 3, 1955 he "did wilfully, unlawfully, feloniously and forcibly take from the person and immediate presence of Jack J. Martens, the following described personal property, to wit, Seventy Dollars (\$70.00) in money, lawful money of the United States, and an automobile of the value of Eight Hundred Dollars (\$800.00), lawful money of the United States, all of the value of Eight Hundred Seventy Dollars (\$870.00), lawful money of the United States, in the possession of Jack J. Martens, which said taking was then and there without the consent and against the will of the said Jack J. Martens, and was then and there accomplished as aforesaid by the defendant by means of force used by said defendant upon and against the said Jack J. Martens, and by said defendant then and there putting the said Jack J. Martens in fear."

Defendant was convicted by the court, sitting without a jury, of a violation of section 503 of the Vehicle Code on the theory that the offense denounced by that section is an offense necessarily included in the crime of robbery.

Defendant's only assignment of error is that a violation of section 503 of the Vehicle Code is not an offense necessarily included in the crime of robbery.

On October 3, 1955, about 2:30 a. m., defendant and Jack Martens drove to a motel in Martens' automobile. They pulled up in front of the manager's office. As Martens was about to get out of the car defendant struck him on the top of the head from behind. There was no one else in the car or in the motel yard at the time. Martens was unconscious for a few seconds. When he revived, defendant had gotten out of the car and was pulling at his clothes. Martens reached for him and held onto his clothes. Defendant started pounding Martens on the back of his head, his back, and his neck. Martens called for help. The proprietor of the motel heard him and ran to the door of his apartment. Defendant broke loose

Robert W. Herrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Arthur L. Martin, Deputy Atty. Gen., for respondent.

from Martens' grasp, jumped in his (Martens') car, turned on the ignition, and drove away. Seventy dollars was missing from Martens' pocket. The police apprehended defendant driving the car a short time later. The \$70 was not found on him.

Penal Code, section 211, reads:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Vehicle Code, section 503, so far as relevant, reads:

"Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, * * * is guilty of a felony * * *."

Penal Code, section 1159, reads:

"The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

The positions of the respective parties are these: defendant argues that a necessarily included offense is one that of necessity "in every case and always, must be truly a part of the offense charged"; and since a violation of section 503 is not always a part of robbery, but may be committed separate and apart from robbery, it is not necessarily included in robbery. The People argue that although a violation of section 503 may not be necessarily included in every robbery, since it may be a part of some robberies it is a necessarily included offense.

[1] The test for determining whether one offense is necessarily included in another was restated by the Supreme Court in the recent case of *In re Hess*, 45 Cal.2d 171, 288 P.2d 5. The court said, 45 Cal.2d at page 174, 288 P.2d at page 7:

"The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." *People v. Greer*, 30 Cal.2d 589, 596, 184 P.2d 512, 516; see also *People v. Kehoe*, 33 Cal.2d 711, 713, 204 P.2d 321."

In *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512, the defendant was charged with statutory rape, Pen.Code, § 261(1), and lewd and lascivious conduct, Pen.Code, § 288, arising out of the same act. In a previous trial he was charged not only with these identical offenses but also with contributing to the delinquency of a minor, the same person on whom the rape and lewd and lascivious conduct were alleged to have been committed. Welf. & Inst.Code, § 702. In that trial he was found guilty of violating section 702, but the jury disagreed as to the counts of statutory rape and lewd and lascivious conduct. In the second trial he pleaded double jeopardy and offered to prove the conviction under section 702. The offer was refused. On review he contended the refusal constituted reversible error. After stating the test of a necessarily included offense, as repeated in *In re Hess*, supra, 45 Cal.2d 171, 288 P.2d 5, the court stated, 30 Cal.2d at page 597, 184 P.2d at page 517:

"In the light of this rule, ['A conviction of the lesser is held to be a bar to [the] prosecution for the greater on the theory that to convict of the greater would be to convict twice of the lesser.'] the error of the trial court in this case is apparent. Statutory rape (section 261(1)) and lewd and lascivious conduct (section 288) are offenses against minors under 18 and 14 years of age respectively, whereas section 702 protects minors under 21. Consequently, the age groups covered by sections 261(1) and 288 of the Penal Code are necessarily included within the age group covered by section 702 of the Welfare and Institutions Code. It is inconceivable that the acts described

in sections 261(1) and 288 would not contribute to the delinquency of a minor. [Citations.] Since every violation of sections 261(1) and 288 is also a violation of section 702, the offense defined in the latter is an offense necessarily included in the offenses defined in sections 261(1) and 288. [Citation.]

"Respondent contends, however, that all three of the offenses involved herein contain different elements. It is true, that each offense is stated differently in the codes and that defendant could have contributed to the delinquency of a minor without committing statutory rape or a lewd and lascivious act. [Citation.] Nevertheless, the converse is not true. We are holding, not that these offenses are identical, but that every violation of sections 261(1) and 288 necessarily constitutes a violation of section 702 and that therefore the offense defined in section 702 is an offense necessarily included in the offenses defined in sections 261(1) and 288."

In *People v. Cuevas*, 18 Cal.App.2d 151, 63 P.2d 311, it was held that a violation of section 503 may be a distinct offense from theft of the vehicle, Pen.Code, § 484; that where it appears the crime of larceny had been fully completed, the subsequent act in driving the vehicle without the consent of the owner was entirely separate and disconnected from the original theft of it. Also see *People v. Jeffries*, 47 Cal.App.2d 801, 807, 119 P.2d 190; In re *Connell*, 68 Cal.App.2d 360, 364, 156 P.2d 483. *People v. Crawford*, 115 Cal.App.2d 838, at page 841, 252 P.2d 963, says that grand theft of an automobile, which requires an intent to steal, includes a violation of section 503 which may or may not be with an intent to steal.

People v. Pearson, 41 Cal.App.2d 614, at page 618, 107 P.2d 463, at page 465, held that, "The crime of violating section 503 of

the Vehicle Code is not included in the crime of robbery or attempted robbery, the elements necessary to be proved being different in each offense." At the time *Pearson* was decided, section 503 read: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner," etc. In 1947 the words "and in the absence of the owner" were deleted.

[2] Consideration of the foregoing points to the conclusion that a violation of section 503 of the Vehicle Code is not necessarily included in the crime of robbery. The reasoning of *People v. Greer*, supra, 30 Cal.2d 589, 184 P.2d 512, and In re *Hess*, supra, 45 Cal.2d 171, 288 P.2d 5, is that every robbery must necessarily constitute a violation of section 503 in order that the latter be included in the former.

Every violation of section 211 of the Penal Code is not also a violation of section 503 of the Vehicle Code. Robbery can be committed without necessarily violating section 503. A person may drive or take a vehicle not his own, without the consent of the owner, without doing so from his immediate presence and without doing so by means of force or fear.

[3] Since defendant was not charged in the information with a violation of section 503 of the Vehicle Code and since it is not necessarily included in the offense charged, the court acted in excess of its jurisdiction in entering a judgment of conviction of that offense against him. In re *Hess*, supra, 45 Cal.2d 171, 175, 288 P.2d 5.

[4] Defendant also appealed from a nonexistent verdict. Since trial by jury was waived, there was no verdict.

The appeal from the nonexistent verdict is dismissed. The judgment is reversed.

SHINN, P. J., and PARKER WOOD, J.,
concur.

145 Cal.App.2d 504

Cite as 302 P.2d 685

Winifred R. CODMAN, William F. Foley, Agnes D. Foley, Emma Glnottl and Edward M. Johnston, Plaintiffs and Respondents,

v.

FAIR OAKS IRRIGATION DISTRICT, Norman Balliff, Henry Kroeger and Roy H. Luhrs, as directors thereof, and Armco Drainage and Metal Products, Inc., a corporation, Defendants and Appellants.

Civ. 8790.

District Court of Appeal, Third District, California.

Oct. 29, 1956.

Rehearing Denied Nov. 21, 1956.

Hearing Denied Dec. 27, 1956.

Action by taxpayers of an irrigation district against the district, its directors, and an irrigation pipe supplier to enjoin issuance of warrants by the district in payment of a debt for pipe purchased by the district from supplier. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment for taxpayers and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where Districts Securities Commission approved issuance of warrants for payment of irrigation district's debt to pipe supplier, it impliedly approved the contractual arrangement between the district and pipe supplier giving rise to such debt, and statute requiring approval of such contract by the Commission in order to validate the contract was sufficiently complied with by such action of the Commission, and the contractual relations were validated notwithstanding fact that Commission did not act until after the contract had been executed.

Judgment reversed with directions.

1. Waters and Water Courses \S 228 1/2

Section of Water Code requiring validation of irrigation district's contracts exceeding a certain amount of the district's assessed valuation, by approval of the Districts Securities Commission, contemplates that such approval may be asked as to a contract in question after the parties have executed it, and in such a case, approval of the Commission, if obtained, has the effect of validating the contract. West's Ann. Water Code, \S 24253.

Cal. Rep. 301-302 P.2d-63

Where Districts Securities Commission approved issuance of warrants for payment of irrigation district's debt to pipe supplier, it impliedly approved the contractual arrangement between the district and pipe supplier giving rise to such debt, and statute requiring approval of such contract by the Commission in order to validate the contract was sufficiently complied with by such action of the Commission, and the contractual relations were validated, notwithstanding that Commission did not act until after the contract has been executed. West's Ann. Water Code, \S 24253.

2. Waters and Water Courses \S 228 1/2

Where Districts Securities Commission approved issuance of warrants for payment of irrigation district's debt to pipe supplier, it impliedly approved the contractual arrangement between the district and pipe supplier giving rise to such debt, and statute requiring approval of such contract by the Commission in order to validate the contract was sufficiently complied with by such action of the Commission, and the contractual relations were validated, notwithstanding that Commission did not act until after the contract has been executed. West's Ann. Water Code, \S 24253.

Bradford, Cross, Dahl & Hefner, Sacramento, for appellant Armco Drainage and Metal Products, Inc.

Driver, Driver & Hunt, Sacramento, for appellant Fair Oaks Irrigation Dist.

Lewis, Lewis & Lewis, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal by the defendants from a judgment which enjoined the Fair Oaks Irrigation District and its directors from paying any part of an indebtedness allegedly due Armco Drainage and Metal Products, Inc., and ordering the district to restore to Armco certain irrigation pipe and accessories which the district claimed to have purchased from Armco but which had not been used.

In the spring of 1951 the district found that there was an urgent need for extensive replacement of sections of its irrigation system. At that time the sale of steel pipe and accessories was regulated by the federal government. Suppliers of such material could not sell freely and could not commit themselves to fill orders. Prices were controlled and vendors could not contract for prices on future deliveries. The district it-

self was subject to contractual limitations by certain provisions of the Water Code. The directors of the district conferred with representatives of Armco about the purchase of pipe. Each side was aware of the difficulties facing the other. There is no substantial variance in the testimony of the men present at the conference as to what was discussed and as to what arrangements were made. It was understood that Armco could make no definite commitments to furnish any pipe and could not undertake affirmatively to fill any orders that might be placed in the future. But, Armco did agree to furnish pipe to the district as and when they could at prices to be fixed when deliveries were made, and it was agreed that the usual credit arrangements prevailing in the area would be followed, that is, two per cent discount if paid within ten days, net thirty days, and four per cent interest on any balance which was not paid in thirty days. The directors told Armco that they had a five-year plan for the replacement of pipe which was no longer serviceable. The district intended to do the work through their own maintenance crews and told Armco that orders would be placed as the directors should decide. All concerned knew of the limitations placed upon the district in making purchase contracts, particularly the provisions of Sections 24250 through 24253 of the Water Code. It was the consensus that the district would have to make payments when, as one witness said, "it legally could". No further discussions were held, but commencing in August of 1951 and terminating in January of 1952 the district placed twenty-one orders with Armco which were filled. Each shipment was separately billed. The total purchases amounted to \$43,007.40. Up to the time judgment was entered herein no payments had been made nor had Armco made a demand for payment. Some \$24,000 worth of the materials delivered to the district had been used and the balance remained stockpiled in the district's yards.

In June of 1952 the respondents, as residents of, and taxpayers in the district, brought this action. They alleged that the

district and Armco had purportedly entered into a contract, under the terms of which Armco was demanding \$43,007.40; that when the contract was made the district did not have appropriate funds sufficient to meet the payments thereunder; that no assessment had been authorized; and that the contract had not been approved by the Districts Securities Commission. Respondents asked the court to declare the contract illegal and to restrain the issuance of warrants in payment of the purported debt.

After the suit was filed, the district initiated proceedings before the Districts Securities Commission in accordance with the provisions of Section 24253 of the Water Code. This section provides that:

"If the largest payment to be made under any one lease or contract for any property exceeds in any year an amount equal to one-fourth of 1 percent of the total valuation of the land in the district according to the assessment next equalized before the making of the lease or contract, the lease or contract shall not be valid unless either:

"1. The district has appropriate funds on hand at the time the lease or contract is made, sufficient to meet all payments to be made thereunder and in excess of the district's normal requirements for the period in which the payments are to be made; or,

"2. Unless a particular purpose or emergency assessment sufficient to meet all of the principal payments to become due under the lease or contract is authorized; or,

"3. *The lease or contract is approved by the Districts Securities Commission.*" (Italics added.)

During the period which is material here the assessed valuation of land in the district was \$400,000, and therefore any contract or lease which called for a payment in any one year in excess of \$1,000 would be invalid unless it was validated under one of the provisions of the section referred to.

It is patent that if, as the trial court found, the entire amount of the indebted-

ness arose out of a contract which was made during the conference previously referred to, such a contract was invalid unless section 24253 was complied with. It is equally patent from the findings as to the amounts of the various orders which were filled that if they be considered as separate contracts many would be within the requirements of the section. It is conceded that if the contract or contracts are valid they can only be so because the commission approved them since neither of the other alternatives was followed.

[1] The legislation under review possesses certain characteristics that are important. Unlike many constitutional and statutory limitations placed upon the incurring of debts by various public agencies, this legislation does not purport to limit the total debt which an irrigation district may incur. The legislation has to do only with contracts concerning the acquisition or the leasing of property for district uses. The right to contract or lease is given expressly. No total limitation of district debts so to be incurred is provided. By the plain wording of section 24253 the district, in the discretion of its board of directors, is free to pledge its credit to any total amount, for any period of time, so long as payments to be made in any one year do not exceed the designated amount. The section does not limit the number of contracts which may be so made. So far as validation by approval of the commission be concerned, the legislation contemplates that such approval may be asked as to a contract in question after the parties have executed it. In such a case, the approval of the commission, if obtained, has the effect of validating a contract already made, but which, for its effectiveness, requires such approval. The legislation does not specify the time within which such approval may be applied for and accorded.

After the suit was filed, on November 15, 1952, the district filed an application for approval with the commission which recited that the district was indebted to Armco in the amount of \$43,007 and to the Sacramento Pipe Company for \$13,000 for pipe

which had been purchased for the purpose of making necessary replacements in the irrigation system. It was stated that a taxpayer's suit had been filed in connection with the Armco obligation and all orders of the court made in that action were referred to. The application asked for permission to enter into new contracts with Armco and Sacramento Pipe Company covering the indebtedness. The application asked also for permission to issue warrants partly for the purpose of satisfying the outstanding indebtedness and partly for the purpose of finishing the replacement program. After a thorough investigation the commission authorized the issuance of warrants in the amount of \$100,000 for the payment of the debts and for the completion of the replacement project.

By appropriate pleadings the action of the commission was brought to the attention of the court before the court proceedings were concluded. Appellants herein then contended that any invalidity in the contractual relations between Armco and the district was obviated by the action of the commission, with the legal result that the court could not restrain the payment of the indebtedness to Armco. However, the trial court refused to stay its hand and entered judgment against the district.

[2] We are of the opinion that the trial court erred. It is apparent that the commission, by approving the payment of the debt to Armco, impliedly approved the prior contractual arrangement between the district and Armco out of which that debt arose. It is this court's opinion that the statute requiring approval of contracts such as here involved was sufficiently complied with whether the Armco-district transaction resulted in one or twenty-one contracts, and that between the beginning of this action and the rendition of the judgment appealed from the affair had been cleared up, the contractual relations validated, and the payment of the debt provided for. As a result, the situation had reached a stage whereby the court should have stayed its hand and dismissed the action as having become moot. In our view, it was error to

enter any judgment other than one of dismissal.

Accordingly, the judgment appealed from is reversed, with directions to the trial court to enter a dismissal of the cause.

PEEK, J., and McMURRAY, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



145 Cal.App.2d 415

Petition of Terence J. O'SULLIVAN, John Casey, George Ellis, Patrick Devlin and Sam Capriolo, in a representative capacity, for, by and on behalf of General Laborers Union No. 261, its officers and members, and members of and employees in the Street Cleaning Department and the Street Repair Department of the City and County of San Francisco, State of California, Petitioners and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO of the State of California; Elmer E. Robinson, Mayor of the City and County of San Francisco, State of California; William L. Henderson, Personnel Director and Secretary of the Civil Service Commission of the City and County of San Francisco; Francis Walsh, Chairman, and C. T. McDonough and William A. Lahanier, members of the Civil Service Commission of the City and County of San Francisco; and Doe One to Doe Thirty, Inclusive, Respondents.

Civ. 17131.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1956.

Action to enjoin defendant city, its mayor and members of its Civil Service Commission from permitting, requiring or allowing employees of city's street repair and street cleaning departments to sign waivers of premium pay for work done before 8 o'clock a.m. The Superior Court, City and County of San Francisco, Thom-

as M. Foley, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal held that where municipal ordinance fixing compensation for city employees provided for written waiver by employees of payment of time and a half over the regular hourly rate for work performed prior to 8 a.m., written waivers voluntarily signed by employees of the city were not void as contrary to public policy.

Judgment affirmed.

1. Injunction ⇐130

In action to enjoin city, its mayor, and members of Civil Service Commission from permitting, requiring or allowing employees of city's street repair and street cleaning departments to sign waivers of premium pay for work done before 8 o'clock a.m., evidence as to whether employees who signed such written waivers did so freely and voluntarily was sufficient to present question for trier of fact.

2. Appeal and Error ⇐1011(1)

Finding of trial court based upon conflicting evidence is not to be disturbed on appeal.

3. Labor Relations ⇐1296

Where municipal ordinance which fixed compensation for city employees provided for written waiver by employees of time and a half over the regular hourly rate of pay for work performed prior to 8 o'clock a.m., waivers signed by city employees freely and voluntarily, waiving their right to time and a half over the regular hourly rate of pay for such work, were not void as contrary to public policy.

4. Municipal Corporations ⇐78

A chartered city is not subject to general law as to municipal matters covered by the charter.

Todd & Todd, Henry C. Todd, San Francisco, for appellants.

Dion R. Holm, City Atty., William F. Bourne, Deputy City Atty., San Francisco, for respondents.

PER CURIAM.

Plaintiffs brought this action to enjoin defendant city, its mayor and the members of its Civil Service Commission from "permitting, requiring or allowing" employees of the city's street repair and street cleaning departments to sign waivers of premium pay for work done before 8 o'clock a.m. After trial, judgment was entered in favor of defendants. Plaintiffs appeal.

Section 151.3 of the charter of the City and County of San Francisco provides that when "any groups or crafts" established a rate of pay in private employment through collective bargaining agreements with employers, and such rates prevail generally in private employment in San Francisco, the supervisors shall fix such rate of pay as the compensation for such groups or crafts in the employ of the city and county.

For some years before filing of this action, the collective bargaining agreement between General Laborers Union No. 261 and private employers had provided that work performed before 8 o'clock a.m. be paid for at one and one-half times the regular hourly rate. Pursuant to the charter, these provisions had been carried into the ordinance fixing wages for city employees. Another section of this same ordinance provided "The working conditions established herein in accordance with the provisions of collective bargaining agreements shall be maintained in the City service except when a provision is specifically waived by the employee concerned." Such waiver shall be in writing and filed with the Civil Service Commission."

The agreement for private employment provides that "where * * * existing traffic conditions, job conditions, or weather conditions render it desirable to start the day shift at an earlier hour, such starting time may, with the mutual consent of the individual employer and local union * * * be made earlier." The city's wage ordinance contains the same provision, except that the phrase "with the mutual consent of the individual employer and local union" is omitted.

For more than 20 years most of the employees in the street cleaning and street repair bureaus had commenced work before 8 a.m. and worked an eight-hour day with time off for lunch. The same practice continued until 1954, and no demand for premium pay for work before 8 a.m. was made until that year. Then the union demanded premium pay for such employees. At that time, defendant city announced its plan to start its street crews at 8 a.m. It circulated waiver forms among employees in the laborers classification of the street department, announcing that those who did sign would start work at the long-established hour, while those who did not sign would start work at 8. These forms were signed by a great majority of the employees in both branches of the street department. Each recites that the employee waives those provisions of the specified collective bargaining agreement for private employment which require premium pay for work performed before 8 a.m., and recites the signer's agreement to accept pay at straight time for such work, and further provides "This waiver of premium compensation for work performed before 8:00 a.m. and not before 7:00 a.m. is made for the purpose of inducing the City and County of San Francisco to reestablish the 7:00 a.m. or 7:30 a.m. beginning time of the work day because such earlier beginning time is more convenient on account of existing traffic conditions, job conditions, or weather conditions."

[1, 2] There is testimony that the large number of trucks dispatched from the city yard would create severe traffic congestion at the yard if all employees began work at the same hour. The evidence also shows that traffic congestion on the city streets is greatest from 8 to 9 a.m. Defendants offered testimony that no coercion was used by it to secure signature of the waivers. There was some evidence from which a contrary inference could be drawn, but the trial court found that "each employee who signed such written waiver did so freely and voluntarily." This finding upon conflicting evidence is not to be disturbed

on appeal. *Memorial Hosp. Ass'n v. Pacific Grape Products Co.*, 45 Cal.2d 634, 290 P.2d 481.

Appellants contend, however, that the waivers are void and unenforceable. They cite authorities from other jurisdictions for the rule that "a contract whereby a public employee agrees to perform services required of him by law for less compensation than that fixed by law is contrary to public policy and void." 160 A.L.R. 491. But the California rule appears to be to the contrary, *Scott v. City of Los Angeles*, 85 Cal.App.2d 327, 193 P.2d 25; *Gamble v. City of Sacramento*, 43 Cal.App.2d 200, 110 P.2d 530; *Huntsman v. Board of State Harbor Com'rs*, 17 Cal.App.2d 749, 62 P.2d 771 [hearing denied by Supreme Court in each of these three cases]; *Myers v. City of Calipatria*, 140 Cal.App. 295, 35 P.2d 377; *Coyne v. Rennie*, 97 Cal. 590, 32 P. 578, where the waiver is free and voluntary.

[3] Even if the rule of other jurisdictions were followed in California, it would not aid appellants here. The rule is based upon the acceptance by the employee of "less compensation than that fixed by law." But here the very ordinance fixing the compensation contains specific provisions for an earlier starting time and for written waiver by the employee. Many of the decisions from other jurisdictions relied upon by appellants are based upon the reasoning that an employing member of the executive branch cannot undo the legislative act of fixing the compensation of the employee. See *Glavey v. United States*, 182 U.S. 595, 21 S.Ct. 891, 45 L.Ed. 1247. But such reasoning also is without application to the case at bar, for here the legislative body has itself made provision for the waiver.

[4] Appellants also argue that the city's acceptance of waivers constitutes a violation of Sections 222 and 223 of the Labor Code. This contention is not renewed in the closing brief and may have been abandoned. In any event, the rule seems clear that a chartered city is not subject to general law as to municipal matters covered by the charter. *City of Pasadena v. Charle-*

ville, 215 Cal. 384, 10 P.2d 745. It is doubtful that the Labor Code applies to employees under a comprehensive municipal civil service system. *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 168 P.2d 741 [hearing denied by Supreme Court].

The judgment is affirmed.



Hoyt REED, Plaintiff and Appellant,
v.

**Carl O. NORMAN, d/b/a Carl's Paint Store;
John E. Haskins, Norman Decorating Co.,
Inc., a California Corporation, and Guy A.
Ray, Defendants and Respondents.***

Civ. 21923.

District Court of Appeal, Second District,
Division 2, California.

Oct. 26, 1956.

Rehearing Denied Nov. 19, 1956.

Hearing Granted Dec. 19, 1956.

Stockholder's derivative action. From a judgment for defendants, entered by the Superior Court of Los Angeles County, Philbrick McCoy and Aubrey N. Irwin, JJ., plaintiff appealed. On defendants' motion to dismiss the appeal, the District Court of Appeal, Ashburn, J., held that corporation, whose corporate powers had been suspended for non-payment of its franchise tax, could not have maintained action for misappropriation of corporate funds and property, and that stockholder had no greater rights than corporation.

Motion granted.

1. Corporations §=202

Derivative action could not be maintained by stockholder if corporation itself could not do so.

2. Corporations §=625

Corporations Code section, providing for legal proceedings by or against direc-

* Opinion vacated 309 P.2d 809.

tors or managers in office at time that corporation forfeited its charter for non-payment of license tax and penalties imposed by the original corporation license tax act, which was repealed in 1913, is of narrow application, being limited to suspensions occurring while such license tax act was in effect. West's Ann.Corporations Code, § 5904.

3. Corporations \Rightarrow 630(1)

Corporation, whose corporate powers had been suspended for non-payment of its franchise tax, could not have maintained action for misappropriation of corporate funds and property. West's Ann.Corporations Code, § 834; West's Ann.Rev. & Tax.Code, §§ 23301, 23303.

Hy Schwartz, Beverly Drive, for appellant.

Raymond R. Roberts, Van Nuys, for respondents.

ASHBURN, Justice.

Respondents Norman and Haskins move to dismiss plaintiff's appeal upon this ground: That the complaint asserts an alleged cause of action belonging to defendant Norman Decorating Co., Inc., a domestic corporation, and plaintiff's action, brought by him as a stockholder, is derivative in nature; that the corporate right to do business has been suspended for non-payment of its franchise tax; that there has been no reinstatement or revivor of that right, and hence the corporation cannot prosecute or defend any suit; that, as the cause of action belongs to the corporation, a stockholder cannot maintain a derivative suit to recover for the benefit of the corporation.

Defendants' objection to introduction of evidence under the amended complaint and supplemental complaint was sustained in the trial court upon the ground that the action is derivative in nature and the pleading fails to comply with the requirements of § 834, Corporations Code. Judgment having been entered in favor of defend-

ants, plaintiff appeals therefrom. He also purports to appeal from an order taxing costs and denying motion to strike the costs, but there is no motion for such an order and no such order in the record at bar.

If this is a derivative action and if the corporate franchise has been suspended pursuant to § 23301, Revenue and Taxation Code and not revived, as contended by respondents, the motion to dismiss must be granted. That section of the code provides for suspension of the corporate powers of a domestic corporation for nonpayment of its franchise tax, "[e]xcept for the purpose of amending the articles of incorporation to set forth a new name". Section 23303 makes it a misdemeanor to exercise or purport to exercise any corporate powers of the suspended corporation "except as hereinabove permitted," referring obviously to § 23301. The suspension becomes effective upon transmittal of the information from the Franchise Tax Board to the Secretary of State, § 23302. Section 23305 affords a right to relief from the suspension upon making proper application and payment of all delinquent taxes, interest and penalties due under that part of the code. This right is given to any stockholder or creditor or a majority of the surviving trustees or directors of the corporation.

During such suspension the corporate disability extends to the defense of an action and the right of appeal from an adverse judgment. *Boyle v. Lakeview Creamery Co.*, 9 Cal.2d 16, 19-20, 68 P.2d 968; *Fidelity Metals Corp. v. Risley*, 77 Cal.App.2d 377, 383, 175 P.2d 592. As the cause of action belongs to the corporation, *Melancon v. Superior Court*, 42 Cal.2d 698, 708, 268 P.2d 1050, the stockholder who sues in its right is subject to the same limitations as the corporation would be if suing in its own name; his status is that of trustee and any judgment recovered inures to the benefit of the corporation (12 Cal.Jur.2d, § 221, p. 775); it follows that if the corporation cannot maintain the action or appeal the stockholder may not do so; he cannot accomplish by indirection the thing that the

statute prohibits when done directly. See *Smith v. Lewis*, 211 Cal. 294, 298, 295 P. 37; *Ransome-Crummey Co. v. Superior Court*, 188 Cal. 393, 397, 205 P. 446; *Grace-land v. Peebler*, 50 Cal.App.2d 545, 123 P.2d 527.

The amended complaint in the instant case presented a dual aspect. It complained of defendant Norman's interference with plaintiff's exercise of his rights as an officer and as holder of a majority of the stock of the corporation, a personal wrong to him; it also alleged numerous misappropriations of corporate funds and property, constituting wrongs to the corporation. "Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. [Citations.] But 'If the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action. * * * The action is derivative, i. e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' [Citations.] And a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong." *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525, 530, 170 P.2d 898, 901, 167 A.L.R. 271. One of the cases cited in support of the last stated proposition is *Witherbee v. Bowles*, 201 N.Y. 427, 95 N.E. 27, which holds that an interference with a shareholder's right to exercise a majority stockholder's control of the corporation is a wrong inflicted upon him individually. 95 N.E. at page 28. In effect it also holds that he may elect to sue in his own right or on behalf of the corporation, or both, where the facts give rise to a cause of action in favor of each. *Ham-*

mer v. Werner, 239 App.Div. 38, 265 N.Y.S. 172, 179, says: "The fact that a particular act of directors may constitute a wrong to the corporation which may be righted ordinarily on behalf of the corporation does not bar a stockholder from having redress if that act effects a separate and distinct wrong to him independently of the wrong to the corporation. Redress of this latter wrong is available to him personally despite the right of a present stockholder to redress the wrong in a derivative action so far as it relates to the corporation." See also, 18 C.J.S., Corporations, § 559, p. 1275.

During the argument upon the objection to introduction of evidence in support of the amended and supplemental complaints (which had been filed on May 9, 1950 and May 31, 1951, respectively), counsel for plaintiff conceded that those aspects of the pleading which asserted a wrong personal to his client had been eliminated by the ruling and the sequelae of the ruling in *Reed v. Norman*, 41 Cal.2d 17, 256 P.2d 930, wherein it was held that 105 shares of defendant Norman's stock were void for non-compliance with the cash requirement of the corporation's permit to sell stock, and hence that the election of directors at which he voted these shares was illegal. This holding reduced Norman's ownership to 150 shares and left plaintiff the owner of 245 shares, thus being the controlling stockholder. The court also remarked, 41 Cal.2d on page 22, 256 P.2d on page 933: "It seems appropriate, however, to call attention to the fact that Reed's rights with respect to the accounting may be derivative in nature and that the record indicates that he has not met the requirements of section 834 of the Corporations Code." That decision was rendered in superior court case No. 573,954, which is a companion to the case at bar. But an appeal in the case now before us (superior court No. 572,897) was decided at the same time and upon the same principles, it being held that "that decision is controlling herein." *Reed v. Norman*, 41 Cal.2d 901, 256 P.2d 933. These rulings were made on May 12, 1953, and were followed by entry of judgment in case

No. 573,954 to the effect that 105 shares of the stock issued to Norman were void and the election of Norman and Haskins to the board of directors on April 27, 1950, was illegal.

[1] As above indicated, when the trial of the instant case started on April 21, 1955, counsel for plaintiff conceded, under quizzing by the court, that the allegations relative to plaintiff's personal right of action had been disposed of through the ruling of the Supreme Court and the judgment entered pursuant thereto. The argument thenceforth proceeded upon the assumption that the action is derivative and the matter was decided on that basis. Plaintiff tendered a second amended complaint which alleged the fact of the Supreme Court holding that 105 shares of Norman's stock were void, set forth numerous misappropriations of corporate funds and property, asked no relief in favor of plaintiff personally, but prayed for an accounting in favor of the corporation. The arguments set forth in the opening brief in this court are made upon the assumption that the action is by nature derivative. The motion papers assert that to be a fact and appellant's counsel has not denied it. We hold therefore that the instant action is a derivative one and cannot be maintained if the corporation itself could not do so.

Opposing counsel rely upon different statutes in discussing the effect of the suspension of the corporate franchise. Plaintiff says that § 5904, Corporations Code is controlling. So far as pertinent, it says: "The directors or managers in office at the time that any corporation, domestic or foreign, forfeited its charter or right to do business in this State for nonpayment of the license tax and penalties imposed by Chapter 386, Statutes of 1905, are trustees of the corporation and its shareholders or members. Such trustees have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against it or to take such legal proceedings as may be necessary to fully settle its affairs. Such trustees may be sued in any of the

courts of this State by any person having a claim against the corporation." Respondents rely on § 23301, Revenue and Taxation Code, which says: "Except for the purpose of amending the articles of incorporation to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer shall be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this State shall be forfeited if any of the following conditions occur: * * *." Here follow specifications of defaults in the payment of franchise taxes. Section 23303, as above pointed out, makes it a misdemeanor, to attempt or purport to exercise any of the corporate powers "except as hereinabove permitted". The certificate of the Secretary of State evidencing the fact of suspension refers specifically to § 23302 of the same code, leaving no doubt that the suspension occurred under § 23301.

[2] Section 5904, Corporations Code, is carefully limited to corporations whose right to do business was forfeited "for nonpayment of the license tax and penalties imposed by Chapter 386, Statutes of 1905". That was the original Corporation License Tax Act. It was repealed in 1913, Stats. 1913, Ch. 336, p. 680. The result is that § 5904 and related sections, though still on the books, are of narrow application, being limited to suspensions occurring while a former statute was in effect.

[3] Section 23301, Revenue and Taxation Code, permits the exercise of corporate powers after suspension only for the purpose of amending the articles to set forth a new name, and declares it a misdemeanor to attempt or purport to exercise such powers for any other purpose. This language (quoted above) is substantially the same as that of the Act which was under consideration in *Boyle v. Lakeview Creamery Co.*, 9 Cal.2d 16, 68 P.2d 968. Though the phrasing is slightly different the meaning is the same. The court said in that case, 9 Cal.2d at page 19, 68 P.2d at page 969: "From a consideration of these statutes, the policy is clearly to prohibit the

delinquent corporation from enjoying the ordinary privileges of a going concern, in order that some pressure will be brought to bear to force the payment of taxes. Under the Political Code, § 3669c, which covers certain state taxes other than those specified by the Franchise Tax Act, the penalty is not made too drastic; the corporation may not sue, but it may defend. * * * But the exception covering the defense of actions is omitted from Franchise Tax Act, which prescribes the entire procedure of levy and collection of the taxes imposed thereunder, as well as the penalties for delinquency. The omission seems deliberate, and indicates the legislative intention that such corporations shall be deprived of the power to defend suits. The statute expressly deprives the corporation of all 'corporate powers, rights and privileges,' subject to one exception, which is specifically set forth, the right to amend the articles to change the name. As the court declared in *Ransome-Crummey Co. v. Superior Court*, supra, 188 Cal. 393, 397, 205 P. 446, 448: 'During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes.' The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision. See, also, 6A Cal.Jur. § 864, p. 1469." That case is controlling here. There is no right to maintain this action.

Any seeming hardship in this ruling appears to have been invited by appellant. The notice of motion to dismiss was served on August 27, 1956; the suspension point was there made and certificate of the Secretary of State attached thereto; both refer to the applicable statute. A stockholder may effect such a revivor, § 23305, Rev. & Tax.Code; appellant has done nothing to that end but has mistakenly stood upon Corporations Code, § 5904.

The motion to dismiss this appeal is granted.

MOORE, P. J., and FOX, J., concur.

145 Cal.App.2d 435

Angelus A. ALLEGRETTI, Plaintiff and Appellant,

v.

The BOARD OF OSTEOPATHIC EXAMINERS OF STATE OF CALIFORNIA, Glen D. Cayler, D.O., Vincent Carroll, D.O., Charles C. Atkins, D.O., Eugene C. Darnall, D.O., Russell M. Husted, D.O., members of said Board, Philip C. Farman, Hearing Officer of said Board, Defendants and Respondents.

Civ. 21493.

District Court of Appeal, Second District, Division 3, California.

Oct. 25, 1956.

Osteopath brought mandamus proceeding against the Board of Osteopathic Examiners to annul action of board in finding osteopath guilty of violating the Business and Professions Code because telephone company erroneously listed osteopath as an "M.D." in the classified section of its telephone directory. The Superior Court of Los Angeles County, William J. Palmer, J., entered a judgment adverse to the osteopath, and he appealed. The District Court of Appeal, Shinn, P. J., held that evidence before Superior Court did not establish as a matter of law either that osteopath acted innocently in permitting his name to be accidentally carried under an improper classification in the directory or with ulterior motive.

Judgment reversed.

Vallée, J., dissented.

1. Physicians and Surgeons ☞11(2)

Where telephone company, because of its mistake, listed osteopath as an "M.D." in classified section of telephone directory, and Board of Osteopathic Examiners charged osteopath with improperly listing himself as an "M.D.", question was not merely whether osteopath had actual knowledge of erroneous listing, but was whether he had reasonable cause to believe that his name was incorrectly listed and refrained from making inquiry with intention of taking advantage of company's mistake,

and, if his omission to make inquiry was willful rather than innocent, his lack of knowledge would be no defense. West's Ann.Bus. & Prof.Code, § 2396.

2. Physicians and Surgeons \Rightarrow 11(2)

Where telephone company, because of its mistake, listed osteopath as an "M.D." in classified section of telephone directory, and Board of Osteopathic Examiners charged osteopath with improperly listing himself as an "M.D.", osteopath was guilty of the charge, if he had actual knowledge of the improper listing of his name or he had reason to believe that it might be improperly listed and willfully with dishonest motive refrained from making any inquiry. West's Ann.Bus. & Prof.Code, § 2396.

3. Physicians and Surgeons \Rightarrow 11(2)

Where telephone company, because of its mistake, listed osteopath as an "M.D." in classified section of telephone directory, and Board of Osteopathic Examiners charged osteopath with improperly listing himself as an "M.D.", osteopath would not be guilty of the charge if he was merely guilty of inaction in suffering his name to be accidentally carried under an improper classification in the telephone directory, and if his only fault was his failure to discover the mistake. West's Ann.Bus. & Prof.Code, § 2396.

4. Mandamus \Rightarrow 168(4)

In mandamus proceeding by osteopath against Board of Osteopathic Examiners to annul action of board in finding osteopath guilty of violating the Business and Professions Code because telephone company erroneously listed osteopath as an "M.D." in the classified section of telephone directory, evidence before Superior Court did not establish as a matter of law either that osteopath acted innocently in permitting his name to be accidentally carried under an improper classification in the directory or with ulterior motive. West's Ann.Bus. & Prof.Code, § 2396.

J. Robert Meserve, Los Angeles, for respondents.

SHINN, Presiding Justice.

We have for consideration an appeal of Angelus A. Allegretti from a judgment denying a writ of mandate annulling the action of The Board of Osteopathic Examiners of the State of California adjudging appellant guilty of violations of certain sections of the Business and Professions Code and suspending his license for the period of one year, also, suspending execution of said order for all but 60 days of said one year period and placing him on probation for a period of two years upon certain specified conditions.

The charges were filed by an inspector of the board. The accusations were made on information and belief and were of a serious nature. It was charged (1) that during the years 1952 and 1953 petitioner carried a professional advertisement using the suffix "M.D." in the classified section of a Los Angeles telephone directory; (2) that between October 3, 1951 and September 29, 1952, he used the same term in contracts, correspondence, conversations, representations and business dealings with the West Valley Telephone Exchange and Secretarial Service, Reseda, California; (3) that for approximately one and a half years prior to January 1954 he used the suffix "M.D." in contracts, correspondence, conversations, representations and business dealings with the manager, officers and staff of the Magnolia Park Hospital, Burbank, California, and (4) that for approximately two and a half years prior to March 1, 1954, he practiced his profession without having first registered his certificate with the County Clerk of Los Angeles County.

In the course of the proceedings before the board and the court there was a failure to substantiate any of the charges except the first one which related to the improper listing of petitioner's name in the 1952 and 1953 directories. The other charges were dismissed. In the final hearing before the board petitioner was found guilty of

A. J. O'Connor, George J. Hider, Los Angeles, for appellant.

the improper listing of his name as an "M.D." in the Los Angeles telephone directories in violation of section 2396 of the Business and Professions Code,¹ and the charge of failing to register his certificate with the county clerk, § 2340, was disregarded, in accordance with findings the court had made in ordering a reconsideration by the board.

Allegretti petitioned for a writ of mandate, seeking to set aside and vacate the order of suspension after his petition for reconsideration was denied by the board, an alternative writ of mandate was issued, respondent made its return thereto and the matter was heard and submitted. The court concluded that petitioner was guilty of "a technical violation" of Charge (1) (using M.D.), and that he was not guilty of Charge (4) (failing to register his certificate). Judgment pursuant to such conclusions was made and entered, granting a peremptory writ of mandate ordering the board to vacate and set aside its decision and also requiring it to reconsider the matter of "penalty and disciplinary action against petitioner in the light of the court's findings of fact, conclusions of law and judgment" and to make a return thereon. Respondents' first return to the peremptory writ was ruled a nullity since petitioner had not received notice of the hearing at which the penalty and disciplinary action were reconsidered, and the matter was sent back to the respondent board for reconsideration. Respondents' second return to the writ alleged that notice was given petitioner, that the matter was fully argued by both sides, that after argument the board fully considered the findings of fact, conclusions of law and judgments of the superior court; that Charge (4) (failing to file his certificate) was wholly excluded from consideration, and thereafter made its findings which again found appellant to be guilty of Charge (1) and ordered

his suspension in accordance with its first order. Petitioner objected to said return. The court on October 28, 1955, filed its "Comment and Orders after Return of Respondent to Writ of Mandate" in which it found that respondents had complied with its orders in regard to said writ of mandate and discharged them from further duties in regard to said writ. Thereupon petitioner gave notice of appeal from said judgment and order of October 28, 1955.

Findings of the court were made January 19, 1955. So far as material to the points to be considered on the present appeal the findings of the court were as follows:

"1. That Petitioner did not cause his name to be listed as an M.D. physician and surgeon in the classified section of the Contra Costa County Telephone Directory of June 1945.

"2. That the listing of the Petitioner as an M.D. physician and surgeon in the classified section of the Contra Costa County Telephone Directory of June 1945 was an error on the part of the telephone company, which petitioner corrected as promptly as practicable. [Findings 1 and 2 refer only to an item of evidence that was before the board, and not to the charges.]

"3. That the Petitioner did not sign an application for directory advertising as an M.D. physician and surgeon in the professional classified section of any telephone directory issued and distributed in the Los Angeles area by the Pacific Telephone and Telegraph Company during the years 1952 and 1953.

"4. That the listing of the Petitioner as an M.D. physician and surgeon in the professional advertising classified section of the telephone di-

1. "Unless the holder of any certificate provided for in this chapter or any preceding medical practice act has been granted the degree of doctor of medicine after the completion of a full course of study as prescribed by an approved medical

school in accordance with the provisions of this chapter, or any preceding medical practice act, the use of the term or suffix 'M.D.' constitutes unprofessional conduct within the meaning of this chapter."

rectory issued and distributed in the Los Angeles area by the Pacific Telephone and Telegraph Company during the years 1952 and 1953, as referred to in paragraph III of the Accusation here in question, was a mistake on the part of said telephone company.

"5. That the Petitioner in each of seventeen months prior to August 25, 1953 received a bill from the telephone company showing that he was charged a fee for 'directory advertising' and that he did not do anything to verify the charge or the listing or to cause the listing to be discontinued.

"6. That on August 25, 1953, about the time when petitioner learned of the listing of his name as M.D. physician and surgeon in the classified telephone directory, he gave his cancellation order by telephone to the telephone company, requiring the discontinuance of such listing."

The only relevant conclusion of law was the following:

"1. That Petitioner was negligent in not verifying and learning what directory advertising he was billed for in any of the 17 monthly billings mentioned in paragraph 5 of the Findings of Fact, and for which advertising he paid, and the union of the original mistake of the telephone company and the continuing negligence of Petitioner caused him to be guilty of at least a technical violation of the law as charged in Subdivision 1 of Paragraph III of the Accusation."

The court's "Comment and Orders after Return of Respondents to Writ of Mandate" stated that in the court's opinion the penalty imposed was far too severe "in the light of the facts found", but it also stated that "the Respondent Board and members thereof have complied at least technically with the orders of the court, and ought to be, and now are, discharged from any further duty in the matter." No other order or judgment was entered. By this order the court did not expressly af-

firm or annul the final order of the board. It merely allowed it to stand.

The final order of the court is deemed by the parties to be the final judgment. We think it should be so regarded. It was entered after the final decision of the board. The judgment first entered vacated the first order of the board. The peremptory writ required the board to make a return and it was contemplated that further judicial action would be taken. "The general rule applicable in determining whether a judgment is final or merely interlocutory, as deducible from the authorities, is that if anything further in the nature of judicial action on the part of the court is essential to the final determination of the rights of the parties the judgment is interlocutory." 28 Cal.Jur.2d 625. The judgment which ordered issuance of a peremptory writ has been properly regarded by the parties as an interlocutory judgment.

Necessarily, the final order of the court must have findings on which to rest. The only findings were those we have mentioned and they form the basis for the final judgment. These must be examined in order to determine whether they are sufficient to dispose of the material issues in the trial to the court and whether they are sufficient to justify a judgment affirming the order of the board.

Before entering upon a discussion of the findings and the evidence we should state what we believe to be the determinative factual issue. There is no doubt that petitioner was improperly listed in the telephone directory as an "M.D." as found by the court. There was ample evidence to support the finding that the erroneous listing was the result of a mistake on the part of the telephone company. There was also evidence which the court could properly have believed that petitioner caused a cancellation of the listing on August 25, 1953, "about the time when petitioner learned of the listing of his name as an M.D. physician and surgeon." Petitioner paid an extra charge of 50 cents per month for directory advertising for a period of

17 months. The court found that he was negligent in not finding out what the charges were for or how his name was listed. This finding, as we shall see, was inconclusive. Petitioner could have been negligent in these respects and yet innocent of any wrongful intention. Upon the other hand the finding that he was negligent does not acquit him of having acted in bad faith and with ulterior motives.

[1] The question is not merely whether petitioner had actual knowledge of the erroneous listing. It is rather the question whether he had reasonable cause to believe that his name was or might be incorrectly listed and refrained from making inquiry with the intention of taking advantage of the telephone company's mistake, if a mistake were being made. If his omission to make inquiry was wilful rather than innocent his lack of knowledge would be no defense to a charge that he made use of the suffix "M.D." The basic question, therefore, was whether his professed ignorance was the result of carelessness or culpability.

The court's finding No. 1 was as to an evidentiary matter. Petitioner was listed as an "M.D." in the Contra Costa directory in 1945. There was conflicting evidence as to whether he was responsible for the error. The court found that he was not. No doubt the purpose of the finding was to direct the board to disregard the Contra Costa incident in further consideration of the charges; otherwise the finding was of no significance.

Findings Nos. 2, 3 and 4 have support in the evidence. In the March 1952 telephone directory there appeared in the classified section under the heading "Physicians and Surgeons, M. D. Allegretti, A. 18121 Ventura, Tarzana, Dickens 3-8103—if no answer call Dickens 3-1901." In the white section appeared the following: "Allegretti, A.A., Doctor, 4737 Havenhurst, Encino, State 4-7306." Immediately above there appeared "Allegretti, A. Doctor, M.D. 18121 Ventura, Tarzana, Dickens 3-8103." The same entries appeared in the March, 1953 directory. Petitioner first

applied for the telephone service in question January 12, 1951. The application which he signed at that time was in evidence. At the time he signed it it read in part as follows: "Allegretti, A. Dr.—No Des.—18221 Ventura Blvd. Tarz." The entry "No Des." indicated that there was no entry to be made under any heading in the classified section of the directory. There was evidence that a clerk of the telephone company entered on the application under the heading "Classified Heading and Code" the following "Physicians & Surgeons M.D. (771)", the figures indicating the described classification. This entry by the clerk was in conflict with the entry "No Des." and the mistake admittedly was that of the telephone company. Although there was a renewal for the listings for the year 1953 it was in evidence that the direction for renewal was received by telephone in response to inquiry by the company and that it was given by Mrs. Allegretti. There was no evidence of any record of the telephone company that had come to the attention of petitioner which stated that he was listed in the directory under an "M.D." classification. Finding No. 5 is likewise supported by the evidence. With respect to finding No. 6 it was undisputed that about August 25, 1953, petitioner became advised as to the manner in which his name was listed and that he then caused the same to be discontinued. The implication of this finding is that petitioner had not learned of the erroneous listing until on or about August 25, 1953. There was sufficient evidence to warrant this implication.

[2] From the penalty that was imposed it should be assumed that the board determined either that petitioner had actual knowledge of the improper listing of his name or that he had reason to believe that it might be improperly listed and wilfully and with dishonest motive refrained from making any inquiry. A decision adverse to petitioner on either of these alternatives would have been sufficient to warrant the finding of guilt and the imposition of a penalty. The court in effect found that

petitioner had no actual knowledge but, as we have said, did not make a finding as to the alternative fact which could have been found adversely to petitioner if the court had concluded that he had reasonable grounds for believing that his name might be improperly listed. The necessity for such a finding results from the fact that upon the evidence and the reasonable inferences this critical issue could have been decided in favor of petitioner or adversely to him.

[3] It is not contended by respondent that a physician and surgeon can be subject to discipline for mere negligence. As applicable to physicians and surgeons there are in the Business and Professions Code some 26 specifications of acts which constitute unprofessional conduct. By their very nature they relate to acts intentionally performed and which would not be the consequence of mere negligence. We do not believe that the legislature would denounce as unprofessional conduct the mere inaction of a physician and surgeon in suffering his name to be accidentally carried under an improper classification in the telephone directory when his only fault was the failure to discover a mistake on the part of the company. And we think it is beyond question that the members of the board found that petitioner's conduct was tainted with bad faith and that he was not merely careless. The findings of the court do not conform to the implied findings of the board, which latter would furnish the only basis for adjudication of petitioner's guilt and the imposition of a penalty.

[4] We have discussed the evidence only to the extent thought necessary for a proper understanding of the findings from which the court concluded that petitioner was guilty of "at least a technical violation of the law * * *." We are not concerned with the question whether the findings of the board were in accordance with the weight of the evidence. We do hold that the evidence before the court does not establish as a matter of law either that petitioner acted innocently or with ulterior motives. That is an issue that can

only be determined from the evidence adduced upon a retrial and it will be the sole question for decision. If the finding is favorable to petitioner the judgment should be that the order of the board be annulled and the charges dismissed. If the finding is adverse to him the order should be affirmed.

The judgment is reversed.

PARKER WOOD, J., concurs.

VALLEE, J., dissents.



145 Cal.App.2d 448

Clara HESSE, Plaintiff and Appellant,

v.

N. F. VINATIERI et al., Defendants and Respondents.

Civ. 21916.

**District Court of Appeal, Second District,
Division 2, California.**

Oct. 26, 1956.

Rehearing Denied Nov. 19, 1956.

Hearing Denied Dec. 19, 1956.

Pedestrian, who was struck by first automobile, brought action against driver and owner of second automobile, on ground that driver of second automobile negligently caused driver of first automobile to run on sidewalk and strike pedestrian. The pedestrian sought to avoid the bar of the statute of limitations on ground of concealment by driver of second automobile of alleged cause of action against him when he made his report of the accident to the police. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., entered judgment of dismissal, and the pedestrian appealed. The District Court of Appeal, Ashburn, J., held that complaint, which did not allege that driver of second automobile, at time of making his report to police, knew that his statement was untrue, or that he did not believe it to be true, or that statement was

not warranted by the information he had, did not charge a fraud or fraudulent concealment and did not avoid bar of the statute of limitations, and that the report to the police was of such a nature that pedestrian had no right to rely on it, and that therefore it could not be used to avoid the bar of the statute of limitations.

Judgment affirmed.

1. Limitation of Actions ⇨179(2)

In action by pedestrian, who was struck by first automobile, against driver and owner of second automobile, on ground that driver of second automobile negligently caused driver of first automobile to run on sidewalk and strike pedestrian, wherein pedestrian sought to avoid bar of statute of limitations on ground of concealment by driver of second automobile of pedestrian's cause of action against him when he made his report of accident to police, petition which did not allege that driver of second automobile, at time of making report to police, knew that his statement was untrue, or that he did not believe it to be true, or that statement was not warranted by information he had, did not charge fraud or fraudulent concealment which would avoid bar of statute of limitations. West's Ann. Code Civ.Proc., §§ 340, subd. 3, 581, subd. 3; West's Ann.Vehicle Code, § 484; West's Ann.Civ.Code, § 1572.

2. Limitation of Actions ⇨104(2)

Mere non-disclosure by defendant to plaintiff of plaintiff's alleged cause of action against defendant is not concealment of the cause of action and will not avoid the bar of the statute of limitations, in absence of a fiduciary relationship. West's Ann.Code Civ.Proc., § 340, subd. 3.

3. Limitation of Actions ⇨104(2)

In order to avoid the bar of the statute of limitations, on ground that defendant concealed plaintiff's cause of action, there must be some affirmative act of defendant calculated to obscure the existence of a cause of action, and such affirmative act must be factually alleged. West's Ann. Code Civ.Proc., § 340, subd. 3.

4. Limitation of Actions ⇨104(2)

In action by pedestrian, who was struck by first automobile, against driver and owner of second automobile, on ground that driver of second automobile negligently caused driver of first automobile to run on sidewalk and strike pedestrian, wherein pedestrian sought to avoid bar of statute of limitations on ground of concealment by driver of second automobile of pedestrian's cause of action against him when he made his report of accident to police, pedestrian had no right to rely on report made to police. West's Ann.Code Civ.Proc., §§ 340, subd. 3, 581, subd. 3; West's Ann.Vehicle Code, § 484.

5. Fraud ⇨17, 20

The existence of a duty on the part of defendant to tell truth to plaintiff is an essential basic element of any valid claim of fraud and deceit, and, unless it is intended that plaintiff rely and act on representation by defendant, or unless plaintiff belongs to a class to whom representation is made, no cause of action can arise therefrom. West's Ann.Civ.Code, § 1711.

6. Limitation of Actions ⇨104(2)

In action by pedestrian, who was struck by first automobile, against driver and owner of second automobile, on ground that driver of second automobile negligently caused driver of first automobile to run on sidewalk and strike pedestrian, wherein pedestrian sought to avoid bar of statute of limitations on ground of concealment by driver of second automobile of pedestrian's cause of action against him when he made his report of accident to police, report to police was not of such a nature that pedestrian had a right to rely on it, and therefore it did not avoid bar of the statute of limitations. West's Ann.Code Civ.Proc., §§ 340, subd. 3, 581, subd. 3; West's Ann.Civ.Code, § 1572; West's Ann.Vehicle Code, §§ 484, 484(a), 488, 488.5.

7. Pleading ⇨34(4)

Even though a pleading is liberally construed in accordance with Code of Civil Procedure, no intendment can be indulged in that pleader has not stated his case as

strongly as it was possible to do so. West's Ann.Code Civ.Proc., § 452.

8. Pleading ⇨34(4)

Rule that no intendment can be indulged in that pleader has not stated his case as strongly as it was possible to do so was peculiarly applicable where plaintiff declined to amend after leave granted, and in such posture of the case all ambiguities were resolved against the plaintiff.

9. Appeal and Error ⇨916(1)

On appeal from judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him.

10. Limitation of Actions ⇨104(2)

In action by pedestrian, who was struck by first automobile, against driver and owner of second automobile, on ground that driver of second automobile negligently caused driver of first automobile to run on sidewalk and strike pedestrian, wherein pedestrian sought to avoid bar of statute of limitations on ground of concealment by driver of second automobile of pedestrian's cause of action against him when he made his report of accident to police, alleged fact that report to police was not in writing and signed by driver of second automobile would not strengthen pedestrian's case, since report, if not written and signed, would not be one required by law, and pedestrian would have no right to rely on it. West's Ann.Code Civ.Proc., §§ 340, subd. 3, 581, subd. 3; West's Ann. Civ.Code, § 1572; West's Ann.Vehicle Code, §§ 484, 484(a), 488, 488.5.

David I. Lippert, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiff, having been injured on September 11, 1951, sued defendants Vinatieri and

Ducommun Metals and Supply Co. on November 7, 1955. She attempted to excuse the delay and the bar of the statute of limitations, Code Civ.Proc., § 340, subd. 3, upon the ground of fraudulent concealment by Vinatieri of the existence of a cause of action against him. Demurrer to her second amended complaint was sustained with leave to amend within ten days. Plaintiff elected to stand upon her complaint. Judgment of dismissal was entered pursuant to Code of Civil Procedure, § 581, subdivision 3, and plaintiff appeals therefrom.

The complaint alleges that plaintiff was standing on the southwest corner of Eighth and Alameda Streets in the city of Los Angeles; that defendant Vinatieri, who was driving a car owned by Ducommun Metals and Supply Co., as its agent, so negligently drove same as to cause one Seemann "to depart from the roadway and run upon the sidewalk where plaintiff was standing and to strike plaintiff with great force and violence." By way of excuse for delay in suing Vinatieri plaintiff alleges that she brought action against Seemann alone, that the case came on for trial, after certain excusable delays, on September 28, 1955, and resulted in a verdict for defendant Seemann. She alleges that Vinatieri was a witness at that trial and she then learned for the first time of the fraud he had perpetrated upon her; that had she known the true facts she would have sued him, as well as Seemann, on August 6, 1952.

In her effort to charge fraud to Vinatieri she alleges that "said N. F. Vinatieri and Ulrich Max Seemann had a legal duty to report the facts of the said accident to the Los Angeles Police Department under the provisions of Section 484 of the California Vehicle Code and did so report at the time of the said accident." She relied on said reports "as made to the Los Angeles Police Department" by Vinatieri and Seemann and concluded that the accident was solely due to the negligence of Seemann, as the police themselves had done. Vinatieri's report to the police is alleged to have said that he was northbound on Alameda and making a left turn to go west on Eighth Street;

that the signal was green for him and the southbound traffic had stopped to yield the right of way; that after he had crossed two southbound lanes he saw a southbound car next to the curb on Alameda about 50 feet north of the intersection which was going about 30 miles an hour, that he saw it was not going to stop so he stopped and the other car swerved to the right, struck the curb and stop sign and a woman standing on the southwest corner. "That plaintiff believed and relied upon the said statements of defendant, N. F. Vinatieri, as to the cause of the accident and particularly upon his statement that other south bound traffic had stopped to yield to him." The complaint further alleges that at the trial one of the principal issues was whether traffic had stopped to yield the right of way to said Vinatieri; that he then testified that he could not remember whether opposing traffic had stopped or was in motion, could not say whether southbound cars passed through the intersection prior to the time he started his left turn, and further stated that such southbound cars may have been rolling slowly. This testimony, according to plaintiff, "established the negligence of N. F. Vinatieri." It is further alleged: "That the said N. F. Vinatieri falsely stated the facts to the Police Department, as aforesaid, and concealed from it and plaintiff the facts thereafter stated in his said testimony in said trial. That such false statement and concealment were made and effected with intent to exonerate himself and his co-defendants from any charge of negligence as joint tort-feasors with said Ulrich Max Seemann or otherwise and plaintiff was thereby misled and deceived by the said statement of defendant, N. F. Vinatieri."

[1-3] This does not charge a fraud or a fraudulent concealment. Primarily this is so because it does not allege that defendant, at the time of making his report to the police, knew that his statement that southbound cars had stopped for him was untrue, or that he did not believe it to be true, or that the statement was not warranted by the information he had. See Civ.Code, § 1572; 23 Cal.Jur.2d § 11, p. 27. The variation be-

tween the statements to the police and the trial testimony did not show falsity of the original statements, for the testimony amounted only to an admission of possible mistake in what the witness had originally reported. A bare charge of falsity is not enough. *Harding v. Robinson*, 175 Cal. 534, 539, 166 P. 808; *Morrell v. Clark*, 106 Cal.App.2d 198, 201, 234 P.2d 774. Nor is the bald assertion of concealment of a cause of action sufficient. Mere non-disclosure is not concealment in the absence of a fiduciary relationship, *Simons v. Edouarde*, 98 Cal.App.2d 826, 829, 221 P.2d 203; there must be some affirmative act calculated to obscure the existence of a cause of action and it must be factually alleged. 54 C.J.S., Limitations of Actions, §§ 206, 377, pp. 226-227, 514; 2 Witkin on California Procedure, p. 1334, § 356; *Bank of America National Trust & Savings Ass'n v. Williams*, 89 Cal.App.2d 21, 25, 200 P.2d 151. So far as intent is concerned it is not alleged that defendant expected or intended that plaintiff should refrain from suing him. His original statement merely amounted to an assertion that he had a defense to any charge of negligence, criminal or civil.

[4] The report made to the police by defendant was not one upon which plaintiff had a right to rely. Her counsel invokes § 484(a), Vehicle Code, which provides: "The driver of a vehicle, other than a common carrier vehicle, involved in any accident resulting in injuries to or death of any person shall within twenty-four hours after such accident make or cause to be made a written report of such accident to the California Highway Patrol, except when such accident occurs within a city such report shall be made within said twenty-four hours to the police department of such city." The report, it will be noted, must be in writing. Section 488 of the same code provides that all required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department of Motor Vehicles and the California Highway Patrol, except that certain facts, such as names and addresses, parties and wit-

nesses, registration numbers and descriptions of vehicles, etc., may be disclosed to any person having a proper interest therein. It further provides: "No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident". Section 488.5 contains this paragraph: "Upon the termination of any criminal proceedings arising out of a traffic accident, or upon the determination by the proper authorities not to file any criminal charges as a result of such accident, but in all cases upon the termination of a period of six months after the date of the accident, all of the factual data gathered by the officers, together with the signed statements of all witnesses, except the reports signed by the drivers involved in the accident, shall be made available upon request to the interested parties named in Section 488."

[5] Appellant relies upon cases such as *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal.2d 226, 153 P.2d 325, and *Kimball v. Pacific Gas & Elec. Co.*, 220 Cal. 203, 30 P.2d 39, but they are not apposite, for they involve instances in which defendant was under a duty to inform plaintiff of certain facts, or had voluntarily undertaken so to do, in either of which cases he has the further obligation to speak truly. The existence of a duty to tell the truth to a plaintiff is an essential basic element of any valid claim of fraud and deceit; unless it is intended that plaintiff rely and act upon a representation made by a defendant, or unless plaintiff belongs to a class to whom the representation is made, no cause of action can arise therefrom. In *Cohen v. Citizens Nat. Trust etc. Bank*, 143 Cal.App.2d 480, 300 P.2d 14, 16, this court said: "A person uttering misrepresentations is liable only to those in whom he intended to induce reliance and who do rely in the manner intended. [Citations.] Even though the misrepresentation has been made directly to the plaintiff, if the facts clearly indicate that the defendant when making such misstatements had no

intention of inducing reliance by his listener, there is no actionable fraud even though the hearer in fact relies to his detriment. * * *" Referring to Civil Code, § 1711¹ it is said, 143 Cal.App.2d at page 486, 300 P.2d at page 18: "Any contention that every misrepresentation is a fraud upon the 'public' and thus the misrepresenter is 'deemed to have intended to defraud' the public is unavailing. If the code section were interpreted so broadly, it would wholly destroy the element of actionable deceit that the defendant must have intended to defraud the plaintiff. Such contention is utterly without support in the law. [Citations.]"

[6] Defendant's report to the police was of such a nature that plaintiff had no right to access to it and hence no right of reliance upon it. Section 484(a) requires a driver's statement to be in writing, which of itself implies a signature; it is to be delivered to the police department when an accident occurs within a city. Section 488 declares it to be for confidential use of the Department of Motor Vehicles and the California Highway Patrol, except for certain limited disclosures to interested parties. It specifically provides that no such report shall be used as evidence in any trial. After six months such signed statements of all witnesses "except the reports signed by the drivers involved in the accident" shall be made available upon request to interested persons.

[7-9] Counsel for appellant would remove his case from the scope of these limitations upon two grounds. First, he says Vinatieri was a witness rather than a driver, which argument is fatuous. Secondly, he says it does not appear that the report alleged in the complaint was in writing or that it was signed. The statute specifically exacts a written report and impliedly requires that it be signed. The pleader's failure to allege non-compliance with those requirements cannot help him. He relies upon a report made pursuant to

1. Civ.Code, § 1711: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is

deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."

"a legal duty to report the facts of the said accident to the Los Angeles Police Department under the provisions of Section 484 of the California Vehicle Code." The following averment that defendant "did so report at the time of the said accident" implies that he performed his statutory duty and filed a written and signed statement. The later allegation that the police findings and recommendations were "appended to said reports" of Vinatieri and Seemann, spells the same thing,—written reports. This is a situation to which the rule stated in *Faulkner v. California Toll Bridge Authority*, 40 Cal.2d 317, 328, 253 P.2d 659, 666, applies: "It is, of course, the rule that 'Since the enactment of section 452 of the Code of Civil Procedure * * * it has been generally recognized that in the construction of a pleading for the purpose of determining its effect "its allegations must be liberally construed, with a view to substantial justice between the parties"' (*Mix v. Yoakum* (1927), 200 Cal. 681, 687, 254 P. 557) but it is also the law that even while giving to a pleading 'the most liberal construction permitted by section 452 of the Code of Civil Procedure no intendment can be indulged in that the pleader has not stated his case as strongly as it was possible so to do' (*Haas v. Greenwald* (1925), 196 Cal. 236, 243, 237 P. 38, 59 A.L.R. 1493; *Higgins v. Security Trust & Sav. Bank* (1928), 203 Cal. 398, 401, 264 P. 744)." Accord: *La Com v. Pacific Gas & Electric Co.*, 132 Cal.App.2d 114, 116, 281 P.2d 894, 48 A.L.R.2d 1455; *Melikian v. Truck Ins. Exchange*, 133 Cal.App.2d 113, 115, 283 P.2d 269. The rule is peculiarly applicable here because plaintiff declined to amend after leave granted and in such a posture of the case all ambiguities are resolved against her. As Mr. Justice Vallée said in *Wilson v. Loew's, Inc.*, 142 Cal.App.2d 183, 298 P.2d 152, 161: "We must assume that plaintiffs have stated their cases as strongly as it was possible for them to do. *Faulkner v. California Toll Bridge Authority*, 40 Cal.2d 317, 328, 253 P.2d 659. Having declined to avail themselves of leave to amend in the particular which defendants specifi-

cally pointed out to them, plaintiffs must 'stand upon their pleading as against all grounds and if the complaint is objectionable upon any ground the judgment of dismissal must be affirmed. [Citations.] Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him.' *Metzenbaum v. Metzenbaum*, 86 Cal.App.2d 750, 752, 195 P.2d 492, 493." If defendant's statement to the police was not written or not signed, it was incumbent upon plaintiff to so allege, and to also show by what process it becomes available to her as a basis for reliance.

[10] However, such an allegation, if made, would not strengthen her case. The report would then be one not required by law, also one not intended for plaintiff, and it would fall within the purview of the *Cohen* case, *supra*.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



145 Cal.App.2d 455

Emma M. STEEVE, Plaintiff and Respondent,

v.

Lillian E. YAEGER, Defendant and Appellant (two cases).

Civ. 4775, 5279.

District Court of Appeal, Fourth District, California.

Oct. 26, 1956.

Rehearing Denied Nov. 20, 1956.

Hearing Denied Dec. 19, 1956.

Action for declaratory relief and an accounting. The Superior Court, Orange County, Franklin G. West, J., entered judgments adverse to defendant and she appealed. The District Court of Appeal, Bar-

nard, P. J., held that where plaintiff prayed for a declaratory judgment determining her rights and interest in certain property under a partnership dissolution agreement, trial court was justified in declaring that plaintiff had an undivided one-half interest in property concerned in the agreement rather than a life interest in the income from such property, notwithstanding fact that plaintiff in her reformation cause of action might not have clearly sought such relief, since in the declaratory judgment action court was justified in construing rights and duties of parties under such agreement in accordance with the evidence and intent of the parties.

Judgments affirmed.

1. Courts ⚖99(1)

Where evidence received during trial was sufficient to sustain a finding that none of plaintiff's causes of action were barred by statute of limitations, trial court did not err in so finding even though it made a ruling just before the trial proceeded on the merits that one of plaintiff's causes of action was barred by such statute.

2. Life Estates ⚖3

No specific words are necessary to create a life estate in realty.

3. Gifts ⚖28(1)

An unqualified gift of rents, issues, and profits of a fund or property, real or personal, amounts to a gift of the fund or property itself.

4. Declaratory Judgment ⚖385

In an action for a declaratory judgment determining rights and interest of plaintiff in certain property under a partnership dissolution agreement, in granting declaratory relief, it was the right and duty of the court to declare the meaning of the agreement and to construe the language used in accordance with the intent of the parties as disclosed by the evidence.

5. Partnership ⚖311(1)

Where an agreement for dissolution of a partnership was prepared by defendant's counsel without notice to or consulta-

tion with plaintiff, any uncertainty or ambiguity therein would be resolved in plaintiff's favor, and if different constructions would be equally proper the one most favorable to plaintiff would be adopted.

6. Declaratory Judgment ⚖366

Where plaintiff prayed for a declaratory judgment determining her rights and interest in certain property under a partnership dissolution agreement, trial court was justified in declaring that plaintiff had an undivided one-half interest in the property concerned in the agreement rather than a life interest in the income from such property, notwithstanding fact that plaintiff in her reformation cause of action might not have clearly sought such relief, since in the declaratory judgment action court was justified in construing rights and duties of parties under their agreement in accordance with the evidence and intent of the parties.

7. Declaratory Judgment ⚖386

Where plaintiff brought an action for declaratory judgment and an accounting and prayed for determination of rights and interest in certain property under a partnership dissolution agreement, court had jurisdiction to grant plaintiff a lien to secure payment of sum due plaintiff which had been misapplied by defendant, since the matter was sufficiently within the issues raised by the pleadings, and no specific pleading, under such circumstances, was necessary.

8. Life Estates ⚖15(1)

Where plaintiff prayed for a declaratory judgment determining her rights and interest in certain property under a partnership dissolution agreement, and court determined plaintiff had a life estate in one-half of the realty formerly held by the partnership, it properly excluded depreciation in determining the net income from the property for which defendant had to account to plaintiff.

9. Tenancy in Common ⚖31

A cotenant is not ordinarily entitled to compensation for services in managing or taking care of common property, in the ab-

sence of an express agreement or a mutual understanding that such services should be paid for.

10. Tenancy In Common Ⓒ31

Where plaintiff, in an action for a declaratory judgment determining her rights and interest in certain property under a partnership dissolution agreement, was determined to be a cotenant for life in realty formerly held by the partnership, and no agreement had been entered into between plaintiff and defendant that defendant's services in managing such realty would be paid for, trial court was justified in refusing to allow defendant to charge for managerial services in accounting for income from realty in question.

11. Partnership Ⓒ297

Where there was a confidential relationship between plaintiff and defendant as to certain realty formerly held by them as partners, and records as to the realty were kept by defendant both before and after dissolution of the partnership, and statements as to share of the income the plaintiff was to receive after dissolution as provided for in the dissolution agreement were not furnished to plaintiff, an accounting was essential to enable the court to determine respective rights of the parties.

12. Account Ⓒ20

In an action for an accounting, when the trial court deems it necessary to have an accounting to determine the rights of the parties, it has the power to order a general accounting or, in its discretion, a limited accounting only.

A. P. G. Steffes, Los Angeles, Harvey, Rimel & Johnston, Santa Ana, for appellant.

Snyder, Fletcher & O'Neil, South Pasadena, Forgy, Reinhaus, Miller & Kogler, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from judgments granting declaratory relief and ordering and approving an accounting.

The plaintiff was a nurse and the defendant was a real estate broker. They were friends and lived together for some years. In 1939, they entered into a written partnership agreement as equal partners. The partnership acquired two parcels of valuable income real property in Fullerton, referred to as "Parcels One and Two," the legal title being held for them by a third party. So far as material here, it also acquired five other parcels of real property, title to four of them being in plaintiff's name and title to one being in defendant's name. On August 10, 1944, the defendant took the plaintiff to the office of defendant's attorney where a contract and deeds terminating the partnership and conveying the property had already been prepared. The plaintiff was surprised and hurt because the defendant was dissolving the partnership without taking it up with her beforehand, but after certain arguments and representations were made she signed the papers.

This contract described the property owned by the partnership, and provided that the partnership agreement should no longer apply and that the parties desired and agreed thereby to partition and divide said properties as set forth therein. It was then agreed that:

Parcels One and Two "shall be conveyed in fee to (the defendant) but reserving a life estate in and to one half of the rents, issues and profits to (the plaintiff) for and during the period of her natural life";

That the four parcels standing in the name of the plaintiff shall be conveyed in fee to the defendant but reserving a life estate to the plaintiff, in the same language just above quoted;

That with respect to the parcel standing in defendant's name, "there shall be conveyed to (the plaintiff) a life estate consisting of one half of the rents, issues and profits, for and during the period of her natural life, and the fee title, subject to said life

estate, shall remain in (the defendant)";

That the parties agree to dispose of all the property except Parcels One and Two, and apply the proceeds upon "the present indebtedness on Parcels One and Two, to the end that said properties may be freed from indebtedness and improved, so as to obtain the maximum rental income for the benefit of the parties hereto";

That each party shall be entitled to \$100 a month from the properties to be charged against the net income to which each party may be entitled;

That the rental of a house in the rear of Parcel Two shall be \$50 per month and shall be paid by the one occupying the same from and after September 1, 1944;

That if one half of the net income from the properties should be insufficient to care for either of the parties, by reason of illness, then as much of the principal or corpus of the properties as necessary shall be used for that purpose;

That except for necessary operating expenses no indebtedness shall be contracted without the concurrence of both parties; and that each party will sign any papers necessary to renew the existing indebtedness when it became due;

That true books of account should be kept, and on December 31 of each year the books should be audited and closed and an accurate statement delivered to each party, with both parties entitled to withdraw the balance of her share of the net profits, if any.

The deeds were recorded, in accordance with the contract, and the defendant continued to collect the rents and pay the bills as she had done during the previous years. The plaintiff went to Los Angeles to work and the defendant continued to live in the house referred to in the agreement. The defendant paid the plaintiff \$100 a month for a time. During a period when the

plaintiff was in a hospital with a nervous breakdown, the defendant also paid bills for her amounting to about \$1100, there being then no net income available for that purpose. The plaintiff married in 1947, and the defendant stopped paying \$100 a month to the plaintiff on January 1, 1948. It was stipulated that since that date defendant has taken out \$200 a month, or \$2400 a year, charging it as a manager's salary. The defendant had an opportunity to sell one of the parcels other than Parcels One and Two for \$20,000, which was \$5000 more than it cost, but refused to do so. This was a citrus orchard which was operated at a loss through these years. In July, 1949, the defendant asked the plaintiff to execute a note and trust deed for \$35,000, which she declined to do. She consulted attorneys, and this suit was filed on August 4, 1949.

The complaint, as amended, set up separate causes of action for rescission of the agreement, for reformation, for declaratory relief, and for quiet title. The answer of the defendant also asked for declaratory relief and, as special defenses, pleaded the statute of limitation and laches. At the trial, it was stipulated that certain issues be tried first and practically all of the evidence, except that of the actual accounting, was then received. After oral argument a minute order was entered reciting that the court finds certain things. Some time later the court's findings of fact and conclusions of law were filed.

The court found, among other things, that when the agreement and deeds were executed on August 10, 1944, the plaintiff was not represented by counsel, legal or otherwise; that they were read to her by defendant's counsel; that at that time the plaintiff was ill, nervous, upset and confused, and did not understand the meaning and effect of the legal language used; that she signed the contract believing the representations then made to her; that both parties then believed that her interest in the property was thus converted into that of a life tenant as to an undivided one half interest in the property; that the defendant

has at all times managed and controlled the property, collecting the rents and paying the taxes and expense; that in January, 1949, the plaintiff for the first time sought legal counsel pertaining to her rights under said agreement, and for the first time questioned the representation made to her by the defendant that she had been overpaid; that in July, 1949, the plaintiff notified defendant that she was rescinding said agreement; that the plaintiff executed the agreement of August 10, 1944, relying on the representation then made to her that the defendant would sell said property, except Parcels One and Two, and would apply the proceeds to discharge the encumbrances on Parcels One and Two, so that each of them would have an unencumbered one half of the income from Parcels One and Two for the remainder of her life; that numerous controversies exist between the parties as to their respective rights under the agreement and deeds; that the defendant had only partially accounted to the plaintiff as to the income from these properties and the expenses in connection therewith; that it is not true that the defendant provided plaintiff with annual accounts involving these properties; that on March 3, 1949, the plaintiff demanded of defendant a detailed accounting; that the plaintiff is vested with a life estate in and to an undivided one half interest in said property for and during her life; that the defendant owns all of the remainder subject to said life estate; that a confidential relationship existed between these parties from 1928 to and including January, 1949; that none of plaintiff's causes of action are barred by the statute of limitations, and plaintiff has not been guilty of laches; that the defendant has not paid to plaintiff her full share of the income from said property; that defendant has not sold all of the property agreed to be sold for the purpose of paying off the encumbrances on Parcels One and Two; that the defendant has performed services and devoted time in the management of these properties; that plaintiff did not discover that the orange orchard was not sold until in July, 1949, when the de-

fendant requested her to sign a note and trust deed for \$35,000; that plaintiff then demanded that the defendant sell the orange orchard, pursuant to the agreement, and use the proceeds toward the discharge of encumbrances on the properties; that defendant refused and still refuses to sell that property for that purpose; and that defendant has failed and refused to pay the plaintiff any sum whatever from the income of said property since April, 1948, although demand has been made therefor.

As conclusions of law the court found, among other things, that a declaratory judgment was necessary, and that an accounting was necessary. An interlocutory judgment was entered granting the plaintiff declaratory relief and construing the terms of the 1944 agreement; ordering an accounting and appointing a certified public accountant as referee to make an accounting and report; ordering that a final judgment be entered upon the approval of the report of the referee; and reserving jurisdiction over the issues tendered for final determination in the final decree. The defendant made a motion for a new trial which was denied and she then appealed from the interlocutory judgment.

The referee filed a report and after the matter was again argued the court made supplemental findings of fact and conclusions of law, approving the report and account of the referee, and finding in accordance therewith that the defendant had collected during the period in question as rents and income from the property the total sum of \$167,998.18; that she had expended \$101,926.50 for maintenance of the property, leaving a net income of \$66,071.68, of which the plaintiff was entitled to one half or \$33,035.84; and that the defendant had paid the plaintiff only \$5,942.39, leaving a balance of \$27,093.45 owing to her. It was also found that when the sum of \$1136.48 was paid for necessary medical care for the plaintiff no net income was available for that purpose, and that under the contract that amount was not chargeable against plaintiff's share of the net income. The court also adopted its previous findings and, as supplemental

conclusions of law, found that of the amount due the plaintiff she was entitled to a personal judgment for \$9,852.69; and as to the remaining \$17,240.76 she was entitled to a judgment *in rem* with a lien on the property, since that amount of the rents had been used to reduce existing liens; and that if this amount was not paid within a reasonable time the plaintiff might foreclose this lien, the orange orchard to be first sold and the proceeds applied thereon. A final judgment was entered in accordance with the original and supplemental findings, and another motion for a new trial was made by the defendant and denied. The defendant then appealed from the final judgment, and that appeal has been consolidated with the appeal from the interlocutory judgment.

[1] The appellant first contends that the court erred in finding that none of respondent's causes of action are barred by the statute of limitations, since the court had earlier ruled that her cause of action for reformation was so barred. The earlier ruling was made just before the trial proceeded on the merits. The evidence later received was sufficient to have justified a change in that ruling. The matter is immaterial, however, since the court did not grant relief on the reformation cause of action.

It is next contended that the court erred in reforming the agreement and deeds to provide that respondent owned a life estate with respect to an undivided half interest in the property itself, whereas the agreement gave her only the right to share equally in the net income during her life. It is argued that the court in effect reformed and modified the agreement under the guise of granting declaratory relief; and that the court should have declared only that the language of the agreement and deeds meant exactly what the respondent had indicated they meant in pleading her reformation cause of action.

[2-6] The court did not reform or modify this agreement. As the court said in *Putnam v. Putnam*, 51 Cal.App.2d 696, 125 P.2d 525, 526: "A declaration of the

rights and obligations under a contract which results in a reformation is but a determination of the intention of the parties and of the legal effect of the contract, not a modification of its terms." In her reformation cause of action the respondent alleged that the attorney for the defendant, who prepared the papers, intended to use language therein that would create in respondent a life estate in and to an undivided one half interest in said real property; that it was intended by both parties that language having that effect would be used, and that both parties signed the papers believing that words and language were used which conveyed or reserved such a life estate to the plaintiff. In the declaratory relief cause of action it was alleged that upon reading the agreement to them defendant's attorney represented to them both that the effect of the papers was to change plaintiff's interest in the property to a life estate in and to an undivided one half interest in the partnership property for and during her life, and that among other things she would be entitled to one half of the income from the whole of the property during her lifetime. It was conceded by both parties in the pleadings and at the trial that the respondent was entitled to one half of the net rents during her lifetime. While the respondent may not have understood the technical meaning and effect of some of the language used in the agreement the evidence, with the reasonable inferences therefrom, fully supports the finding and conclusion that she was told and understood that she was to have a life interest in one half of the property which would entitle her to one half of the net income, and that both parties intended at that time that the agreement and deeds should accomplish that purpose. That intention not only appears from the evidence but is somewhat confirmed by the agreement itself, which provides that no indebtedness shall be contracted without the concurrence of both parties; that each party is to sign any necessary renewal of the existing indebtedness; that the parties, and not the appel-

lant alone, shall dispose of all of the property except Parcels One and Two, and use the proceeds to clear the debt on Parcels One and Two; and that in the event of illness, where the income is not sufficient, each party may invade the corpus. No specific words are necessary to create a life estate and as said in *Re Estate of Franck*, 190 Cal. 28, 210 P. 417, 418, "It is also equally well settled that the unqualified gift of the rents, issues, and profits of a fund or property, real or personal, amounts to a gift of the fund or property itself." While this was a division of property rather than a gift, there was here a provision reserving and giving to the respondent an unqualified right to receive one half of the net proceeds during her lifetime, and the same principle should be here applied. In granting declaratory relief it was the right and duty of the court to declare the meaning of the contract, and to construe the language used, in accordance with the intent of the parties as disclosed by the evidence. These papers were prepared by appellant's counsel without notice to or consultation with the respondent. Under settled rules any uncertainty or ambiguity therein should be resolved in respondent's favor; and if different constructions would be equally proper the one most favorable to her should be adopted. While some inconsistencies appear in the complaint, as between the various causes of action, the respondent's contentions clearly appear throughout her pleading and, in this equitable action, the court was justified in construing the rights and duties of the parties in accordance with the evidence and the clear intent of the parties.

[7] It is next contended that the court erred in giving the respondent a lien to secure the payment of that part of the amount due her which represented one half of the amount paid by the appellant, from the income, to reduce the principal sum of the encumbrance on the main property. It is argued that the granting of such a lien was not within the issues presented; that if this had been pleaded appellant might have shown that it was contrary to the

agreement of the parties; and that the court had previously found that she was entitled to charge for "debt reduction." The matter was sufficiently within the issues raised by the pleadings and, in any event, no specific pleading was necessary under the circumstances. *Garcia v. Venegas*, 106 Cal.App.2d 364, 235 P.2d 89; *Dool v. First National Bank*, 207 Cal. 347, 278 P. 233. It clearly appeared that the appellant had used a large part of the income to reduce the trust deed indebtedness on Parcels One and Two, although the agreement specifically provided that other proceeds should be used for that purpose. While a minute order had previously stated a finding that she was entitled to charge "debt reduction and interest," that was an error which the court could correct, and its final finding and judgment are controlling. If the appellant was entitled to use the income to pay off existing liens, thus increasing her own interest, the clearly expressed purpose of the contract would be largely defeated. The court was correct in disallowing this charge, and in doing equity could give the respondent a similar lien, by way of subrogation, in place of the lien which had been wrongfully discharged.

[8] It is next contended that the court erred in finding that the appellant was not entitled to deduct amounts for "depreciation" in arriving at the amount of net income. It is admitted that the contract made no specific reference to depreciation, and that the appellant had charged on her books \$10,370.75 for such depreciation. It is argued that the accountant who prepared statements for the appellant set up an allowance for depreciation, and that for about ten years, including the prior partnership, the parties abided by his judgment and acquiesced in this charge. There was evidence that the respondent was not given copies of the statements prepared by that accountant, and she had not consented to such a charge. Depreciation is a mere accounting charge and does not represent the actual expenditure of money. No mere question of bookkeeping, or of income taxes, is involved in this connection, and no good reason appears why a

life tenant should be charged with depreciation in determining the net income from property.

[9,10] It is next contended that the court erred in not permitting the appellant to deduct from the gross income the amount she charged as a manager's salary. It is argued that many years before the parties had told each other that they never intended to marry; that while they lived together the respondent did her part of the housework; that after respondent's marriage in 1947 the appellant had to do all of the work which the respondent had previously done; that beginning in 1948 the appellant paid herself \$200 a month to compensate herself for the additional work she was doing; and that it was only fair that she should receive the amount which the respondent had previously been receiving. The \$100 a month previously paid to both was a partial division of income, and was clearly not intended as compensation. A cotenant is not ordinarily entitled to compensation for services in managing or taking care of common property, in the absence of an express agreement or a mutual understanding that such services should be paid for. *Combs v. Ritter*, 100 Cal.App.2d 315, 223 P.2d 505. The appellant had collected the rents, paid the expenses and managed these properties for several years before 1944 and continued to do the same thereafter. The respondent ceased living with the appellant in September, 1944, and no claim for compensation was made by the appellant until 1948, when it was admittedly taken without consultation with the respondent. The respondent was a cotenant to the extent of her life tenancy and, under established rules, the court was justified in refusing to allow that charge in view of the evidence presented.

It is next contended that the court erred in finding that the respondent was entitled to have certain of her medical expenses paid out of the "corpus", instead of regarding this amount as advances made by the appellant. This finding was in accordance with the contract provision, and is amply supported by the evidence that no

net income was then available for that purpose.

[11,12] It is further contended that the evidence was insufficient to justify the finding that the respondent was entitled to an accounting. It is argued that the books and records which "were kept in a filing cabinet" in appellant's home were available to the respondent at all times; that had the respondent sent someone to examine those books and records such person could have obtained the same information which the referee later obtained; and that it is unjust to allow the respondent to have an investigation and audit made partially at the expense of the appellant. It is difficult to understand this contention. The evidence shows that there was a confidential relationship between these parties; that the records were kept by the appellant, and the statements provided for in the contract were not furnished to the respondent; that the appellant had paid some personal expenses from the income received, and had commingled some of her personal funds with the rents and income she had collected from the property; and that she had made some improper charges. Under the circumstances shown an accounting was absolutely essential in order to enable the court to determine the respective rights of the parties. While an accounting was prayed for, some contention is made that a limited accounting only, rather than a general accounting was asked for. An analysis of the pleadings does not support this contention and, moreover, in such an action as this when the court deems it necessary to have an accounting to determine the rights of the parties it has the power to so order. *Braden v. Lewis*, 119 Cal. App.2d 84, 259 P.2d 16.

The findings are sufficiently supported by the evidence, with the reasonable inferences therefrom; the court's construction of the meaning of the contract as intended by the parties is a reasonable one; and the record strongly indicates that the judgment entered is a just one.

The judgments are affirmed.

GRIFFIN, J., concurs.

47 Cal.2d 258

In re Paul R. BAILLEAUX, on
habeas corpus.
Cr. 5808.

Supreme Court of California.
In Bank.
Oct. 31, 1956.

Rehearing Denied Nov. 28, 1956.

Habeas corpus proceeding. The Supreme Court, Shenk, J., held that where State had attempted to extradite prisoner from sister state for parole violation and federal court had granted writ of habeas corpus and had held that prisoner had been released from obligation to State and was no longer subject to terms and conditions of parole, judgment of federal court issuing writ of habeas corpus was res judicata and reimprisonment was unlawful and prisoner was entitled to be released.

Petitioner discharged.

1. Judgment ⇨829(3)

Full faith and credit must be accorded a judgment of federal court.

2. Judgment ⇨829(3)

Judgment of federal court has same effect in courts of state as it would have in a federal court.

3. Judgment ⇨540

In federal jurisdiction as in state courts, doctrine of "res judicata" prevents relitigation of issues determined by final judgment in prior action between same parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

4. Judgment ⇨518

State's contention, in proceeding on prisoner's petition for writ of habeas corpus, that, in prior proceeding on petition for writ of habeas corpus before federal court, federal court erred in holding that prisoner was no longer subject to terms and conditions of parole was a collateral attack on final judgment.

5. Judgment ⇨489

A collateral attack on final judgment is permitted only under limited circumstances, and one such circumstance is where court entering judgment is without jurisdiction.

6. Courts ⇨97(5)

Where State asserted, in proceeding on prisoner's petition for writ of habeas corpus, that federal court was without jurisdiction to discharge prisoner on his prior petition to federal court for writ of habeas corpus, question would be determined in accordance with federal law.

7. Judgment ⇨498

In federal courts a collateral attack on ground of lack of jurisdiction will not be permitted unless attacking party makes an affirmative showing that issue of jurisdiction was not litigated in court entering judgment under attack, and, if issue of jurisdiction was litigated in first court, determination thereon is final as against collateral attack.

8. Judgment ⇨498

If party attacking final judgment fails to show that issue of jurisdiction was not litigated in court, which entered judgment federal courts will assume that this issue was litigated.

9. Habeas Corpus ⇨117(2)

Where State had attempted to extradite prisoner from sister state for parole violation and federal court had granted writ of habeas corpus and had held that prisoner had been released from obligation to State and was no longer subject to terms and conditions of parole, judgment of federal court issuing writ of habeas corpus was res judicata and reimprisonment was unlawful and prisoner was entitled to be released.

Paul R. Bailleaux, in pro. per., and Robert H. Kroninger, Oakland, for petitioner.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

SHENK, Justice.

By this petition for the writ of habeas corpus, Paul R. Bailleaux seeks his release from Folsom prison. The warden as respondent has filed a return. Issues of fact were raised which would ordinarily require a reference. In order to obviate the necessity for such a proceeding counsel for the petitioner and the respondent filed certain documents and have joined in a stipulation of facts in which it is agreed that the documents and the stipulation disclose all of the material facts and that matter may be disposed of on the record thus presented.

In September, 1939, the petitioner was convicted of robbery in the first degree and sentenced to San Quentin Prison for the term prescribed by law. In 1942 he was released from San Quentin on parole, subject to the terms and conditions set forth in the "ticket of leave" given him. On October 5, 1943, the Chief Parole Officer of the State of California submitted a report to the Board of Prison Terms and Paroles (the predecessor of the Adult Authority), charging that the petitioner had violated his parole by committing an armed robbery in the State of Washington. The report described the circumstances of the robbery and recommended that the petitioner's parole be revoked and that he be returned to San Quentin "at such time as he will be eligible for release or discharge from the Washington State Penitentiary." In November, 1943, the Board suspended the petitioner's parole pending investigation of the parole officer's charges and ordered that he be retaken and returned to custody to abide the further order of the Board.

When the petitioner was released from the Washington prison California attempted to extradite him. He was taken into custody pursuant to a warrant of extradition issued by the Governor of Washington. He then applied to the United States

District Court for the Eastern District of Washington, Southern Division, hereinafter called the Federal Court, for a writ of habeas corpus. On January 17, 1949, that court entered an order granting the application and directing the agent of the California Adult Authority to release the petitioner. Pursuant to this order he was released from custody.

Subsequently the petitioner went to the State of Oregon. In May, 1954, he was returned from Oregon to San Quentin. The Adult Authority held a hearing on charges of parole violation, and on August 6, 1954, the petitioner's parole was revoked.

The petitioner's primary contention is that the order of the Federal Court issuing a writ of habeas corpus and discharging him is res judicata of the issue of the right of California to reimprison him.

[1-3] Full faith and credit must be accorded a judgment of the federal court. *Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S.Ct. 134, 83 L.Ed. 104; *Hancock National Bank v. Farnum*, 176 U.S. 640, 641-642, 20 S.Ct. 506, 44 L.Ed. 619; *Mueller v. Elba Oil Co.*, 21 Cal.2d 188, 205, 130 P.2d 961; *Code Civ.Proc.*, § 1908. Such a judgment has the same effect in the courts of this state as it would in a federal court. *Bank of America Nat. Trust & Savings Ass'n v. McLaughlin Land & Livestock Co.*, 40 Cal. App.2d 620, 626-627, 105 P.2d 607; 29 Cal. Jur.2d § 303, pp. 288-289. In the federal jurisdiction, as in the courts of California, the doctrine of res judicata prevents the relitigation of issues determined by a final judgment in a prior action between the same parties. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36; *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 18 S.Ct. 18, 42 L.Ed. 355, and cases cited therein; *Norris v. San Mateo County Title Co.*, 37 Cal.2d 269, 273, 231 P.2d 493; *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892; *Code Civ.Proc.*, § 1908. This doctrine is applicable to the petitioner's case. *United States v. Chung Shee*, 9 Cir., 76

F. 951; *Montgomery v. Eldson*, D.C., 123 F.Supp. 292; *Ex parte Gagliardi*, D.C., 284 F. 190; 2 *Freeman*, Judgments, 5th ed. 1925, pp. 1761-1763; see *In re Begerow*, 136 Cal. 293, 297-298, 68 P. 773, 56 L.R.A. 528. In the present proceeding a hearing was held in the Federal Court and its judgment became final. The judgment reads in material parts as follows:

"The above entitled cause coming on for hearing before the Court on this 17th day of January, 1949, the petitioner appearing in person and by his attorney, W. A. Toner, and the respondent, Vard Ryan Massey, appearing by Jane Dowdle, Assistant Attorney General of the State of Washington, and the Court having heard the testimony of the petitioner and being fully advised in the matter, now finds that the said petitioner is being detained by the respondent as agent of the California Adult Authority in violation of his constitutional rights and that he is not a fugitive from justice of the State of California but has been duly discharged and released by the respondents and should be freed from the custody of the agents of said authority.

"Now Therefore It Is Considered, Ordered, Adjudged and Decreed: That the said petition for habeas corpus be and the same hereby is allowed and granted, and it is further ordered that the respondent release the said petitioner forthwith."

The parties to the Washington proceeding were essentially the same as those now before this court—the petitioner and the State of California. The Federal Court held that the petitioner had been released by California from his obligations to the state and was no longer subject to the terms and conditions of his parole. If that judgment is *res judicata*, the 1954 order of the Adult Authority revoking the petitioner's parole was of no avail.

[4-6] The respondent contends that the Federal Court erred in holding that the pe-

titioner was no longer subject to the terms and conditions of his parole from the California court. This is a collateral attack on a final judgment, and such an attack is permitted only under limited circumstances. One circumstance is where the court entering the judgment was without jurisdiction. *Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577; *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565; *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897; *Gagnon Co., Inc. v. Nevada Desert Inn, Inc.*, 45 Cal.2d 448, 289 P.2d 466; *Code Civ.Proc.*, § 1916. Accordingly the respondent asserts that the Federal Court was without jurisdiction to discharge the petitioner. This question is to be determined in accordance with federal law. *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429; *Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649; *Gagnon Co., Inc. v. Nevada Desert Inn, Inc.*, *supra*, 45 Cal.2d 448, 289 P.2d 466; *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 P. 238.

[7,8] In the federal courts a collateral attack on the ground of lack of jurisdiction will not be permitted unless the attacking party makes an affirmative showing that the issue of jurisdiction was not litigated in the court entering the judgment under attack. If the issue of jurisdiction was litigated in the first court, the determination thereon is final as against a collateral attack. *Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26; *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244; *Mueller v. Elba Oil Co.*, *supra*, 21 Cal.2d 188, 130 P.2d 961. If the attacking party fails to show that the issue of jurisdiction was not litigated in the first court, the federal courts will assume that this issue was litigated. *Cook v. Cook*, 342 U.S. 126, 72 S.Ct. 157, 96 L.Ed. 146; *Bostwick v. Baldwin Drainage Dist.*, 5 Cir., 133 F.2d 1, certiorari denied, 319 U.S. 742, 63 S.Ct. 1030, 87 L.Ed. 1699; *In re Eichhoff's Estate*, 101 Cal. 600, 36 P. 11; 29 Cal.Jur. 2d § 201, pp. 155-156. There is no show-

ing in this record to indicate that the issue of jurisdiction was not litigated in the Federal Court.

[9] The respondent relies on *In re Kimler*, 37 Cal.2d 568, 233 P.2d 902. That case is not controlling. Here we are concerned with the effect of a prior judgment of a federal court in which that court had determined the precise question which the respondent now seeks to relitigate, namely, whether the custody of the petitioner was lawful. In the *Kimler* case this court said 37 Cal.2d at page 570, 233 P.2d at page 904 that the "Missouri court did not purport to determine the effect of *Kimler's* release by the prison authorities of" California, and that by "the clear language of the Missouri judgment, the only fact determined was that the 'facts and circumstances are not sufficient to justify' extradition." Here the federal court determined the effect of the release of the petitioner by the California authorities. It had jurisdiction to do so and its judgment should be respected.

We conclude that the judgment of the Federal Court is *res judicata*; that the reimprisonment of the petitioner was unlawful, and that he is entitled to be released from custody.

The petitioner is discharged.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the result reached in the majority opinion inasmuch as it is directly in line with my dissent in *In re Kimler*, 1951, 37 Cal.2d 568, 575, 233 P.2d 902, 904.

In the *Kimler* case a judgment of a Missouri court was involved. *Kimler* was released on habeas corpus by the Missouri court and a majority of this court there

said: "The judgment [of habeas corpus] declared that ' * * * *no sufficient cause for the detention* of said petitioner appearing, it is ordered * * * that the Writ of Habeas Corpus be sustained and made permanent, and that the petitioner * * * be * * * discharged from imprisonment and detention for the cause aforesaid.' (Italics added.)" A majority of this court specifically there held that *Kimler's* "discharge in habeas corpus in Missouri is not *res judicata* in the present proceeding." In the *Kimler* case a majority of this court relied upon *State ex rel. Cooney v. Hoffmeister*, 336 Mo. 682, 80 S.W.2d 195,¹ in holding that the Missouri discharge of *Kimler* was not *res judicata*. The holding in the *Hoffmeister* case was that the asylum state could not inquire into the guilt or innocence of the accused; that the question presented was for the determination of the demanding state. In the *Kimler* case it was held that the prisoner was entitled to release because no sufficient cause for his detention appeared. But a majority of this court held that the Missouri judgment was not entitled to full faith and credit *even though* the Missouri court in the *Kimler* case must have been well aware of its holding in the *Hoffmeister* case together with the facts and circumstances involved therein. In other words this court knew better what the Supreme Court of Missouri held than the Supreme Court of Missouri did! See, also, *Ex parte Messina*, 233 Mo.App. 1234, 128 S.W.2d 1082.

I said in my dissent to the *Kimler* case, 37 Cal.2d at page 579, 233 P.2d at page 909: "The discharge of *Kimler* in Missouri must be treated as *res judicata* on the issue above mentioned, that is, that there is no longer any basis for California to imprison *Kimler* arising from his conviction here, and therefore he is entitled to a discharge in this proceeding." This court, or a ma-

1. This case was decided by the Supreme Court of Missouri in 1935.

145 Cal.App.2d 588

J. C. COLLINS, Petitioner,

v.

SUPERIOR COURT of the State of California, In and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 22022.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 2, 1956.

majority thereof, held, however, in the Kimler case that Kimler's discharge on habeas corpus by the Missouri court was not res judicata. This despite the fact that the opinion in that case shows, without a shadow of a doubt, that the merits were adjudicated by the Missouri court. In its holding the majority blithely ignored the full faith and credit clause of both the federal and state Constitutions. Here, however, the majority has, apparently, had a change of heart because we are told that full faith and credit must be accorded a judgment of the federal court; that the doctrine of res judicata prevents the relitigation of issues determined by a final judgment in a prior action between the same parties. In other words—once is enough. With this I wholeheartedly agree. However, this case and the Kimler case were both previously adjudicated on the merits with diametrically opposite results reached by a majority of this court. The only dissimilarity between the two is that here a prior judgment of a federal court is concerned; in the Kimler case a prior judgment of a sister state was concerned. Otherwise there is no difference. The Missouri court in the Kimler case specifically noted that the "facts and circumstances are not sufficient to justify the surrender and extradition of the petitioner to the State of California"; the federal court in the case at bar specifically found that the petitioner was not a "fugitive from justice of the State of California but has been duly discharged and released by the respondents and should be freed from the custody of the agents of said authority." It is difficult to see how two cases could be more similar inasmuch as this court must give full faith and credit to the judgments of the courts of both sister states and the federal government.

Even though I am of the opinion that the conclusion reached here is in conflict with that reached in the Kimler case, I am happy to concur in the result reached herein because it is sound law.

Rehearing denied; TRAYNOR, SCHAUER and SPENCE, JJ., dissenting.

Proceeding on a writ of certiorari to review two orders of Superior Court adjudging petitioner to be in contempt of support orders of that court issued in connection with an annulment action brought by petitioner's wife. The District Court of Appeal held that where Superior Court adjudged petitioner to be in contempt without affidavits upon which orders to show cause why he should not be held in contempt were issued having been offered in evidence, and without petitioner having had a right to challenge the relevancy or the competency of the matter set forth in the affidavits, even though the court could take judicial notice of the orders it had made, it could not take judicial notice of and assume as true the facts stated in the affidavits until petitioner had an opportunity to challenge those facts as evidence, and when it did so, it deprived petitioner of due process, and its judgments of contempt would be annulled.

Judgment annulled.

1. Contempt Ⓒ40

Proceedings to have a person adjudged guilty of an indirect contempt because of a violation of an order of a court, although ancillary to the action in which the order which it is alleged defendant has violated was made, are nevertheless quasi-criminal in character.

2. Constitutional Law Ⓒ273 Contempt Ⓒ54(4)

In order that the court may have jurisdiction to try one charged with contempt, the affidavit which initiates the proceeding must state facts constituting the offense and

must affirmatively show that the person charged with the contempt had knowledge of the order he is charged with violating, and the hearing had in the proceeding must be such as to constitute procedural due process.

3. Constitutional Law ⇨305

Due process is absent if a party is denied the right to have his cause tried and determined in accordance with the procedures that are applied in other cases of like character.

4. Constitutional Law ⇨311

"Due process" implies the right not to be deprived of one's property or liberty without evidence having been offered against him in accordance with established rules, and an opportunity to cross-examine those whose evidence is given against him, and an opportunity to present evidence in his own behalf.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Process".

5. Constitutional Law ⇨273

Contempt ⇨60, 61(1)

Where Superior Court adjudged petitioner to be in contempt without affidavits upon which orders to show cause why he should not be held in contempt were issued having been offered in evidence, and without petitioner having had a right to challenge the relevancy or the competency of the matter set forth in the affidavits, even though the court could take judicial notice of the orders it had made, it could not take judicial notice of and assume as true the facts stated in the affidavits until petitioner had an opportunity to challenge those facts as evidence, and when it did not, it deprived petitioner of due process, and its judgments of contempt would be annulled.

6. Contempt ⇨23

A party who is present at a hearing before a court commissioner is not charged with knowledge of an order thereafter made by the court, and cannot be held in contempt of court for failure to abide by such court order based on a showing of presence at hearing before commissioner.

Herbert W. Simmons, Jr., Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Thomas H. Carver, Deputy County Counsel, Los Angeles, for respondent.

PER CURIAM.

This matter is before us on a writ of certiorari to review two orders of the respondent court, by each of which petitioner is adjudged to be in contempt of an order of that court, and on each of which he has been sentenced to five days in the county jail. We have reached the conclusion that neither order can be sustained and that each must be annulled.

Petitioner is the defendant in an action brought by one Bettye Lois Collins seeking a divorce from him or, in the alternative, an annulment of her marriage to him. Contemporaneously with the commencement of the action Bettye caused petitioner to be cited before the respondent court to show cause why he should not be ordered to pay to her reasonable sums for attorney's fees, court costs, alimony, and for the support of the minor child of the parties. Hearing was had upon the order to show cause on October 25, 1955, before a commissioner of the court, and on that day the commissioner in the presence of petitioner made a finding that petitioner had the ability to pay \$80 per month for the support of the minor child of the parties. Under that same date he made written findings and recommendations to the court recommending that petitioner be ordered to pay through the court trustee the sum of \$80 per month for the support of the minor child of the parties, payable at the rate of \$20 per week on the first four Fridays of each month, the defendant to be credited upon such payments for payments made for the support of petitioner through the city attorney (order apparently had been made for the payment of \$32 per month in a failure-to-provide proceeding before the city attorney); and that he be ordered to pay to counsel for Bettye the sum of \$175, payable at the rate of \$15 per month.

On October 31 the court approved these findings and recommendations and made its

order accordingly. This order was not made in the presence of petitioner, nor was it served upon him.

On April 4, 1956, the action was tried as a default in the absence of petitioner; and on April 5, 1956, a decree annulling the marriage of Bettye and petitioner, and ordering petitioner to pay Bettye the sum of \$80 per month for the support of the minor child of the parties at the rate of \$20 per week, payable on the first four Fridays of each month was filed; and on the 9th of April, 1956, this decree was entered. On July 2, 1956, petitioner filed in the respondent court an affidavit alleging that on April 4, 1956, the respondent court made an order that petitioner pay to the plaintiff for the support of the minor child the sum of \$80 per month, payable at the rate of \$20 per week on the first four Fridays of each month, and alleging that since the making of the said order the conditions and circumstances surrounding said parties had materially changed, and setting forth that petitioner had a net income of \$260 per month and obligations of over \$300 per month, and praying that the order of April 4 be modified so as to reduce the amount which the petitioner would be required to pay for the support of his child.

Upon this affidavit an order was issued and served upon Bettye requiring her to show cause why the decree, insofar as it provided for payment by petitioner for the support of his child, should not be modified. On July 31, 1956, an order to show cause was issued by the respondent court directed to petitioner requiring him to show cause why he should not be adjudged guilty of contempt of court for willfully disobeying "the Order heretofore made on the 4th day of April 1956" as more particularly described in the affidavit of the plaintiff, which was annexed.

The affidavit of the plaintiff, which was the basis for the order to show cause, alleged in substance that on the 4th of April,

1956, the court had made the order which we have hereinbefore set forth as having been contained in the decree of annulment, that the petitioner had only made certain payments, which are set forth in detail in the affidavit and which totaled the sum of \$79, and was delinquent in the sum of \$253. It alleged that the defendant had the ability to make the payments in which he was delinquent but had willfully failed and refused so to do. It alleged that petitioner was not present when the order was made, and that the order was not pronounced in his presence; but in answer to the question set forth in the affidavit, "What other knowledge of the Order has the adverse party received?", stated, "Through his atty, and O.S.C. re modification filed by defendant herein shows actual notice." It further stated that petitioner had sufficient income to comply with the order and that that income was in the sum of \$260 per month net.

On the same day an order to show cause issued requiring petitioner to show cause why he should not be adjudged guilty of contempt for willfully disobeying the "Order heretofore made on the 25th day of October 1955." The affidavit filed by Bettye which was the basis for this order to show cause alleged that on the 25th of October, 1956,¹ the court had ordered petitioner to pay to plaintiff for the support of the minor child of the parties \$80 per month payable on the first four Fridays of each month; that payments totaling \$440 had accrued under said order; that there had been paid on account thereof the sum of \$155 only; and that petitioner was delinquent in the sum of \$285. The affidavit alleged that the order of October 25 was audibly pronounced in the presence of petitioner; and in answer to the question, "What other knowledge of the Order has the adverse party received?", stated, "Through his attorney." It made the same allegations as to the ability of petitioner to support his minor child as were set forth in the affidavit heretofore mentioned.

1. This is the date given in the affidavit, but all parties apparently understood it to refer to October 25, 1955.

All orders to show cause were made returnable on August 21, 1956, and on that day the court apparently received some evidence upon the issues tendered by the order requiring Bettye to show cause why the order as to child support of April 4, 1956, should not be modified. After this evidence was taken, the court proceeded to determine the issues of contempt presented by the order to show cause directed to petitioner. At the opening of this proceeding, the following occurred:

"The Court: Number 5, Collins, and you may proceed with the contempt.

"Mr. Stephenson: We arrived at a stipulation which we feel will dispose of the matter of the contempt.

"We offer to stipulate that the amounts set forth as the arrearage in each fourth of the contempt affidavits be found by the Court to be the amount in arrears as of July 31, 1956 on each order.

"The Court: July 31st?

"Mr. Stephenson: Yes, and in other words, there would be then an arrearage of \$285.00 on the order of October 25th, 1955, and an arrearage of \$253.00 on the order of April 4th, 1956 for child support, and an arrearage of \$135.00 as of that July 31st on the order for attorney's fees which was made on October 25, 1955.

"We further offer to stipulate that the Court need not find the defendant in contempt on these orders, but in lieu thereof the Court make an order now for the payment of these arrearages and whatever amount per month the Court feels is reasonable that the defendant should pay.

"Mr. Simmons: We are willing to stipulate, your Honor. We would like to ask the Court to make note of the fact that the defendant has during this period of time in question paid either eight, seven or eight, and in a few instances \$10.00 a week except for a few weeks.

"Mr. Stephenson: I have the list here of payments that were made and they were fairly regular, your Honor.

"The Court: Do you wish to offer that list, Mr. Simmons?

"Mr. Stephenson: I have no objection if you feel you'd like to offer it.

"Mr. Simmons: It might be well to have it in the file.

"The Court: You are offering it, Mr. Simmons. It will be received."

The court then orally announced its decision modifying the decree of annulment insofar as it provided for the support of the minor child of the parties; and immediately, without taking any further evidence and without the affidavits of Bettye having been offered or received in evidence, without any opportunity on the part of petitioner to cross-examine the affiant or to refute the statements made in the affidavits or to offer evidence to excuse his delinquency, proceeded to pronounce judgments finding petitioner in contempt of both orders, despite the objections of petitioner's counsel that he had understood that the charge of the contempt had been withdrawn by stipulation and despite counsel's statement that he was taken by surprise and that he desired to reopen the matter in order to show that his client was not actually working during a certain period of time due to illness. At one stage in the proceedings when counsel attempted to point out to the court that there had not been any sufficient showing of the order of April 4 and that therefore the court should not proceed, the court peremptorily told him that he was interrupting and that if he didn't like the order that the court was making he could take an appeal. The court, as heretofore stated, found petitioner in contempt of both orders and sentenced him to the county jail for five days, the sentences to run consecutively.

[1] Proceedings such as this to have a person adjudged guilty of an indirect contempt because of a violation of an order of the court, although ancillary to the action in which the order which it is alleged the de-

fendant has violated was made, are nevertheless quasi-criminal in character. *Ex parte Ah Men*, 77 Cal. 198, 200, 19 P. 380; *Mitchell v. Superior Court*, 163 Cal. 423, 125 P. 1061; *Ex parte Gould*, 99 Cal. 360, 33 P. 1112, 21 L.R.A. 751; *Phillips v. Superior Court*, 22 Cal.2d 256, 257, 137 P.2d 838.

[2] In order that the court may have jurisdiction to try one charged with contempt, the affidavit which initiates the proceeding must state the facts constituting the offense and must affirmatively show that the person charged with the contempt had knowledge of the order he is charged with violating, *Phillips v. Superior Court*, supra, 22 Cal.2d at page 258, 137 P.2d 838; *Warner v. Superior Court*, 126 Cal.App.2d 821, 273 P.2d 89, and the hearing had in the proceeding must be such as to constitute procedural due process, *Warner v. Superior Court*, supra.

[3,4] While no exact definition of due process may be formulated, it is established that due process is absent if a party is denied the right to have his cause tried and determined in accordance with the procedures that are applied in other cases of like character. *San Jose Ranch Co. v. San Jose, etc., Co.*, 126 Cal. 322, 326, 58 P. 824; *Gray v. Hall*, 203 Cal. 306, 317, 265 P. 246. It implies the right not to be deprived of one's property or liberty without evidence having been offered against him in accordance with the established rules, and an opportunity to cross-examine those whose evidence is given against him, and the opportunity to present evidence in his own behalf. *McClatchy v. Superior Court*, 119 Cal. 413, 420, 51 P. 696, 39 L.R.A. 691; *Matter of Lambert*, 134 Cal. 626, 633, 66 P. 851, 55 L.R.A. 856; *Langendorf United Bakeries v. Industrial Acc. Comm.*, 87 Cal.App.2d 103, 104, 195 P.2d 887, and cases cited.

[5] In the case at bar no evidence was offered against petitioner. The affidavits upon which the orders to show cause were issued served as the complaint charging the contempt. They might also serve as evidence at the hearing but they did not constitute such evidence until offered and re-

ceived by the court, and upon their being offered petitioner would have the right to object to any matter stated therein upon any proper legal ground as to its relevancy or competency. In the proceedings here he would also have the right, if the evidence was offered and received, to cross-examine the affiant, *Langendorf United Bakeries v. Industrial Acc. Comm.*, supra; 16A. C.J.S., Constitutional Law, § 624, p. 834. Without the affidavits having been offered and without the petitioner having had a right to challenge the relevancy or the competency of the matter set forth in the affidavits, he was deprived of a trial of the issues tendered by the affidavits according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. It is true that the proceeding in contempt being ancillary to the annulment action, the court might take judicial notice of the orders it had made; but it could not take judicial notice of and assume as true the facts stated in the affidavits until the defendant had had the opportunity to challenge those facts as evidence, and when it did so it deprived petitioner of due process, *Moore v. California Minerals, etc., Corp.*, 115 Cal. App.2d 834, 837, 252 P.2d 1005. Procedural due process being lacking, the judgments of contempt must each be annulled.

[6] As to the judgment finding petitioner in contempt of the order denominated as one of October 25, 1955, is concerned, the facts disclosed by the file of the respondent court in the annulment action negative the truth of the finding made in the judgment of contempt that the defendant had knowledge of that order; for while the affidavit which is the foundation for the order to show cause in that contempt proceeding states that the order was audibly pronounced in the presence of petitioner, the proceedings had in that matter and of which the court was charged with judicial notice show that the only proceeding had on October 25 was a hearing before the commissioner who had no power to make any order, and that the actual order of the court was not made until October 31, 1955, and then was made in

chambers by the approval of the recommendations of the commissioner. We advert to this phase of the matter not because it could in any wise affect the decision which we have necessarily come to, as heretofore announced, but because it has apparently been common practice to assume, contrary to the facts, that a party who is present at the hearing before the commissioner is charged with knowledge of an order thereafter made by the court. That this is not true follows not only from the fact that the commissioner has no power to order a party to do anything, but also from the fact that the court is not bound to make an order in accordance with the commissioner's findings or his recommendations.

The judgments holding the petitioner in contempt are, and each of them is, annulled.



145 Cal.App.2d 620

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Herman Robert HAYMAN, Defendant and
Appellant.**

Cr. 5684.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 2, 1956.

Hearing Denied Nov. 30, 1956.

Defendant filed a petition for a writ of error coram nobis to review a judgment sentencing him to imprisonment after revocation of probation granted him after he pleaded guilty of forgery of endorsement on a bank check. From an order of the Superior Court, Los Angeles County, Charles W. Fricke, J., denying the petition, defendant appealed. The District Court of Appeal, Moore P. J., held that there was no legal basis for petition, which stated no facts which petitioner did not know when he pleaded guilty or could not have dis-

covered by exercising reasonable diligence long before applying for writ and did not declare any probative facts as basis of his claim, nor when or how they were discovered, so that court might determine whether defendant proceeded with due diligence.

Order affirmed.

1. Criminal Law ☞997(6)

The office of "writ of error coram nobis" to review judgment against defendant in criminal case is to bring trial court's attention to facts existing at time of trial which would have constituted valid defense, but were not presented because of duress, fraud or excusable mistake, without negligence of defendant, and which, not appearing on face of record, would have effected acquittal of defendant or at least caused entry of more favorable judgment against him.

See publication Words and Phrases, for other judicial constructions and definitions of "Writ of Error Coram Nobis".

2. Criminal Law ☞997(2)

The writ of error coram nobis is not properly used to correct errors of law or redress irregularities which could have been corrected on motion for new trial or by appeal.

3. Criminal Law ☞997(6)

The scope of writ of error coram nobis is extremely narrow and must be confined to inquiry into facts which might have been properly defensive matter at trial of petitioner therefor but for interposition of some agency other than petitioner's negligence.

4. Criminal Law ☞997(2)

The writ of error coram nobis cannot be used for purpose of appeal from judgment in criminal case because such remedy was lost through failure to invoke it in time without petitioner's fault.

5. Criminal Law ☞997(11)

A petition for writ of error coram nobis to review judgment sentencing petitioner to imprisonment after revocation of probation granted him when he pleaded

guilty of forgery of endorsement on bank check was without legal basis, where it stated no facts which petitioner did not know at time of such plea or could not have discovered by exercising reasonable diligence long before applying for writ and did not declare any probative facts as basis of his claim or when or how they were discovered so that court might have determined whether he proceeded with due diligence.

Herman Robert Hayman in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

December 23, 1943, Hayman was accused by information (1) of having defrauded Eugene Williams and others October 22, 1943, by forging the name of J. R. Love on the back of a check drawn on the Union Bank & Trust Company in the amount of \$49; (2) of having forged the name of Elmo Griffin on the back of a check on the Union Bank and Trust Company in the sum of \$13.22; (3) of having forged the name of George Jones on the back of a check October 22, 1943, drawn on the Union Bank and Trust Company in the sum of \$68.31. On December 27, 1943, he regularly entered his plea of not guilty as charged in all counts of the information. On February 1, 1944, he withdrew his plea of not guilty and regularly entered his plea of guilty as charged in Count I and filed an application for probation. On February 24 the other counts of the information were dismissed and the court granted him probation for a period of five years on condition that he serve the first six months of his probationary period in the county jail, make reimbursement for all checks he had forged, have no checks or checking account, report regularly to the Probation Department and obey all laws.

On March 11, 1948, the same court entered the following judgment: "Whereas

the said defendant, having duly pleaded guilty in this Court of the crime of forgery of endorsement, a felony, as charged in Count 1 of the information, other counts having been dismissed, and having been granted probation, and said defendant having violated the terms of his probation, probation heretofore granted is revoked and

"It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law which sentence is ordered to run consecutively with sentence imposed by the United States Court.

"It is further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at San Quentin when released by the United States Authorities.

"Done in open Court this 11th day of March, 1948."

At the time of sentence the court remarked: "In this case the defendant was charged with a number of forgeries, pleaded guilty to one count and was placed on probation.

"It now appears that this same defendant appeared before the United States District Court for the Southern District of California, in January of this year, and for the offense of impersonation of the holder of Government obligations, forging a number of Government checks and conspiracy, was given a number of sentences to the Federal penitentiary. Violation is so perfectly obvious there isn't any doubt about the situation at all.

"It appears that this defendant is not within the jurisdiction and is not available for sentence at this time.

"There being no legal cause why sentence should not now be pronounced, it is therefore the order of this court that probation heretofore granted be vacated and set aside, and it is the sentence of this court the defendant be imprisoned in the State Prison of the State of California for the term prescribed by law.

"The Sheriff is directed to carry this sentence into execution by transferring the defendant to the State Prison at San Quentin and turning him over to the custody of the Director of Corrections of that Institution, upon release of the defendant from the Federal Penitentiary. This sentence to run consecutively with the sentence imposed by the United States Government, of course."

April 11, 1956, appellant filed in the superior court his "Petition for Writ of Error Coram Nobis" whereby he contended (1) that the superior court knew where he could be located and could by reasonable diligence have cited him to appear at the time of passing sentence; (2) that it was prejudicial error for the court to impose a secret sentence after the prisoner was out of the jurisdiction, Pen.Code, § 1193; (3) that petitioner had a right to be present at the imposition of his sentence; (4) that the Probation Department declined to cite petitioner for violating his probation; (5) that petitioner has been in continuous confinement since 1946 and will be eligible for release in 1960.

From the order denying the petition, petitioner has appealed.

[1-3] There is no legal basis for the petition for a writ of error coram nobis. The office of that writ is to bring the attention of the court to such facts as existed at the time of the trial that would have constituted a valid defense, but which, without negligence on the part of the defendant, were not presented, either through duress, fraud or excusable mistake and which, not appearing on the face of the record, would have effected an acquittal of the petitioner or, at least, have caused a more favorable judgment to be entered against him. *People v. Tuthill*, 32 Cal.2d 819, 821, 198 P.2d 505; *People v. Reid*, 195 Cal. 249, 255, 232 P. 457, 36 A.L.R. 1435. It is not a writ whereby convicts may attack or relitigate just any judgment on a criminal charge merely because the unfortunate person may become displeased

with his confinement or with any other result of the judgment under attack. *People v. Martinez*, 88 Cal.App.2d 767, 771, 199 P.2d 375. It is not properly used to correct errors of law or to redress irregularities at the trial that could have been corrected on motion for new trial or by appeal. *People v. Martinez*, supra. On the contrary, it is a process whose scope is extremely narrow and must be confined to an inquiry into those facts which might have been properly defensive matter at the trial but for the interposition of some agency other than the negligence of the petitioner. *People v. Darcy*, 79 Cal.App.2d 683, 693, 180 P.2d 752.

[4,5] Neither may the writ of error coram nobis be used for the purposes of appeal because that remedy was lost through failure to invoke it in time without fault on the part of the petitioner. *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325; *People v. Pryor*, 87 Cal.App.2d 352, 353, 196 P.2d 948. There is nothing in the petition that should have required the trial court to reassert jurisdiction of the action with a view to inquiring whether judgment should be vacated. It states no facts upon which petitioner relies which he did not know at the time he pled guilty or which he could not by the exercise of reasonable diligence have discovered long prior to his application for the writ. *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13. Neither does the petition declare probative facts as the basis of his claim nor the time and occasion when or how they were discovered, whereby the court might have determined whether he proceeded with due diligence. His only attempt to meet that requirement was by alleging that he was not notified of his sentence to San Quentin "until long after the time within which to appeal had expired." His long delay was deadly poison to any probative facts that might otherwise have been grounds for the writ.

Denial of petition affirmed.

FOX and ASHBURN, JJ., concur.

145 Cal.App.2d 539

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Robert GIANI, also known as Robert Rafael
Giani, Defendant and Respondent.

Cr. 3233.

District Court of Appeal, First District,
Division 1, California.

Oct. 31, 1956.

Rehearing Denied Nov. 15, 1956.

Hearing Denied Nov. 28, 1956.

Prosecution for violation of section 288a of Penal Code against defendant who was awarded new trial when District Attorney was allowed, over objection, to ask defendant on cross-examination whether on date of alleged occurrence he was a homosexual, to which answer was "yes". The Superior Court, County of Marin, Carlos R. Freitas, J., entered order, and the State appealed. The District Court of Appeal, Fred B. Wood, J., held that question was improper, in absence of sound basis for entertaining presumption or inference that every homosexual is "psycho-biologically" predisposed to perform acts proscribed by statute, and, under circumstances, admission of evidence over objection was prejudicial error.

Order affirmed.

1. Criminal Law ☞1144(12)

In prosecution for violation of section 288a of Penal Code against defendant who was awarded new trial when District Attorney was allowed, over objection, to ask defendant on cross-examination whether on date of alleged occurrence he was a homosexual, to which answer was "yes", record afforded no sound basis for entertaining presumption or inference that every homosexual is "psycho-biologically" predisposed to perform acts proscribed by statute. West's Ann.Pen.Code, §§ 288a, 1181, subd. 5, 1238, subd. 3, 1323.

2. Witnesses ☞305(2)

Even if fact designed to be proved by expected answer to question "were you a

homosexual" were relevant to issue of predisposition of such a person to violate section 288a, Penal Code, fact that question was asked by prosecution, and not offered in proof by defendant, would preclude contention that defendant, by testifying, had waived protection of any exclusionary rule of law which may have been imposed for his benefit. West's Ann.Pen.Code, § 288a.

3. Sodomy ☞1

No particular purpose, motive, or intent is a necessary element of crime described by section 288a of the Penal Code. West's Ann.Pen.Code, § 288a.

4. Criminal Law ☞371(1)

Evidence of other similar crimes is not ordinarily admissible to prove specific intent unless the intent accompanying the act is equivocal, or where it is claimed by defendant that act was result of mistake, accident, or inadvertence, or where intent is otherwise denied. West's Ann.Pen.Code, § 288a.

5. Criminal Law ☞1170½(5)

Witnesses ☞277(2)

Question, upon cross-examination of defendant accused of violation of section 288a of Penal Code upon person of 15 year old boy, whether defendant was a homosexual, to which answer was "yes", was improper, in absence of sound basis for entertaining presumption or inference that every homosexual is "psycho-biologically" predisposed to perform acts proscribed by statute, and, under circumstances, admission of evidence over objection was prejudicial error. West's Ann.Pen.Code, §§ 261, 288a, 1181, subd. 5, 1238, subd. 3, 1323; West's Ann.Welfare & Inst.Code, §§ 5500, 5650-5653.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Paul I. Archbold, San Francisco, for respondent.

FRED B. WOOD, Justice.

Charged with the violation of section 288a of the Penal Code, upon the person of a fifteen year old boy, defendant took the witness stand and denied the charge. Upon cross-examination the district attorney was allowed, over objection, to ask, "On May 23d of this year [the date of the alleged occurrence] were you a homosexual?" The answer was, "Yes." Assigning this as prejudicial error defendant made and the trial court granted a motion for a new trial, predicated upon Penal Code, section 1181, subdivision 5. The state has appealed under sanction of section 1238, subdivision 3. The order must be affirmed.

Appellant invokes the principle that, although a defendant in a criminal action cannot be compelled to be a witness against himself, "if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Pen.Code, § 1323. This defendant was not examined in chief as to his sexual make-up, whether homosexual or heterosexual. True, says the appellant, but this "does not mean that

the cross-examination must be confined to a mere categorical review of the matters, dates or times mentioned in the direct examination" and that a defendant "can be cross-examined with respect to facts or denials which are necessarily implied from the testimony-in-chief, as well as with respect to facts which he expressly states." *People v. Zerillo*, 36 Cal.2d 222, 228 and 229, 223 P.2d 223, 227 and 228.

It is difficult to see the relation between defendant's affirmations and denials on the witness stand and the information which the question "were you a homosexual" might elicit. Appellant speaks of homosexuality as "a psycho-biological condition which predisposes, indeed compels, a party to commit an abnormal sexual offense," such as the offense proscribed by section 288a. Appellant has not cited any expert medical testimony to that effect. It has suggested that we refresh the judicial recollection by reading one or more of a series of Sexual Deviation Research Reports of studies officially conducted by the State Department of Mental Hygiene acting through the Superintendent (Karl M. Bowman, M. D.) of the Langley Porter Clinic.¹

1. The California Sexual Deviation Research project came about as the result of certain studies conducted by the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process. The sub-committee issued three significant reports: One in March, 1950, another in January, 1951, and the third in August, 1952.

The sub-committee's preliminary report appears in the Assembly Journal for the 1950 First Ext. Session at pp. 29-299. It was also printed as a separate document. It was followed by a final report printed in the Assembly Journal for the 1951 Regular Session at pp. 2799-2866, as a part of the report of the main committee which appears in the 1951 Journal at pp. 2701-2866. The main committee's 1951 report was also printed as a separate document; the sub-committee report appearing at pp. 103-170 thereof. The August, 1952 report of the sub-committee (newly created but virtually a continuation of the original sub-committee) appears in the Assembly

Journal for the 1952 Second Ext. Session at pp. 135-193.

The statute which sanctioned and directed the conduct of this research work was Chapter 35 of the Statutes for the 1950 First Extra Session, p. 477; codified in 1953 as sections 5650-5653 of the Welfare and Institutions Code. Stats. 1953, ch. 153, p. 1028.

The following reports have been filed by the State Department of Mental Hygiene acting through the Langley Porter Clinic, Karl M. Bowman, M.D., Medical Superintendent:

Preliminary report stating the problem and describing the proposed project (55 pages mimeographed) was received by the Assembly on March 12, 1951. (Assembly Journal for the 1951 Regular Session, p. 1461.)

Sexual Deviation Research Report by Karl M. Bowman, March 1952, was printed as a separate document and in the Assembly Journal for the 1952 First Ext. Session at pp. 37-113.

California Sexual Deviation Research Report, dated January, 1953, was re-

We have perused those reports but find nothing therein which seems to support counsel's broad claim that *every* homosexual is predisposed to commit crimes, sexual crimes, crimes of the nature of the crime defined and proscribed by section 288a. Instead, we find such statements as these: "The facts are that the majority of homosexuals are no particular menace to society. A small number of them, like those who are heterosexual, will attempt to seduce or sexually assault others or try to initiate sex relations with small children." (1951 Report; mimeographed, p. 7.) "[M]ost exhibitionists, homosexuals and peepers may fit into the class of psychopaths and yet be socially harmless individuals." (January, 1953, Report, p. 109.) Evidence does not "exist for the popular idea 'that homosexuals are in general antisocial individuals.'" (January, 1953, Report, p. 117.)

Moreover, it is not required that the defendant, in support of his objection to the challenged question, demonstrate that not every homosexual is psycho-biologically predisposed, indeed compelled to commit the act here charged. It is for the cross-examiner to show a sound basis for his assumption that homosexuals are so predisposed. The probable lack of a scientific basis for any such assumption seems indicated by the following statement made at the conclusion of the state's four-year sexual deviation study: "Up to now much research in sexual deviation has been theoretic and speculative rather than empiric, and most of the empiric research has been clinical and descriptive rather than experimental. It is suggested that an important task is that of developing and applying reliable scientific procedures in the effort to

discover basic principles in the area of human sexuality. This difficult task involves searching systematically and empirically for the components of personality, of culture, of interpersonal relationships, of heredity, and constitution that contribute to sexual deviation and to sexual conformity." (March, 1954, Report, p. 157.)

[1] In this state of the record we perceive no sound basis for entertaining a presumption or an inference that every homosexual is "psycho-biologically" predisposed to perform the acts proscribed by section 288a of the Penal Code.

We are mindful of Edmund Burke's classic utterance in his Second Speech on Conciliation with America: "I do not know the method of drawing up an indictment against a whole people." The Works of the Right Honorable Edmund Burke, Vol. II, p. 136, 3rd Edition, Boston: Little, Brown & Company, 1869. Equally true, we think, would be the statement "You can not indict an entire segment of the population." Yet, that, it would seem, is precisely what the challenged question does. Perhaps we could express it more clearly were we to assume the charge to be that of rape, "accomplished with a female not the wife of the perpetrator," Pen.Code, § 261, and that the prosecutor asked the defendant upon cross-examination "Are you a heterosexual?", the contention being that every heterosexual is of a "psycho-biological" make-up which "predisposes, indeed compels," him to commit rape.²

Appellant's counsel frankly states he has found no case law precisely in point supporting appellant's claim. He does invoke the well-established principle that "All

ceived by the Assembly on February 24, 1953 (Assembly Journal for the 1953 Reg.Sess., p. 1156) and was ordered printed as a separate document (Same, p. 1197).

California Sexual Deviation Research Report, dated March, 1954, was printed as a separate document. It was received by the Assembly on March 2 and on March 3, 1954, was ordered printed.

(Assembly Journal, 1954 Reg.Sess., pp. 64 and 74.)

2. We note in passing that the acts proscribed by § 228a are equally condemned whether committed by persons of the same sex or of opposite sexes. People v. Coleman, 53 Cal.App.2d 18, 26-27, 127 P. 2d 309, and cases there cited.

Appellant's argument, pressed to a logical conclusion, would seem to tend to

facts having rational probative value are admissible, unless some specific rule forbids.' * * * The general test of relevancy of indirect evidence is whether it tends logically, naturally, and by reasonable inference to prove or disprove a material issue", *People v. Jones*, 42 Cal.2d 219, 222, 266 P.2d 38, 41, and the application of that principle to the facts in the *Jones* case (prosecution of a charge of violating section 288 of the Penal Code). An order denying defendant's motion for a new trial was reversed, for error in holding inadmissible the testimony of a psychiatrist that he had examined the defendant and concluded he "is not a sexual deviate and * * * is incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and a half years of age." At page 222 of 42 Cal.2d, at page 41 of 266 P.2d. His "sole purpose in offering in evidence the doctor's opinion * * * was to prove that he did not engage in the acts for which he was on trial", not to disprove the existence of the required specific intent. 42 Cal.2d at page 223, 266 P.2d at page 42. The reviewing court then adverted to the use of evidence of good character tending to rebut testimony of an incriminating character, showing defendant's general reputation in the community, creating a reasonable doubt of guilt. Next, reference was made to the statutes dealing with the sexual psychopath, indicating a legislative determination that a person who commits sex offenses "is more likely to violate section 288 than one who has no such propensity; to some extent there is a cause and effect relationship. Evidence that a person has no such disposition is analogous to that in regard to character, for it bears upon the probability of the innocence of the accused. From evidence which tends to prove that a person is not a sexual psychopath, an inference

reasonably may be drawn that he did not commit the act denounced by section 288. See Code Civ.Proc., § 1960. The competency of expert opinion in this field of evidence is established by the statutory procedure for the determination of sexual psychopathy, Welf. & Inst. Code, §§ 5504-5506. Accordingly, the evidence here excluded was relevant to the general issue before the jury and should have been admitted." 42 Cal.2d at pages 224-225, 266 P.2d at page 42.

Quite significant, we think, is the fact that the court was there speaking of an offer to prove by expert testimony that a particular individual had no disposition to commit the offense charged, not merely that he was a member of a large class of persons as a basis for a layman's inference (not a medical expert's opinion) that all members of that class were predisposed to commit the act charged. Also, insofar as the court did refer to a class it was a conceivably narrower class (sexual psychopaths) than the one to which appellant herein refers (homosexuals). The Legislature has not, in so many words at least, declared that every homosexual is a sexual psychopath. Instead, it was defined the latter term as meaning a person "who is affected, *in a form predisposing to the commission of sexual offenses*, and *in a degree constituting him a menace to the health or safety of others*, with any of the following conditions: (a) Mental disease or disorder. (b) Psychopathic personality. (c) Marked departures from normal mentality." Welf. & Inst.Code, § 5500. (Emphasis added.) Conceivably a person might be affected by one or another of the conditions described in clauses (a), (b) and (c) but not "in a form" predisposing him to commit sexual offenses, nor "in a degree" constituting him a menace to the health or safety of others. In the absence of expert medical testimony on

ward the view that if the information herein charged defendant with violating § 288a in participation with a person of the opposite sex (adult or minor, consenting or nonconsenting) it would be

proper for the cross-examiner to ask "Are you a heterosexual" upon the theory that such a person is predisposed to commit such an act.

the subject we hesitate to equate the word "homosexual" with the term "sexual psychopath."

We note the court's criticism (in the Jones case) of the holding in *People v. Sellers*, 103 Cal.App.2d 830, 230 P.2d 398, the rejection of a defendant's offer of the opinion of a medical expert, who had examined him, whether the defendant was to any extent a homosexual. Concerning that, the court in the Jones case observed in part, that "a showing of sexual normality * * * has relevancy to the non-performance of homosexual acts." At page 225 of 42 Cal.2d, at page 43 of 266 P.2d. That statement, viewed in its context, was made concerning an offer by the defendant to show *indisposition* to commit the offense, by proving he was not a homosexual (conceivably viewed as a large group which *includes* a smaller group defined as sexual psychopaths). If so, the relevancy of the offer was obvious. The converse is not necessarily true; i. e., the concept that if a man merely belongs to the larger group (homosexual) he is predisposed to commit the particular offense.

[2] It seems pertinent also to observe that even if the fact designed to be proved by the expected answer to the question "were you a homosexual" were equally relevant to an issue herein as was the proffered testimony in the Jones and Sellers cases relevant to issues in those cases, respectively, there is this significant difference: In the Jones case and in the Sellers case the defendant was making the offer. He thereby waived the protection of any exclusionary rule the law may have imposed for his benefit. Here, in contrast, the prosecution made the offer and the defendant objected.

In view of the conclusion we have reached, it is unnecessary to enter upon an extended discussion of the exclusionary rules of evidence and the exceptions thereto. We do note that the challenged question is not designed or adapted to elicit proof of "similar acts" committed upon

the person of the prosecuting witness or any one else, whether to show propensity, a behavior pattern or a *modus operandi*.

[3,4] We observe, also, that "'no particular purpose, motive, or intent is a necessary element of the crime described'" by section 288a of the Penal Code, *People v. Avanzi*, 25 Cal.App.2d 301, 302, 77 P.2d 237, 238, quoted with approval in *People v. Coleman*, 53 Cal.App.2d 18, 27, 127 P.2d 309, 315. Evidence of other similar crimes is not ordinarily admissible to prove specific intent unless "the intent accompanying the act is equivocal, or where it is claimed by the defendant that the act was the result of mistake, accident, or inadvertence, or where intent is otherwise denied." *People v. Channell*, 136 Cal.App.2d 99, 112, 288 P.2d 326, 335. No greater should be the reason for receiving evidence of a personality trait or quality that might predispose a person to commit the proscribed act. That seems to have been the view of the court in *People v. Musumeci*, 133 Cal.App. 2d 354, at page 360, 284 P.2d 168 at page 172, where (in a prosecution under section 288 of the Penal Code) it was held prejudicial error to allow (upon cross-examination of the defendant) the question "You are a sex pervert, aren't you?" The discussion in 133 Cal.App.2d at pages 361 to 366, 284 P.2d 168, Presiding Justice White speaking for the court, is cogently persuasive.

[5] We entertain no doubt that the error herein was prejudicial. "In a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person [a prosecution for violations of § 288 and § 288a, Pen.Code], it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and conduct of the trial". *People v. Evans*, 39 Cal.2d 242, 251, 246 P.2d 636, 642.

The order is affirmed.

PETERS, P. J., and BRAY, J., concur.
Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

145 Cal.App.2d 601

Manuel MOLINA, Petitioner and Appellant,
v.

Russell MUNRO, Director, and Phillip S. Davis, Area Administrator, Department of Alcoholic Beverage Control, The Alcoholic Beverage Control Appeals Board, Defendants and Respondents.

Civ. 21760.

District Court of Appeal, Second District,
Division 2, California.

Nov. 2, 1956.

Hearing Denied Dec. 24, 1956.

Mandamus proceeding brought to have liquor license revocation order set aside. The Superior Court, Los Angeles County, Arnold Praeger, J., denied the petition, and an appeal was taken. The District Court of Appeal, Moore, P. J., held that plaintiff could not successfully complain that he had been denied due process in revocation proceeding by reason of his being in jail at time of hearing, since he had been represented at such hearing by counsel who had made no motion for continuance to enable licensee to be present in person.

Affirmed.

1. Intoxicating Liquors ⇨108(10)

Department of Alcoholic Beverage Control must be sustained, in license revocation case, provided it has committed no error of law, if evidence is sufficient to support its finding of fact. West's Ann. Const. art. 20, § 22.

2. Intoxicating Liquors ⇨108(10)

All substantial conflicts in evidence must be resolved in favor of findings of Department of Alcoholic Beverage Control in license revocation case. West's Ann. Const. art. 20, § 22.

3. Intoxicating Liquors ⇨108(5)

In proceedings culminating in revocation of off-sale retail liquor license, evidence sustained finding that licensee had abused his license by sale of beer to a minor. West's Ann.Bus. & Prof.Code, § 25658(a).

4. Intoxicating Liquors ⇨108(1)

To prevail under Business and Professions Code section providing a defense when motor vehicle operator's license had been exhibited, liquor licensee must have demanded documentary proof of customer's majority before furnishing any alcoholic beverage to minor. West's Ann.Bus. & Prof.Code, § 25660.

5. Evidence ⇨7

It is within common knowledge that "beer" is an intoxicating liquor. West's Ann.Bus. & Prof.Code, §§ 23006, 25658.

6. Administrative Law and Procedure ⇨327 Licenses ⇨38

A proceeding before an administrative agency to determine whether a license should be revoked is not criminal or quasi-criminal prosecution, and litigant may appear therein solely by his counsel to defend charges against him, and, having done so, he cannot thereafter complain.

7. Constitutional Law ⇨318

Off-sale retail liquor licensee could not successfully complain, in mandamus proceeding brought to have license revocation order set aside, that he had been denied due process in revocation proceedings by reason of his being in jail at time of hearing, where he had been represented at such hearing by counsel who had made no motion for continuance to enable licensee to be present in person. West's Ann.Gov. Code, §§ 11505, 11509.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

Appellant, a liquor licensee, was charged by the Department of Alcoholic Beverage Control with selling beer to a minor, one Gilbert Monson. Bus. & Prof.Code, § 25658(a). He had previously been convicted of that offense in the municipal

court. Following an administrative hearing on the accusation pursuant to the decision proposed by the hearing officer, the Department of Alcoholic Beverage Control made its order revoking appellant's license. On appeal, the Alcoholic Beverage Control Appeals Board (hereinafter called "the Board") duly affirmed the Department's order. Appellant then petitioned the superior court for a writ of mandate directing the Department to set aside its order of revocation, in reply to which, respondent Board filed its opposition to the issuance of the writ along with a copy of its own decision. Having duly considered the pleadings and the administrative proceedings, the court denied the petition for the writ of mandate. This appeal followed.

The Facts

As an off-sale, retail liquor licensee, appellant operated a store adjacent to a public street in Los Angeles. Gilbert Monson, a minor of fifteen years, entered the store and purchased three one-quart bottles of beer from appellant. On former occasions, Gilbert had purchased cigarettes from appellant but had never been asked to exhibit a driver's license or other evidence of his majority. Acting upon complaints about appellant's liquor sales to minors, the Los Angeles Police Department stationed two

officers in waiting when Gilbert called at appellant's store August 6, 1954, to make such a purchase. The merchant was then charged with a sale of alcoholic beverage to a minor in violation of the Alcoholic Beverage Control Act. Bus. & Prof. Code, § 23000 et seq.

He was convicted by the municipal court and sentenced to serve 60 days in the county jail. There he lingered when the hearing before the administrative board proceeded to investigate the abuse of his license by the sale of beer to the youth. Although appellant was in jail at the time of the hearing, he was represented by his counsel. No motion for a continuance was made in order that appellant might be present at the trial, but his lawyer "in lieu of appellant's testimony" introduced the reporter's transcript of appellant's trial in the municipal court for the sale of the three quarts of beer to Monson for the "court to see what the defendant's version of the case is."

Statutes Involved

The law applicable to the conduct of a liquor dealer in selling beer to a minor is found in certain decisions hereinafter cited, and in the Constitution and in certain statutes, section of the Business and Professions Code printed for the sake of brevity on the margin below.¹

1. Business and Professions Code sections as they read in 1954 when appellant sold the beer:

§ 25658. "(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor."

§ 25660. "In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of the person, is a defense to the prosecution or proceeding for the suspension or revocation of any license."

§ 24200. "The following are the grounds which constitute a basis for the suspension or the revocation of licenses: * * *

"(b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 of Division 2 of the Revenue and Taxation Code or any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors."

California Constitution, Article XX, section 22, fourth paragraph:

"* * * * The department shall have the power, in its discretion, to deny,

The Contentions

[1, 2] Appellant contends that the findings do not support the order. The Department of Alcoholic Beverage Control is an agency of the State created by the Constitution for the very purpose of investigating charges of misconduct brought against licensees under the Alcoholic Beverage Control Act of 1935. Const., Art. XX, § 22. Thus, its decision after an administrative hearing without prejudicial error will not be upset when supported by substantial evidence even though contradicted. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131, 173 P.2d 545. It must be sustained, provided it has committed no error of law, if the evidence is sufficient to support its findings of fact. *Griswold v. Department of Alcoholic Beverage Control*, 141 Cal.App.2d 807, 297 P.2d 762. As in other actions, all substantial conflicts must be resolved in favor of the findings of the Department of Alcoholic Beverage Control. *Ibid.*

[3] The evidence adduced is abundant to support the findings. Two officers saw Gilbert make the purchase; the evidence is conclusive that the boy was only fifteen years of age; there was testimony that the beverage purchased was "beer"; the youth testified that he indeed bought the "beer" from appellant; in fact, appellant made various admissions of his sale of the beverage.

[4] Appellant seeks to defend his actions on the ground that Gilbert had been in his store a week before the three-quart sale when he identified himself as being past 21 years. On that occasion he exhibited a driver's license which purportedly proved his majority. Appellant testified that he relied upon such prior exhibition of documentary proof in making the sale which has resulted in the revocation of his license. His theory is that this conduct brings him within the terms of Business and Professions Code section 25660 providing a de-

fense when the vendor has been exhibited a "motor vehicle operator's license". To prevail under that section it was incumbent upon the merchant to demand documentary proof of the customer's majority "before furnishing any alcoholic beverage to a minor". The hearing officer and the Department of Alcoholic Beverage Control did not believe appellant's story. Therefore, his defense under section 25660 was not established.

[5] Finally, appellant contends that he is entitled to a writ of mandate for the reason that no proof was ever made that the "beer" he sold Gilbert Monson contained one half of one per cent or more of alcohol. Whenever the term "beer" is used without words of qualification, it signifies a malt liquor and an intoxicating beverage. See *Buchanan v. State*, 77 Ga.App. 435, 49 S.E. 2d 157, 158; *Williams v. State*, 73 Ga.App. 421, 36 S.E.2d 839, 840; *State v. Schrader*, 243 Iowa 978, 55 N.W.2d 232, 236; *State v. Winter*, Mont., 285 P.2d 149, 151. In the *Williams* case, *supra*, the court rejected the argument that the indictment was defective because it did not specify the variety of beer sold, and held that the term "beer" is in general usage to designate any and all malted liquors within the purview of the state liquor laws which declare that "beer" signifies "fermented beverages made wholly or in part from malt or any similar fermented beverage." The Montana liquor law includes beer in its definition of intoxicating liquors, without specifying the percentage of alcohol therein. The *Winter* case, *supra*, construing that statute, held that "beer" in its ordinary meaning, when used in connection with laws involving the sale of alcoholic beverages, implies a malt liquor and an intoxicating beverage. This malt liquor, under the generic name "beer," is used in both Europe and America as a common beverage. The word "beer," like the words "brandy," "whisky," "gin," and "rum," is held universally to be an intoxi-

suspend or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public wel-

fare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. • • •

cating liquor *per se* for the reason that it is within the common knowledge and ordinary understanding that it is an intoxicating liquor. *Briffitt v. State*, 58 Wis. 39, 16 N.W. 39. Therefore, when a person is accused under section 25658, *supra*, of having sold "beer," the court takes judicial notice that it means an intoxicant. In short, the Business and Professions Code, section 23006, defines "beer" as "any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any other similar product * * *." Such authorities should be conclusive that whenever merchandise is sold as "beer" it could not mean anything but an intoxicating beverage. Moreover, while appellant was on the witness stand in the municipal court he might have testified that Gilbert called for "root beer," "ginger beer" or for one of the other varieties of nonintoxicating beer, if such was a fact. Having sworn to tell the whole truth then, his contention now that it was not proved to be intoxicating must be regarded as so much bluster. It must now be presumed that if he knew the beer was nonintoxicating he would have so testified at his trial.

Due Process Denied?

[6, 7] Surely, appellant could not mean that he was denied the right of "due process of law." He was represented at the administrative hearing by a member of the bar who actively participated in the proceedings, cross-examined witnesses, introduced evidence and made use of all available facts or authorities to effectuate appellant's exoneration of the accusation. The attorney made no motion for a continuance to enable appellant to be present in person, but he offered in evidence the transcript of the proceedings of appellant's trial in the municipal court for the purpose of proving his innocence. He is in no position now to complain of his failure before the Department. A proceeding before an administrative agency to determine whether a license should be revoked is not a criminal or quasi-criminal prosecution. *Murphy v. Board of Medical Examiners*, 75 Cal.App.

2d 161, 166, 170 P.2d 510. As in any other civil action, a litigant may appear solely by his counsel to defend the charges against him. Having done so, his fortunes are linked with the ensuing judgment. In the absence of reversible error at the hearing, his litigation has become history. There is no statute that requires a party to an administrative hearing to be personally present. On the contrary, he may be present by his attorney. Government Code Annotated, §§ 11505, 11509.

Appellant's attorney had notice of the accusation, appeared at the time and place designated for the hearing and participated without ever registering an objection on the ground that the Department had no jurisdiction. Appellant does not claim that the attorney was not authorized to represent him.

Order denying alternative writ of mandate affirmed.

FOX and ASHBURN, JJ., concur.



145 Cal.App.2d 636

Alice Vierra RISKAS, Executrix of the Estate of Charles Kaufman, deceased, substituted in the place and stead of Charles Kaufman, etc., Plaintiff and Respondent,

v.

Wayne DE LA MONTANYA, Individually and doing business as Contractors Equipment Service, et al., Defendants, Cross-Complainants and Appellants,

Henry A. Tieslau, Cross-Defendant and Respondent.

Civ. 17009.

District Court of Appeal, First District, Division 1, California.

Nov. 5, 1956.

Action by owner of crane against lessee thereof for recovery of rentals. The

Superior Court, County of Alameda, A. T. Shine, J., entered judgment for crane owner, and lessee appealed. The District Court of Appeal, Bray, J., held that evidence supported findings of trial court that owner of crane did not warrant its fitness for use for which lessee intended, and that lessee's payments in money and materials were accepted on account rather than as full settlement of amount due.

Affirmed.

1. Bailment Ⓒ31(3)

In action by crane owner against lessee thereof for rentals due, evidence supported findings of trial court that owner did not warrant crane's fitness for use for which lessee intended, that crane was reasonably fit for use intended, and that no repairs chargeable to the owner were made by the lessee.

2. Bailment Ⓒ14(1)

Where defendant leasing crane from owner inspected the same before taking it and owner did not know the purpose for which crane was to be used and lessee agreed to make all repairs, statutes providing that one who lets personal property must put it into condition for the purpose for which it is let and repair all deteriorations not the fault of the hirer, and that if owner fails to fulfill obligations the lessee, after giving notice, may expend any reasonable amount necessary to make good the owner's default and recover such amount from him, were not applicable. West's Ann.Civ.Code, §§ 1955, 1957.

3. Compromise and Settlement Ⓒ23(3)

In crane owner's action against lessee thereof for rentals allegedly due, evidence supported finding that payments made by lessee in money and materials were received on account rather than in full settlement.

4. Accord and Satisfaction Ⓒ25(4)

In crane owner's action against lessee thereof for rentals due, where lessee did not expressly plead accord and satisfaction

and his only reference to the subject was a denial as to the amount due, issue of accord and satisfaction was not raised.

5. Accord and Satisfaction Ⓒ25(1)

Generally, one who relies on an accord and satisfaction must plead both, except that if a plaintiff, as a part of his case, proves a payment under circumstances which tend to show an accord and satisfaction, defendant may rely upon the facts thus shown as constituting an accord and satisfaction though not pleaded as such in the answer.

6. Bailment Ⓒ33

In crane owner's action against lessee thereof for rentals due, where lessee's answer and cross-complaint contained no reference to accord and satisfaction, but merely denied allegation as to amount due, court's finding that payments in money and materials were received by owner on account rather than in full settlement, was sufficient and court was not required to make specific finding on accord and satisfaction.

Wagener, Brailsford & Knox, Oakland, for appellant.

Oswald G. Ingold, Henry Poppic, Berkeley, for respondent.

BRAY, Justice.

Defendant appeals from a judgment for plaintiff for \$3,300 and a denial of relief to defendant upon his cross-complaint.

Questions Presented.

1. Was there a warranty of the fitness of the crane?

2. Should the court have found expressly on accord and satisfaction?

Evidence.

Defendant rented a crane from plaintiff's assignor, Henry A. Tieslau, for a monthly rental of \$825.¹ Defendant took possession of it on October, 18th, moving it to Mare Island. Defendant testified that

1. The rental agreement provided for an option to purchase the crane, which option was never exercised.

it repeatedly broke down in use because of mechanical failures which defendant had to repair, and that he was able to use it on the intended job approximately 50 hours only. About December 12th defendant placed the crane in storage. Approximately 7½ months after the rental agreement was executed, the crane was returned to Tieslau. Plaintiff sued for 8 months' rental less a credit of \$412.50, or \$6,187.50. Defendant answered, alleging that the crane was not in a condition to perform the work for which it was hired, and that at the request of Tieslau, defendant expended \$1,700 for repairs to the crane. Defendant cross-complained for that amount. The court found against defendant on his allegations that the crane was unfit and that he repaired it at Tieslau's request, or that defendant expended \$1,700 or any other sum for repairs of the crane. It then found that the balance due plaintiff on said contract of hiring the crane was \$3,300 and gave judgment for that amount. It further denied defendant any relief upon his cross-complaint.

[1] 1. Warranty.

This case is primarily a factual one, in which practically all the material testimony of defendant is denied by Tieslau. As to warranty, defendant testified that prior to the execution of the rental agreement he explained to Tieslau that he intended to use the crane as a dragline crane and told him the character of the work to be done. Tieslau testified that the crane was rigged for both dragline and regular work but that defendant did not tell him what the crane was to be used for. In fact the work was more or less secret. Tieslau testified that defendant inspected the crane on two occasions before ordering it, that the crane was in reasonably good condition (his son testified to the same effect concerning its condition) and that defendant had agreed to make all the main repairs and to do all maintenance work, and that the work claimed to have been done by defendant was "simply maintenance on the machine." He further testified that at no

time had defendant notified him that the crane was not working properly or needed repairs, also that he had not been informed that the crane was placed in storage and was not thereafter being used.

Defendant's evidence was to the contrary, but it was for the court to resolve the conflict. The work at Mare Island stopped on December 10th because of flooding of the work area and its being under water, and could not thereafter be resumed.

Tieslau testified that the first time he knew that defendant claimed that the crane was not fit for the work or that defendant claimed to have made repairs chargeable to him was after suit filed; that at all times prior thereto defendant admitted owing the money but was in financial difficulties and wanted more time to pay. An employee of a collection agency testified to the same effect. Thus there is substantial evidence for the court's implied findings of no warranty, that the crane was reasonably fit, and that no repairs chargeable to Tieslau were made.

[2] Defendant contends that the court failed to find directly on the warranty and repair issue. Defendant's allegation of warranty was that the crane was not in a condition to perform the work for which it was hired; that upon learning of its condition defendant immediately notified Tieslau thereof and that Tieslau advised that he would make an adjustment. The court found this allegation to be untrue. Section 1955, Civil Code, which provides that one who lets personal property must put it into condition fit for the purpose for which it is let and repair all deteriorations not the fault of the hirer, and section 1957 providing that if the letter fails to fulfill the obligations as prescribed by section 1957, the hirer "after giving him notice to do so," may expend any reasonable amount necessary to make good the letter's default and recover such amount from him, are not applicable here, where the defendant inspected the crane before taking it, the letter did not know the purpose for which the crane was to be used and the

hirer agreed to make all repairs. Moreover, under the circumstances here, section 1957 requires notice. The court found that none was given. See *Baker v. Gibson*, 14 Cal.2d 59, 65, 92 P.2d 796, cited by defendant, and *Pugh-Miller Drilling Co. v. Main Oil Co.*, 1929, 98 Cal.App. 297, 300, 276 P. 1043, for requirement that notice must be given.

2. Accord and Satisfaction.

[3,4] Defendant testified that a payment of \$100 and the delivery to Tieslau of certain materials was accepted by the latter in full settlement of Tieslau's claims. While admitting the receipt of this money and certain materials, Tieslau testified that they were received on account and not in full settlement. This issue the court resolved in Tieslau's favor by finding the amount due from defendant. Defendant contends the court should have made an express finding on accord and satisfaction. Defendant did not expressly plead it. His only reference in the answer and cross-complaint to this subject was a denial of plaintiff's allegation as to the amount due. This did not raise an issue of accord and satisfaction and hence the court was not required to find on it.

[5,6] While the general rule is that he who relies on an accord and satisfaction must plead both *Berger v. Lane*, 190 Cal. 443, 447, 213 P. 45, there is an exception to the rule. "This rule, however, we take it is subject to the exception that if a plaintiff, as a part of his case, proves a payment, and the circumstances under which it was made tend to show an accord and satisfaction, the defendant may rely upon the facts thus shown as constituting an accord and satisfaction though not pleaded as such in the answer." *B. & W. Engineering Co. v. Beam*, 23 Cal.App. 164, 177, 137 P. 624, 629. This exception, however, would not apply here, for two reasons: (1) the plaintiff did not prove an accord and satisfaction, and (2) the defendant did not prove one. The finding of the court on the allegations of the complaint and answer was a sufficient finding

on the subject. As said in *Golden Gate Building Materials Co. v. Fireman*, 205 Cal. 174, 177, 270 P. 214, 215: "Under such conflicting evidence support is found for the decision of the trial court that there was no accord and satisfaction, but a finding to this effect was not required. If made, it would have been adverse to appellants and its omission was immaterial as the findings made fully determine the cause. [Citations.]"

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



145 Cal.App.2d 624

Fred C. JENSEN and Marie Jensen,
Plaintiffs and Appellants,

v.

W. R. SHADBURNE, Ira J. Edgecomb,
Defendants and Respondents.

Civ. 8835.

District Court of Appeal, Third District,
California.

Nov. 2, 1956.

Rehearing Denied Nov. 27, 1956.

Hearing Denied Dec. 24, 1956.

Suit was brought to prevent interference with ditch and for damages for crop losses and for punitive damages, and one of the defendants filed a cross-complaint and counterclaim for judgment for damages for trespass and to compel plaintiffs to compensate such defendant for the costs of maintenance of ditch at certain diversion point. The Superior Court, Siskiyou County, James M. Allen, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, McMurray, J. pro tem., held that where plaintiffs, in answer to cross-complaint and counterclaim, admitted that plaintiffs were the successors in interest to gold dredging companies, which had entered into a stipu-

lation with that defendant for maintenance of the diversion point and to share maintenance costs at diversion point, and it appeared that plaintiffs had received water from the diversion point in accordance with judgment entered in action, in which gold dredging companies were parties, and which established rights to water in creek, plaintiffs were properly required to share the maintenance cost at diversion point.

Judgment affirmed.

1. Mortgages ⇨204

Beneficiary under trust deed could maintain an action to prevent the impairment of his security, if damage was such as to impair materially his security.

2. Trespass ⇨10

If permission granted by co-owner of realty to third parties to extend ditch was ineffective, the third parties were trespassers.

3. Trespass ⇨27

Where assignment of lease carried with it the right to possession of the realty, the possessor had sufficient interest to justify him in repelling by reasonable means a trespass by those who extended ditch over the realty.

4. Judgment ⇨681

Where plaintiffs, in answer to cross-complaint and counterclaim of one of the defendants to compel plaintiffs to compensate him for costs of maintenance of ditch at certain diversion point, admitted that plaintiffs were successors in interest to gold dredging companies, which had entered into a stipulation with that defendant for maintenance of diversion point and to share maintenance costs at diversion point, and it appeared that plaintiffs had received water from diversion point in accordance with judgment entered in action, in which gold dredging companies were parties, and which established rights to water in creek, plaintiffs were properly required to share maintenance cost at diversion point.

Mark M. Brawman, Yreka, for appellants.

Burton, Lee & Hennessy, Yreka, for respondents.

McMURRAY, Justice pro tem.

Plaintiffs Jensen, through their predecessors in interest in two gold dredging companies, had the right to maintain a dam and ditch at diversion point number 12 on Seiad Creek. The Jensens succeeded to this right when they purchased the property. In the winter of 1952-1953 storms destroyed Jensens' diversion works at point number 12 and required the construction of new facilities or the extension of the ditch upstream. Mr. Jensen obtained written permission to extend his ditch upstream toward diversion point number 10 from a certain Mr. Wigley, who was a co-owner of the property over which such extension was to be made. Before Mr. Wigley gave permission to the Jensens to extend the ditch over the property here involved he had leased that property to the Seven Oaks Lumber Company. This lease reserved to the lessor the right to use the premises for agricultural purposes. Subsequently, this lease was assigned by the lumber company to the Winkelman Company as security in certain transactions, and the Winkelman Company had gone into possession and employed Shadburne as its agent in actual possession. Shadburne, also, was a beneficiary of a deed of trust on this same property. By a superior court action in Siskiyou County, the plaintiffs' predecessor gold companies also had the right to take forty inches of water from diversion point number 10 on the creek. There was a stipulation in that action for judgment that the gold companies, in return for the right to take water at point number 10, would share one-half of the maintenance costs for the diversion works at point number 10 with Mr. Shadburne who was the predecessor in interest of Mr. Wigley.

Acting upon the permission given by Mr. Wigley, the Jensens extended their

ditch up the creek to diversion point number 10. Defendant Shadburne then ordered the defendant Edgecomb to fill it up. This was done. The Jensens then brought suit to prevent Shadburne from interfering with the ditch and for damages for crop losses and for punitive damages.

Shadburne interposed defenses and a counterclaim. He alleged that the construction of the ditch was in violation of a judgment determining the water rights on the creek and as a counterclaim asked for damages for trespass. Shadburne asserted that he had agreed with plaintiffs' predecessor in interest to furnish forty inches of water at point number 10, and that they had agreed to share the maintenance costs at diversion point number 10. He asked that plaintiffs be compelled to compensate him for the costs of maintenance at diversion point number 10.

The trial court found that the Jensens had no right to change their diversion point to the injury of any other person, and that the extension of the ditch was a trespass on the lands in possession of Wigley's lessee and defendant Shadburne as beneficiary under the deed of trust. The court awarded Shadburne \$50 damages which represented the cost of filling in the ditch. The court also determined that Shadburne was entitled to \$125 as one-half of the cost of maintaining the works at diversion point number 10.

The appellants Jensen contend that they were not trespassers on the land of Wigley, and that, therefore, Shadburne had no right to fill up the ditch and further complain that the reservation in the lease by Wigley to the Seven Oaks Lumber Company of the right to use part of the property for agricultural purposes justified Wigley's action in giving the Jensens the right so to use such property. As far as the reservation by Wigley to use part of the land for agricultural purposes was concerned the trial court decided that this was intended to mean a reservation on the demised lands and not a reservation to transfer water to other lands. The trial

court viewed the property here involved and its construction of this provision in the lease would seem to be logical and proper.

[1-3] Shadburne, as the beneficiary under a deed of trust, could maintain an action to prevent the impairment of his security, but in such case the damage must be such as to materially impair his security. *Robinson v. Russell*, 24 Cal. 467. This interest of Shadburne's would not seem to have been substantial in the eyes of the trial court, as the court assessed \$50 as damages for the invasion of the property covered by the deed of trust, which would, therefore, indicate that no material impairment of the security had resulted. However, since Shadburne was employed as an agent of the Winkleman Company, the assignee of the Seven Oaks Lumber Company lease, it would appear that the trespass was committed by the Jensens, since if the permission granted was ineffective the Jensens were trespassers. (See *Restatement of Torts*, Sec. 164.) The fact that the assignment of the Winkleman Company carried with it the right to possession of the land is a sufficient interest to justify that possessor to repel a trespass by reasonable means. (*Prosser on Torts*, p. 131.) Here, the filling in of the ditch dug by the Jensens was such an act on the part of the lessee's assignee in possession.

[4] Appellants complain that the judgment in so far as the \$125 award against them as their share of the maintenance cost at diversion point 10 is unsupported by the evidence, since it is apparent by the record that there was no showing of notice to the Jensens of the stipulation between their predecessors in interest and Shadburne as to the maintenance of the diversion works at point number 10 on Seiad Creek. Appellants' contention in this respect is not supportable. In their answer to the cross-complaint and counterclaim, the appellants admit that they are the successors in interest to the gold dredging companies which entered into the stipulation with Shadburne, and during the course of trial it appears that the Jensens have received

water from point number 10 in accordance with the judgment entered in the action establishing the rights to water in Seiad Creek. Therefore, having admitted that they are successors in interest of the companies which by contract stipulation agreed to share in the cost of maintaining the diversion works and since the very basis for his action here is based upon another section of the same judgment, it appears that appellants are in the position of attempting to accept the benefits of a judgment or contract without undertaking the burdens imposed thereby.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.



145 Cal.App.2d 587

Evert L. HAGAN, Appellant,

v.

Benjamin H. FLESHER, Respondent.

Ext. 439.

District Court of Appeal, Second District,
Division 1, California.

Nov. 2, 1956.

Appellant, who had filed notice of appeal from order disallowing costs, made a motion in the District Court of Appeal for extension of time within which to file proposed settled statement on appeal. The District Court of Appeal, Doran, J., held that where appellant on October 10, 1955, filed notice of appeal from order disallowing costs, and thereafter appellant and respondent were unable to agree on settled statement of facts, and judge, who made order, was transferred, making it more difficult to settle statement, and negotiations for settlement of matter of costs were pending until April, 1956, when respondent advised appellant that negotiations

would not be carried out, and due to urgencies or other legal affairs appellant was unable to proceed with appeal until July, 1956, making it impossible to proceed with appeal within prescribed time, District Court of Appeal would extend time within which appellant might prepare and file proposed settled statement to 30 days after filing of its opinion.

Motion granted.

Appeal and Error ⇐624

Where appellant on October 10, 1955, filed notice of appeal from order disallowing costs, and thereafter appellant and respondent were unable to agree on settled statement of facts, and judge who made order was transferred, making it more difficult to settle statement, and negotiations for settlement of matter of costs were pending until April, 1956, when respondent advised appellant that negotiations would not be carried out, and due to urgencies of other legal affairs appellant was unable to proceed with appeal until July, 1956, making it impossible to proceed with appeal within prescribed time, District Court of Appeal would extend time within which appellant might prepare and file proposed settled statement to 30 days after filing of its opinion.

Jesse A. Hamilton, Los Angeles, for appellant.

Samuel V. Cornell, Compton, and Sumner J. Spielman, Los Angeles, for respondent.

DORAN, Justice.

It appearing from affidavits on file that on or about October 10, 1955, plaintiff and appellant herein filed a notice of appeal from an order disallowing costs to plaintiff, and that thereafter plaintiff and defendant were unable to agree upon a settled statement of facts, and that the judge who made the order in question was transferred to Pomona, California making it more difficult to settle said statement, and that ne-

gotiations for settlement of the matter of costs were pending until in April, 1956, when the defendant advised plaintiff that such negotiations would not be carried out, and that due to urgencies of other legal affairs plaintiff was unable to proceed with the appeal until in July, 1956, making it impossible to proceed with such appeal within the prescribed time, and it appearing that the case is one in which an extension should be granted;

It is therefore ordered that the time within which appellant may prepare and file his proposed settled statement on appeal is hereby extended to 30 days from and after the filing of this opinion.

WHITE, P. J., and FOURT, J., concur.



145 Cal.App.2d 647

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ezell BANKS, Defendant and Appellant.
Cr. 2651.

District Court of Appeal, Third District,
California.
Nov. 5, 1956.

Prosecution for robbery in the first degree. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Peek, J., held that evidence sustained conviction.

Judgment affirmed.

Robbery \Rightarrow 24(1)

Evidence sustained conviction for robbery in the first degree.

Lewis F. Shearer, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The defendant, Ezell Banks, appeals from a judgment entered upon the jury's verdict finding him guilty of three counts of robbery in the first degree. Upon his request, Mr. Lewis F. Shearer was appointed by this court to represent defendant on appeal. Mr. Shearer has now reported to the court that he has made a careful review of the record and finds no error, and that there was substantial evidence to support the findings of the jury. He also reports he finds no support for the comments contained in letters which have been filed as a part of the record in this case, and which this court has assumed to be the contentions made by defendant on appeal. In view of the manner in which the case comes before us, this court has made an independent study of the entire record, and it is our conclusion that there is no merit in the appeal.

Counts II and III, of which defendant was convicted, were based on the holdups of two liquor stores located in Stockton. In each instance the victims of the robberies positively identified defendant as one of the robbers who entered their respective establishments purportedly as customers and then forced the victims to surrender the money in the cash registers. There is further testimony that the gun used by defendant's companion in the robberies was similar to the one introduced in evidence. Defendant himself was not armed. The evidence in support of the first charge shows that although defendant did not personally participate in the robbery, he instigated it by sending two of his friends to commit the same, since he and the victim were co-workers, and hence the victim would have recognized him.

From the record before the court it would appear that it is defendant's position that he was convicted upon improper or insufficient evidence; that he was not ably represented by the public defender;

and that the police were guilty of unlawful acts.

As previously stated, we have examined the entire record. The identification of the defendant by the victims of the liquor store robberies was positive, the defendant's connection with the robbery charged in the first count was more than ample, and lastly, the record contains no evidence, other than certain isolated comments by the defendant, relative to any mistreatment of him by police officers. There were no errors in the admission or exclusion of evidence, and the jury was fully and properly instructed. Under the facts and circumstances disclosed by the record we find no merit in the appeal.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



144 Cal.App.2d 808

A. S. NAHAS, Donald R. Nuss, Theo H. Erb, Ernest L. Emenegger, and W. C. Warden, Individually and as co-partners doing business under the fictitious firm name and style of Nahas Department Store No. 4, Plaintiffs and Respondents,

v.

LOCAL 905, RETAIL CLERKS INTERNATIONAL ASSOCIATION, an unincorporated association and local labor union, etc., and Ben N. Scott, Defendants and Appellants.

Civ. 21729.

District Court of Appeal, Second District, Division 2, California.

Oct. 31, 1956.

Action to enjoin labor union from picketing within area of store tenant's premises claimed to be private property of tenant. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment en-

joining union and union appealed. The District Court of Appeal, Ashburn, J., 301 P.2d 932, reversed decision of the Superior Court. On petition for rehearing, the District Court of Appeal held that fact that store tenant had a right to use parking lot and sidewalks of shopping center in common with others, did not make him a tenant or cotenant in possession of such parking lot and sidewalks.

Petition for rehearing denied.

1. Licenses ⇨44(2)

The criterion of a "lease" or "license" is the presence or absence of a right of exclusive possession in the grantee, exclusive as to the landlord as well as to others, and when that is absent, the agreement spells a license rather than a lease.

See publication Words and Phrases, for other judicial constructions and definitions of "Lease" and "License".

2. Licenses ⇨44(2)

Mere fact that license to use certain premises is not terminable at will or is coupled with a tenant's interest does not destroy its character or convert it into a lease.

3. Licenses ⇨44(2)

Whether an agreement for the use of real estate is a "license" or a "lease", is dependent upon whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of construction of the instrument.

4. Ejectment ⇨9(5)

Trespass ⇨19(5)

Because a licensee has no interest in the land he may not maintain an action in trespass or ejectment and at the most may maintain merely an action to enjoin or redress a violation of his rights to exercise the license.

5. Labor Relations ⇨993

Where tenant of store in shopping center had merely a license to use the sidewalks

and parking lot adjacent to store in common with others, an injunction enjoining labor union from maintaining pickets on sidewalk and parking area was too broad.

Gilbert, Nissen & Irvin, Los Angeles, for appellants.

Sheppard, Mullin, Richter, Balthis & Hampton, George R. Richter, Jr., and Edwin H. Franzen, Los Angeles, for respondents.

PER CURIAM.

Respondents' petition for rehearing presents arguments built upon the assumption that Nahas was a tenant or a co-tenant in possession of the parking lot, sidewalks, etc. They are misplaced. A mere right to use in common with others does not rise to that dignity.

[1,2] The criterion of lease or license is presence or absence of a right of exclusive possession in the grantee, exclusive as to the landlord as well as others. When that is absent the agreement spells a license rather than a lease. Moreover, the fact that the license is not terminable at will or is coupled with a lessee's interest, does not destroy its character or convert it into a lease. 1 Tiffany on Real Property (3rd Ed.) § 79, p. 117: "A tenancy involves an interest in the land passed to the tenant and a possession exclusive even of the landlord except as the lease permits his entry, and saving always the landlord's right to enter to demand rent or to make repairs. A mere permission to use land, dominion over it remaining in the owner and no interest in or exclusive possession of it being given, is but a license. * * * Such a person has not the possession of the land, this remaining in the licensor, and he has not, it seems, any interest in the land which he can assert as against a third person, that is, he has no rights in rem.

"The question whether an instrument is a lease, creating an estate in favor of another and the consequent relation of tenan-

cy, or is merely a license, is one properly of the construction of the language used, as showing an intention to give possession vel non. That this is so has been quite often recognized."

[3] Kaiser Co. v. Reid, 30 Cal.2d 610, 619, 184 P.2d 879, 885: "As stated in Von Goerlitz v. Turner, 65 Cal.App.2d 425, at page 429, 150 P.2d 278, at page 280: 'The test * * * "whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument."' (Emphasis added.)"

This test has been accepted for many years in this state, as elsewhere. See Shaw v. Caldwell, 16 Cal.App. 1, 7, 115 P. 941; Covina Manor, Inc., v. Hatch, 133 Cal.App. 2d Supp. 790, 793, 284 P.2d 580; 51 C.J.S., Landlord and Tenant, § 6, p. 513; 35 C.J. § 10, p. 954; Tips v. United States, 5 Cir., 70 F.2d 525; Cluett v. Sheppard, 131 Ill. 636, 23 N.E. 589; Bowley v. Fuller, 121 Me. 22, 115 A. 466, 468, 24 A.L.R. 964; Thayer v. Brainerd, D.C.Mun.App., 47 A.2d 787; Mangum v. Milwood, 207 Ga. 501, 62 S.E. 2d 836, 837.

[4] Because a licensee has no interest in the land he cannot maintain an action in trespass or ejectment. At the most, he may maintain an action to enjoin or to redress a violation of his right to exercise the license. See Annotation in 139 A.L.R. 1204. The principle is thus stated in Bell Telephone Co. of Pennsylvania v. Baltimore & O. R. Co., 155 Pa.Super. 286, 38 A.2d 732, 733: "It is true that a license does not confer a right of possession sufficient to support an action in trespass quare clausum fregit (Tiffany, Real Property, §§ 814, 829), or an action of ejectment. Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173. But a licensee may maintain an action of trespass in the nature of common-law case

for any invasion or disturbance of the terms of the license whether by the licensor or by third parties."

[5] Treated as an action to enjoin interference with plaintiffs' license to use the parking lot and sidewalks the relief which was granted in the present instance was too broad.

The petition for rehearing is denied.



145 Cal.App.2d 615

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

George Henry DANIELS, Defendant and
Appellant.
Cr. 5575.

District Court of Appeal, Second District,
Division 2, California.
Nov. 2, 1956.

Prosecution for burglary in second degree. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to support conviction and to show felonious intent of defendant who was found in tavern storeroom about midnight after room had been locked by the proprietor.

Affirmed.

1. Burglary \S 41(3)

In prosecution for second degree burglary, evidence was sufficient to sustain conviction and to show felonious intent of defendant who was found in tavern storeroom at midnight after proprietor had locked room.

2. Criminal Law \S 322

There is a presumption that police officers have done their duty and introduced all competent evidence available. West's Ann.Code Civ.Proc. \S 1963, subd. 5.

3. Criminal Law \S 641(1)

Where record showed that defendant's attorney attended sessions of municipal court, cross-examined adverse witnesses and assisted defendant to give his own testimony in an orderly, effective fashion, and disclosed a careful cross-examination by defendant's attorney at the preliminary hearing, inadvertent suggestion of attorney during trial that matter of prior convictions be deferred to time of sentence did not amount to an unconstitutional deprivation of defendant's right to representation by counsel at all stages of the proceeding.

4. Criminal Law \S 641(1)

Where defendant has an attorney of his own choosing, any contention that conviction should be reversed on ground of attorney's gross incompetence will be dismissed because any error lies in the judgment of the defendant in selecting counsel.

5. Criminal Law \S 1035(1)

In prosecution for second degree burglary, defendant, who stated that he wished to waive his right to trial by jury and have cause tried by court, was unable to contend on appeal that he had been deprived of his right to a jury trial. West's Ann.Const. art. 1, \S 7; West's Ann.Pen. Code, \S 1042.

Lewis Garrett, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted of burglary in the second degree, defendant appeals. He now contends that (1) the evidence was not of sufficient substantiality to support the judgment; (2) his conviction resulted from

his having suffered prior convictions of four felonies; (3) he was denied representation by counsel; and (4) was denied trial by jury.

Mrs. Roberts operated a beer tavern in the 4200 block on South Broadway in the City of Los Angeles. Behind the beer parlor is a room in which beer was stored, which could only be entered from the outside. On the night of appellant's call, she had closed her shop at 11:45 p. m., locked the rear room with a padlock and left the premises for her dinner. Shortly after midnight, special officer Abrams approached the tavern, observed that the lock was gone, looked and saw appellant standing in the storeroom. He ordered appellant to come out and inquired as to his purpose in visiting the room. His reply was that he had entered to urinate. The officer looked for the lock, found it had been bent and was lying on the floor. He found no instrument on appellant's person that might have been used to pry the lock.

Mrs. Roberts returned while Abrams was conversing with appellant, and soon police officers arrived and took the latter away. She testified that she stored beer in the room and that it appeared not to have been disturbed by appellant. On the following day an officer found a long, black screw-driver stuck in the wall and the proprietress testified that it did not belong to her.

Insufficient Proof?

[1] Appellant contends there is insufficient evidence of felonious intent to support the judgment; that the evidence raised only a suspicion of felonious intent; that appellant's positive testimony as to his innocent intentions was uncontradicted and therefore should have been believed; that the State's failure to introduce evidence of fingerprints on the padlock raises the presumption that such evidence would have been adverse to the prosecution.

The established facts are that the prosecutrix locked her storeroom with a padlock at 11:45 p. m.; appellant was found

inside the room shortly after midnight; the padlock was found bent, lying on the floor of the room. It was a reasonable inference that a stranger found alone in that room after midnight had entered the place for the purpose of committing some crime. It is not likely that another person could have in the brief space of time after Mrs. Roberts' departure and the arrival of appellant forced the padlock off the door and left the premises. Appellant was found there, inside the building. From the fact of his presence in the room, alone, after midnight and the broken lock, it was no strain upon the reasoning processes to deduce his felonious purpose. The trial court could reasonably have found that no other person had entered the same room after 11:45 p. m.; that appellant had, alone, effected a forcible entry for a criminal purpose. Why should he have chosen that storeroom if in quest of a urinal while numerous service stations and barrooms were available along the thoroughfares? If such was his need, he might, as a reasonable person have stopped on his way from Watts at 77th Street to Broadway at 43rd. His testimony that he arrived at Mrs. Roberts' tavern at 2:00 a. m. may have impressed the court with his lack of truthfulness in view of the contrary testimony that he arrived there "shortly after midnight."

Appellant invokes the decision in *People v. Wilkins*, 141 Cal.App.2d 557, 297 P.2d 42, in support of his argument that the evidence discloses at most a mere "suspicion" of guilt. In the *Wilkins* case the door to a pharmacy had been broken in order to effectuate the entry of a burglar. Officers investigating the attempted entry discovered defendants prowling about the alley in the vicinity of the drugstore. The court held that such evidence established beyond a reasonable doubt the fact of attempted burglary, but created only a "suspicion" that this defendant was the guilty party. The important distinction between that case and this is that *here the defendant was actually discovered standing in the*

storeroom. His entry was established beyond peradventure of a doubt. All that remains is determining his felonious intent in making the entry. The circumstances detailed here surely create more than a suspicion of his wrongful purpose. A trial court is not compelled as a matter of law to believe a defendant's story that he entered a commercial establishment through a door with a broken padlock in the dead of night for the sole purpose of urinating.

In the instant matter, Daniels' identity is not in question. He was apprehended in the storeroom and did not question that he was there. While he denied having been motivated by a criminal intention, his denials were overcome in the mind of the court by his entry with use of force, after midnight, surrounded by gloom, without a satisfactory explanation for his presence. The trial court had to determine whether or not he spoke the truth and it chose to believe that the circumstances were more convincing of his guilt than the presumption of his innocence and his denials of guilt. Its conclusion is final, in the absence of prejudicial error at the trial, if substantial evidence supports the conviction. *People v. Gutierrez*, 35 Cal. 2d 721, 727, 221 P.2d 22; *People v. Von Benson*, 38 Cal.App.2d 431, 434, 101 P.2d 527.

[2] Appellant insists that the People's failure to introduce into evidence the fingerprints on the lock, or proof that it had no fingerprints, brings into play the presumption, Code of Civil Procedure, § 1963, subd. 5, that such failure is tantamount to proof that would have been adverse to the prosecution. The vice of such argument lies in the fact that there was no evidence that the lock had or could have had fingerprints. Also, it conflicts with the presumption that the officers did their duty and introduced all competent evidence available. The wilful suppression of material evidence that would have benefited a defendant accused of a felony is too serious a crime to charge against an officer on pure conjecture.

Deprived of the Right of Representation by Active Counsel?

[3, 4] Because appellant's counsel inadvertently suggested during the trial, in reply to the district attorney's inquiry, that the matter of the prior convictions be deferred to the time of sentence, appellant now urges that he "was unconstitutionally deprived of his right to representation by counsel at all stages of the proceeding." The prompt reply by the court to defendant's attorney that there had been no conviction fills appellant with a zeal to contend that he was not fairly represented. Such contention is much ado about nothing. Appellant's counsel attended sessions of the municipal court, cross examined adverse witnesses and assisted appellant to give his own testimony in an orderly, effective fashion. Where the record discloses a careful cross-examination by defendant's lawyer at the preliminary, the accused had adequate representation despite his contention on appeal that he did not have the benefit of a competent lawyer for his defense. *People v. Hood*, 141 Cal.App.2d 585, 297 P.2d 52. Furthermore, where an appellant contends for a reversal on the ground that a trial lawyer of his own choosing was guilty of gross incompetence, the contention will be dismissed for the reason that if there was any error it lay in the judgment of defendant in selecting counsel for his defense. *People v. Stevens*, 5 Cal.2d 92, 98, 53 P.2d 133.

People v. Chesser, 29 Cal.2d 815, 178 P.2d 761, is distinguished by its facts. At his arraignment, Chesser refused the assistance of counsel.

[5] Appellant's contention that he was deprived of a jury trial deserves little comment in the light of his own statement to the trial court that he "wished to waive his right to trial by jury and to have his cause tried by the court, sitting without a jury." He understood his waiver. There is nothing in the record to indicate that he did not know of the waiver and of the actual trial without a jury. It must be assumed that his counsel had advised him

prior to the trial of the advantages of a jury trial and of the penalties that might be assessed in case he should be found guilty. He never complained of the services of his trial counsel or of the waiver of a jury trial until after a new attorney had been retained to prosecute this appeal.

In view of the record, the Constitution, Art. I, § 7, and the statute, Pen.Code, § 1042, no prejudicial error has been shown. *People v. Pughsley*, 74 Cal.App.2d 70, 71, 168 P.2d 27; *People v. Voice*, 68 Cal.App.2d 610, 612, 157 P.2d 436.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



145 Cal.App.2d 529

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

**John D. WOODARD, Steve Mikolasik, Carl
St. Claire and Stewart Metz, Defendants,**
Stewart Metz, Appellant.
Cr. 1118.

District Court of Appeal, Fourth District,
California.
Oct. 20, 1956.

Defendant was convicted of conspiracy to commit subornation of perjury. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgment and order denying new trial and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence as to whether a plan and agreement existed between defendants was sufficient to present question for jury.

Judgment and order affirmed.

1. Criminal Law ☞1170(2)

In prosecution for crime of conspiracy to commit subornation of perjury, exclud-

ing testimony of accused's character witness after he testified on cross-examination he had never discussed accused's reputation or heard it discussed was error but was not prejudicial, where accused produced several other witnesses who testified as to defendant's claimed good reputation and no witnesses were produced in opposition. West's Ann.Pen.Code, § 182.

2. Conspiracy ☞23

The gist of conspiracy is the unlawful agreement to commit an offense and an overt act done in furtherance of the agreement. West's Ann.Pen.Code, § 182.

3. Conspiracy ☞47

The existence of conspiracy may be established by direct evidence or by circumstantial evidence, which may be inferred from the acts or conduct of the defendant in mutually carrying out a common unlawful purpose. West's Ann.Pen.Code, § 182.

4. Conspiracy ☞24

An explicit or formal agreement between the parties to alleged conspiracy is not necessary. West's Ann.Pen.Code, § 182.

5. Conspiracy ☞41

When conspiracy is established, all members of the conspiracy are bound by all the acts of the members done in furtherance of the agreed plot. West's Ann.Pen.Code, § 182.

6. Criminal Law ☞1144(13)

The District Court of Appeal must assume in support of judgment of conviction, the existence of every fact which the trier of facts could reasonably have deduced from the evidence, and then determine whether the facts justify the inference of guilt.

7. Conspiracy ☞48

In prosecution for conspiracy to commit subornation of perjury, evidence as to whether a plan and agreement existed between defendants to suborn perjury by procuring witness to testify falsely was sufficient to present question for jury. West's Ann.Pen.Code, § 182.

8. Witnesses Ⓒ379(9)

In prosecution for crime of conspiracy to commit subornation of perjury, under the circumstances, the refusal to permit defendant to impeach testimony of witness by witness' testimony before Grand Jury was proper.

9. Witnesses Ⓒ291

Refusal of trial court to allow defendant's counsel to call prosecution's witness for further examination, after people had presented rebuttal testimony to cross-examination and rested their case, on ground witness had approached defendant's counsel during recess and said he wanted to correct his testimony, was not error where defendant's counsel had some knowledge of proposed corrections by witness before case was closed and there was other sufficient competent direct evidence before jury relating to the particular transaction.

10. Criminal Law Ⓒ719(1), 730(7)

In prosecution for conspiracy to commit subornation of perjury, if prosecuting attorney referred to defendant's previous arrests in argument to jury and said that defendant had failed to produce any evidence to effect that he had not been arrested in those places when in fact he had, such action was misconduct but was not prejudicial error, where after an objection was made to portion of prosecutor's argument court admonished jurors that they should consider the rumors that defendant had been subjected to previous arrests as not proved. West's Ann.Pen.Code, § 182.

11. Criminal Law Ⓒ829(1)

In criminal prosecution, refusal of trial court to give defendant's requested instructions was not error where such instructions were adequately covered by other instructions given by the trial court.

James L. King and Harold King, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants Stewart Metz, John D. Woodard, Steve Mikolasik and Carl St. Claire were indicted by the Grand Jury on June 22, 1955. In Counts I and II it was charged that Woodard and Mikolasik committed perjury, in violation of section 118 of the Penal Code. Count III charged Metz and St. Claire with subornation of perjury, in violation of section 127 of the Penal Code. In Count IV they were charged with bribery, Sec. 137, Penal Code. And in Count V Metz, St. Claire, Mikolasik and Woodard were charged with the crime of conspiracy to commit subornation of perjury, Sec. 182, Penal Code, in that between October 14, 1954 and January 25, 1955, they feloniously conspired to procure certain persons to be called as witnesses in a criminal action in the Municipal Court against defendant Mikolasik, wherein the people were prosecuting said defendant for the crime of violating Section I of a City Ordinance No. 536, of the City of San Bernardino, a misdemeanor, and of having administered an oath to them to testify falsely in said criminal action.

Four overt acts are alleged: (1) That defendant Woodard, at the request of defendant St. Claire, on January 17, 1955, transported, in his car, one Walter L. Dunn from the office of St. Claire to the office of the attorney for the defendant Mikolasik; (2) that defendant Metz, on January 19, 1955, did the same thing; (3) that defendant Metz, on January 22, 1955, paid money to Dunn; and (4) that St. Claire, on January 23, 1955, directed his employee, Dunn, to testify that he, Dunn, was, on October 14, 1954, a trusty in the City Jail, and to falsely testify that he visited the Brass Rail Cafe on October 14, 1954.

Defendants Metz and St. Claire went to trial only upon the fifth count and were allowed a separate trial from the other named defendants. It resulted in a conviction of both by a jury on that count, as charged. Motions for new trial were denied. They were sentenced to State's prison, execution of sentence was suspended,

and probation was granted for two years on certain specified conditions, including the payment of a \$1,000 fine. Defendant Metz alone appealed from the judgment and order denying a new trial.

The evidence shows that defendant Metz was a member of a firm which had been engaged in the business of owning and placing amusement-type and pinball machines in various business establishments. On October 14, 1954, this firm had a pinball machine located in the Brass Rail Cafe on West Third Street in San Bernardino. It had been there for about three months and was being operated under a license issued by the City. The net proceeds from its operations were divided equally between the said firm and the proprietor of the place. On that day two men, who were officers of the Riverside Police Department, entered the Brass Rail Cafe and played the pinball machine. Defendant Mikolasik was employed in the cafe at the time. The officers testified that they had put \$4.00 into the pinball machine and had been paid off by Mikolasik in the sum of \$4.00. They also testified there were no other persons present at the time except the parties indicated. Mikolasik was arrested upon a charge of violating a City ordinance prohibiting gambling, and the machine was impounded. On January 20, 1955, the case against Mikolasik came to trial in the Municipal Court and Attorney Krumm represented him.

Three witnesses testified for the defense in the Municipal Court, the said Mikolasik, John Woodard and Walter Dunn. They each testified that they were present in the Brass Rail Cafe when the two officers were in there on October 14, and that the \$4.00 paid to the officers was a refund of the \$4.00 put into the machine by them, and not a payoff on the machine; that the officers made some complaint about the machine and Mikolasik refunded their money (which they put into the machine) rather than have any trouble with them.

It appears that upon cross-examination of the witness Dunn it was established

that he was confined in the City Jail of San Bernardino on October 14. The case was continued until five days later when Dunn again took the witness stand and testified that he had been a trusty in the City jail on October 14, and as such trusty was working outside of the jail in a garden around the Hall of Justice on which the jail was located; that he had changed his clothes, left his work, gone to the Brass Rail Cafe, and was present at the time the two officers were there. Thereafter Dunn was charged with the crime of perjury and ultimately entered a plea of guilty thereto in the Superior Court. As a result of this, defendants Metz and St. Claire were charged in Count V of this indictment with the crime of conspiracy to procure Dunn as a witness in the Municipal Court trial, and to therein testify falsely.

The testimony at the trial of this action may be thus summarized: Dunn said he had been a used-car salesman for St. Claire & Cramp Motor Unit & Service Station, of which defendant St. Claire was part owner; that this place of business was near the Brass Rail Cafe, of which defendant Mikolasik was one of the proprietors, and which was located in the west end of the city, nearly a mile from the city jail; that Mikolasik and St. Claire were quite close personal friends; that defendant Metz had a company account with St. Claire and obtained much of his gasoline at this station; and that one of St. Claire's pinball machines was located in that place of business. Defendant Woodard had been an employee of St. Claire and knew him pretty well.

One of the office employees of St. Claire, Lambith, testified that St. Claire had a desk near him; that a few days prior to the Municipal Court trial of Mikolasik, he answered the telephone and the voice stated it was Mr. Metz, which he recognized, and he asked for Carl (St. Claire); that he heard Carl say over the telephone something about the pending Municipal Court case and about witnesses, and heard him say: "If you want to buy witnesses you

can get them for a dime a dozen"; that Carl told Metz he was going to appear as a witness and he would take care of it, and that he could get anything if he wanted to pay for it; that Carl hung up the telephone and said to Lambith that he did not think he should stick his neck out by testifying to anything that was not so. The conversation between Carl and the witness was admitted only as to defendant St. Claire. He further testified that several such conversations over the telephone were noted and on one occasion St. Claire assured Metz that he (Carl) would be a witness at the trial, and told the other party on the telephone not to worry because he would take care of it; that subsequently St. Claire told Lambith he (St. Claire) was going to be a witness at the trial but changed his mind and was not going to testify to something that was not so; that Walter Dunn needed the money and did not have anything to lose and he would have him go in his place; that he saw Metz in and around Carl's premises several times during the month of January, 1955; that on Wednesday, the day before the trial, he saw Metz there talking to Carl; that on the evening of January 19th he saw Dunn in the office with Carl and they were discussing the forthcoming trial to be held the next day and he heard him tell Dunn to go home and stay sober so he would be sure to be down there in the morning at 8 o'clock to go to attorney Krumm's office about the trial. Metz gave Dunn a ride to that office that morning but did not go with him to see the attorney. Lambith then testified that after Dunn testified he returned to the service station and St. Claire told him "he (Dunn) was pretty stupid if he could not remember that he was in jail at the time he was supposed to be in the Brass Rail", and Dunn said he did not remember being in jail at that time and St. Claire said he had made a "mess" of it and asked Dunn if he was a trusty at the time and discussed the possibility of leaving the jail grounds and going to the Brass Rail; that Dunn did not like the idea because he would probably get in deeper

than he was if the chief found he left the jail grounds when he was supposed to be there; that Carl assured him there was nothing else he could say and told Dunn to go and so testify; that Carl called someone on the telephone and outlined this proposed testimony of Dunn to that person; that during the next three days there was considerable discussion between Dunn and Carl in reference to this testimony; and that on the morning of the next hearing (January 25th) Dunn and St. Claire had breakfast together.

Dunn then testified that Metz and St. Claire were discussing his proposed testimony while on the lot and St. Claire called him over, introduced him to Metz, and said: "That was the story they were going to use and they wanted me to go down there * * * and do a good job" of it, and if I did, "I would get my money; * * * This is the man who will pay you one hundred if you appear as a witness at the Mikolasik case * * *"; that he told St. Claire he did not even know anything about the Brass Rail since he had not been there for several years, and did not know Mikolasik; that St. Claire replied: "You don't need to. You will find out when you get down town"; that Metz drove him to the attorney's office; that the attorney asked him if he was a trusty at that time and he answered in the affirmative and stated that he could verify it by the city gardener; that he was taken to the garden by this attorney; that the day before the trial he saw St. Claire and Metz on a lot and he stopped Metz and asked: "Well, when do I get some of the money for appearing as a witness in the Mikolasik case" because his room rent was due; that Metz reached in his pocket and handed him a twenty-dollar bill and said "This will hold you over until this other trial"; that he paid his room rent at that time (this fact was corroborated by the hotel clerk); that after the trial he (Dunn) returned to the lot and St. Claire would not speak to him; that Metz came by and he asked him for the rest of his money and Metz said: "Hell, I don't even know you"; that he did not

see Metz again, and St. Claire ordered Dunn off of the lot.

The attorney for Mikolasik, in the Municipal Court, testified he was requested by Metz to represent Mikolasik and was paid by Metz for this service; that Mikolasik came to his office and told him that St. Claire, Woodard and Dunn were in the Brass Rail at the time; that immediately after this conversation Metz came to his office and asked his opinion concerning the outcome of the case and he told him the chances were favorable in view of the testimony of the supporting witnesses who would testify that Mikolasik made no payoff but only refunded the money to the officers; that a conference was later had between him, Dunn, Woodard, St. Claire and Mikolasik in his office and in substance they all said they were there on that occasion; that they went to the Municipal Court and so testified.

Mikolasik testified that when he was arrested he called Metz and told him about the facts and later he went to see the attorney employed by Metz and was there told that Woodard, St. Claire and Dunn would be witnesses. Mikolasik did testify that Dunn was there at the time. He also stated that after the trial Dunn came to the Brass Rail and demanded \$20.

[1] St. Claire testified at the Mikolasik trial that he was at the Brass Rail at the time, saw Dunn and Woodard there, but did not hear the conversation in reference to the claimed payoff. He denied generally the claimed conversations with Metz and Dunn and produced several witnesses from his office who testified that they heard no such conversations. He denied generally the testimony of Dunn and others which would implicate him in the charge. He said Lambith had been discharged by him on several occasions and this accounted for his testimony in the instant case. Metz denied promising anything to Woodard or Dunn for testifying as a witness. He admitted driving Dunn to the attorney's office, denied the conversation regarding him paying Dunn \$100 for testifying, ad-

mitted Dunn approached him at the lot and said something about doing Metz a favor and that he told Dunn he "didn't do him a favor, he wasn't on trial", that "You went down there and perjured yourself, you better be worried about yourself, not me"; and that Metz drove away. He then said that it was not his practice to hire an attorney for operators of pinball machines for alleged payoffs but this being the first machine confiscated in some time, he felt obligated to provide legal counsel. Defendant Metz produced a considerable number of character witnesses of some prominence in the city, and among them was one who had known defendant Metz for about ten years, both in a professional capacity and on a social basis. He testified he knew his reputation in the community to be good. On cross-examination he testified he had not specifically discussed his reputation with persons in the community for truth, honesty and integrity. Thereupon the prosecution moved to strike his entire testimony and the court erroneously granted the motion. Since defendant produced several other witnesses who testified as to defendant's claimed good reputation and the people produced no witnesses in opposition, defendant may not now claim prejudicial error as a result of the ruling. *People v. Hoffman*, 199 Cal. 155, 160, 248 P. 504.

The next point claimed is that the evidence did not establish that there was an agreement or understanding between two or more people to do an unlawful act, and that there was no overt act done by this defendant in furtherance of such agreement. It is claimed that the evidence produced against defendant Metz comes almost entirely from the witness Dunn, an admitted perjurer, and since the extra-judicial statements of one of the alleged conspirators is not sufficient to prove the agreement against the co-conspirator, there was no sufficient evidence to establish the claimed unlawful agreement insofar as it affected defendant Metz, citing such authority as *People v. Black*, 45 Cal.App.2d 87, 113 P.2d 746; *People v. Doble*, 203 Cal. 510, 265 P.

184; and *People v. Bucchierre*, 57 Cal. App.2d 153, 134 P.2d 505.

[2-5] It is well settled that the gist of conspiracy is the unlawful agreement to commit an offense and an overt act done in furtherance of the agreement; that its existence may be established by circumstantial as well as by direct evidence, which may be inferred from the acts or conduct of the defendant in mutually carrying out a common unlawful purpose. An explicit or formal agreement between the parties is not necessary, and when established, all the members of the conspiracy are bound by all acts of the members done in furtherance of the agreed plot. *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519; *People v. Daener*, 96 Cal.App.2d 827, 216 P.2d 511; *People v. Sica*, 112 Cal.App.2d 574, 247 P.2d 72; *People v. Frankfort*, 114 Cal.App.2d 680, 251 P.2d 401.

[6,7] We must assume in support of the judgment the existence of every fact which the trier of facts could reasonably have deduced from the evidence, and then determine whether the facts justify the inference of guilt. *People v. Frankfort*, supra. Applying these principles, it is clear that the jury was amply warranted in drawing the inference that a plan and agreement existed between the defendant Metz and the codefendant St. Claire to suborn perjury by procuring Dunn to testify falsely. The evidence is sufficient to support the charge.

[8] It is next argued that the trial court erred in refusing to allow the defendant Metz to impeach the testimony of Dunn by his testimony taken before the Grand Jury. After Dunn testified at this trial that he testified falsely at the Municipal Court trial, i. e., that he was present at the Brass Rail on October 14th, and was confronted with the record showing he was then confined in the City Jail, he was asked on cross-examination if he did not honestly believe he was telling the truth until he was confronted with the jail record. He was then asked if he did not testify before the Grand Jury that he did not realize that

he had not been at the Brass Rail until he was "trapped" by being confronted with the record. The trial court refused to admit his testimony before the Grand Jury in this respect on the ground it was not proper impeachment. No doubt Dunn knew on each occasion whether he was at the Brass Rail on that occasion and the fact that he was "trapped" would not affect his knowledge of the true facts. The ruling was proper.

[9] At the trial one Haynes testified he had a conversation with his employer, St. Claire, in which he asked St. Claire if it was true that Dunn was going to get \$100 for testifying in the Brass Rail trial, and he replied in the affirmative and that the S. & A. Novelty Company, with which defendant Metz was associated, was going to pay him. He was fully cross-examined on this testimony. After the people had presented rebuttal testimony and rested their case, counsel for defendant asked permission to recall the witness for further testimony under the authority of *People v. Brady*, 56 Cal.App. 777, 206 P. 668; and *People v. Renwick*, 31 Cal.App. 774, 161 P. 1002. The court refused and counsel approached the bench beyond the hearing of the jury, and made an offer of proof to the effect that the witness approached counsel for defendant in the hall during a recess at about that stage of the proceedings and said he wanted to resume the stand and correct his testimony in certain respects, saying that "I want to testify I didn't know whether he made any such statement or not". The request might well have been granted. However, from the showing made it indicates that counsel for defendant had some information as to this recanting witness' intended testimony some time before the case was closed. The trial judge concluded that it was improper to allow the witness to again testify as defendant's witness at that stage of the proceedings. On a motion for new trial the witness' affidavit was offered in support of it. He there stated, contrary to his testimony at the trial and the offer of proof, that he did not have

the conversation with St. Claire regarding the payment of \$100 to the witness in the Mikolasik case. The trial judge fully considered the motion and affidavit and concluded he did not have much faith or trust respecting the witness and his change of testimony, and denied the motion. Since there was other sufficient competent direct evidence before the jury relating to this particular transaction we perceive no prejudicial error in the ruling.

[10] It is next claimed that the prosecuting attorney was guilty of prejudicial misconduct in his argument to the jury. The character witnesses of defendant were asked, on cross-examination, if they had ever heard of defendant's previous arrests in Los Angeles and in Berkeley and they answered in the negative. No complaint is made to this questioning but it is claimed that the prosecuting attorney referred to these arrests in his argument to the jury and said that defendant had failed to produce any evidence to the effect that he had not been arrested in those places. Assuming the truth of this statement, misconduct was apparent. *People v. Stennett*, 51 Cal.App. 370, 197 P. 372. However, the closing argument was not reported due to failure of the recording equipment. It does appear from the reporter's transcript that an objection was made to some portion of the prosecutor's argument and the court admonished the jurors that the questions asked of the various character witnesses were proper but they were not to be concerned with the truth or falsity of the alleged rumors or reports, and they should not consider them as having been proved. Under the circumstances it cannot be held that prejudicial error resulted.

[11] Lastly, the defendant offered 49 instructions and 18 of them were given.

Among those refused as covered were two (No. III and No. IV) touching upon the subject of the indictment being a mere accusation and not evidence of guilt. The claim is that they were not covered by other instructions. We see no merit to this. While not specifically covered, in effect, the jury was sufficiently informed on that subject. Refused instruction No. IX related to the question of proof necessary in a criminal action as compared to that in a civil action. This was sufficiently covered by other instructions, particularly one given in the language of CALJIC 21, on reasonable doubt, presumption of innocence, and burden of proof. Defendant's refused instruction No. IV defined a criminal conspiracy and contained a statement that it was not unlawful for two or more persons to agree to do something that can lawfully be done by one person, and that the jury could not consider acts or declarations of others made outside of the presence of the defendant until, independent of such declarations and acts, a conspiracy had been shown to exist, citing *People v. Doble*, supra.

Defendant's given instruction No. XXXIII, in the language of CALJIC 935 reiterates this principle together with the other instructions given on the subject. It was sufficiently covered. No error appears as to given instruction No. XXIII pertaining to the consideration of the testimony of the defendant as compared to other witnesses. This was sufficiently covered by defendant's given instruction No. XIII and other instructions in the language of CALJIC 52 pertaining to the credibility of witnesses generally.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., concurs.

145 Cal.App.2d 547

**Frank UHL and Henrietta Uhl, Plaintiffs
and Respondents,**

v.

**Eleanor M. BALDWIN, Defendant, Cross-
Complainant and Appellant,**

**Helen Elizabeth Stremel and Alex P. Stremel,
Cross-Defendants and Respondents.**

Civ. 21767.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 1, 1956.

Occupant of first automobile brought action against driver of second automobile for injuries sustained in intersectional collision, and husband of occupant brought action for loss of consortium. The driver of the second automobile brought a cross-action against the driver of the first automobile and her husband for personal injuries and property damage, and the driver of the first automobile and her husband countered with a cross-action against the driver of the second automobile for damage to first automobile. The cross-complaint of the driver of the first automobile and her husband was dismissed at the outset of the trial, and the count of the occupant's husband for loss of consortium was dismissed by stipulation during the trial. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered judgment adverse to the driver of the second automobile, an order granting the occupant of the first automobile a new trial on question of damages, and an order denying motion of driver of second automobile for new trial, and she appealed. The District Court of Appeal, Fox, J., held that where negligence of driver of second automobile was plainly spelled out, and there was no evidence tending to show contributory negligence on part of occupant of first automobile, and occupant of first automobile, who sustained a fracture of the pelvis and right clavicle, incurred total special damages, consisting of medical, hospital, and similar expenses, amounting to \$1,920.76, and jury returned a verdict for only \$2,000, Superior Court did

not abuse its discretion in granting new trial on issue of damages alone.

Judgment and order granting a new trial on issue only of damages affirmed, and purported appeal from order denying motion of driver of second automobile for new trial dismissed.

1. Appeal and Error ⇨996

The District Court of Appeal on appeal cannot reevaluate the evidence and the credibility of the witnesses and draw inferences contrary to those of the trier of the facts.

2. Appeal and Error ⇨996

If there is evidence of facts supporting an inference favorable to the judgment, a reviewing court is without power to substitute its own deductions for those of the jury.

3. Automobiles ⇨171(8)

Fact that motorist approaching intersection has right of way over vehicle approaching from motorist's left does not of itself absolve motorist of necessity of using reasonable care in traversing the intersection.

4. Automobiles ⇨244(11)

In action by occupant of first automobile against driver of second automobile for injuries sustained by occupant of first automobile in intersectional collision, wherein driver of second automobile filed a cross-action against driver of first automobile and her husband for personal injuries and property damage, evidence sustained judgment in favor of occupant of first automobile and adverse to driver of second automobile on her cross-complaint against the driver of the first automobile and her husband.

5. Automobiles ⇨242(1, 8)

In action by occupant of first automobile against driver of second automobile for injuries sustained by occupant of first automobile in intersectional collision, wherein driver of second automobile filed a cross-action against driver of first automobile and her husband for personal injuries and property damage, rebuttable pre-

sumption that driver of second automobile was exercising due care because she suffered from loss of memory as result of the accident, if applicable, constituted merely one item of evidence, to be weighed by jury with other direct, physical, and circumstantial evidence. West's Ann.Code Civ.Proc., § 1957.

6. Automobiles ⇨242(1, 8)

In action by occupant of first automobile against driver of second automobile for injuries sustained by occupant of first automobile in intersectional collision, wherein driver of second automobile filed a cross-action against driver of first automobile and her husband for personal injuries and property damage, circumstances and inferences pointing to negligence of driver of second automobile far outbalanced any presumption of due care on part of driver of second automobile because she suffered from loss of memory as result of the accident. West's Ann.Code Civ.Proc., § 1957.

7. Automobiles ⇨201(8)

Where two automobiles collide as result of the concurring negligence of both drivers, passenger in one of the automobiles, if free from negligence, may recover from the negligent driver of the other automobile.

8. Negligence ⇨93(12)

Where two automobiles collided at intersection, and occupant of first automobile did not exercise any control or management over the first automobile, and occupant of first automobile was not engaged in any joint enterprise with driver of first automobile, negligence of driver of first automobile could not be imputed to occupant of first automobile, and occupant of first automobile could recover from the negligent driver of the second automobile for the injuries sustained by the occupant of the first automobile, unless occupant of first automobile was herself guilty of negligence.

9. Automobiles ⇨244(56)

In action by occupant of first automobile against driver of second automobile for injuries sustained by occupant of first

automobile in intersectional collision, wherein driver of second automobile filed a cross-action against driver of first automobile and her husband for personal injuries and property damage, evidence sustained finding that occupant of first automobile was not contributorily negligent.

10. Appeal and Error ⇨977(1)

New Trial ⇨9

The granting of a new trial limited to issue of damages appropriately rests in discretion of trial court, and its determination will not be reversed on appeal in absence of an abuse of discretion.

11. New Trial ⇨9

When record discloses that damages are inadequate, issue of liability close, and there are other circumstances indicating that verdict was probably the result of a compromise on liability issue, the record discloses an abuse of discretion on part of trial court in granting a new trial limited to issue of damages.

12. New Trial ⇨9

Where defendant's negligence was plainly spelled out, and there was no evidence tending to show contributory negligence on part of plaintiff, and plaintiff, who sustained a fracture of the pelvis and right clavicle, incurred total special damages, consisting of medical, hospital, and similar expenses, amounting to \$1,920.76, and jury returned a verdict for plaintiff for only \$2,000, trial court did not abuse its discretion in granting plaintiff a new trial on issue of damages alone.

George L. Hecker, Orlan S. Friedman, Beverly Hills, for appellant.

Rafter & Fredricks, Hermosa Beach, for respondents Uhl.

John R. Allport, Los Angeles, for respondents Stremel.

FOX, Justice.

This action for damages arose out of a collision between two automobiles at an intersection. The drivers of the respective

vehicles were Mrs. Helen Stremel and Eleanor Baldwin. Riding in the Stremel car was Mrs. Henrietta Uhl, who, with her husband, initiated the present proceedings by filing an action against defendant Baldwin comprising two counts. The first cause of action was for recovery of damages for personal injuries sustained by Mrs. Uhl, the second was for loss of consortium suffered by Mr. Uhl. This latter count was dismissed by stipulation during the trial. Further references to plaintiff hereinafter relate only to Mrs. Uhl.

Thereafter, defendant Baldwin filed a cross action against Mrs. Stremel and her husband on which she sought recovery for personal injuries and property damage caused by the accident. The Stremels countered with a cross action against defendant Baldwin for damage to their car. The Stremel cross-complaint was dismissed at the outset of the trial.

The action was tried before a jury, resulting in a verdict of \$2,000.00 in favor of Mrs. Uhl as against defendant Baldwin. The jury also found against defendant Baldwin on her cross-complaint against the Stremels. Judgment was entered accordingly. Both Mrs. Uhl and Baldwin moved for a new trial. Mrs. Uhl's motion was granted on the ground of insufficiency of the evidence and the court ordered a new trial on the sole issue of damages. Defendant Baldwin's motions were denied.

Defendant Baldwin (hereinafter called defendant) appeals from the judgment in favor of the Stremels and Mrs. Uhl (hereinafter called plaintiff) and from the order granting plaintiff a limited new trial. The purported appeal from the order denying her own motions for a new trial, a nonappealable order, must be dismissed.

Facts.

The accident occurred at about 2:30 p. m. on April 27, 1954, at the intersection of 164th Street and Wilton Place, in the city of Torrance. The day was clear. Plaintiff was a passenger in a car being driven by Mrs. Stremel. They were traveling east on 164th Street and were approaching the

intersection of Wilton Place just prior to the accident. At the same time, defendant was traveling north on Wilton Place. The intersection was uncontrolled by traffic signals or signs of any kind. The field of view for a person traveling east along 164th Street and looking south on Wilton was virtually the same as that of one traveling north on Wilton who looked to the west on 164th Street. In this connection, the testimony was that an eastbound traveler on 164th Street who was within 25 feet of the intersection could see to the end of the block in looking south on Wilton. Similarly, a driver northbound on Wilton who was within 25 feet of the intersection had a view to the west along 164th Street extending almost to Arlington Avenue, the next parallel thoroughfare.

Prior to entering the intersection, Mrs. Stremel testified she was traveling about 25 miles an hour. When she reached the intersection, she testified she looked south on Wilton with an unobstructed view but saw no approaching vehicle. At that time her application of the brakes had reduced the speed of her car to between 15 and 20 miles per hour. She continued to slow down up to the time her car was struck in the intersection, at which time her speed was about 10 miles per hour. She testified the accident took place a little north of the center line of 164th Street, stating, "I swerved." Mrs. Stremel informed the investigating officer that she did not see the other car until the moment of impact. After the accident her car moved 158 feet to the east before coming to rest.

Defendant was traveling about 20 to 25 miles per hour along Wilton. She saw no cars on 164th Street as she approached it. When she reached the intersection she testified she slowed down to about 15 miles per hour. When she was two or three car-lengths from the intersection, she again looked to see whether there were any cars on 164th Street. Although there was nothing to interfere with her view of eastbound traffic, defendant testified she did not see Mrs. Stremel's car. As a result of retrograde amnesia induced by head injuries

sustained in the accident, defendant testified her last recollection was of proceeding into the intersection after not seeing any cross traffic on 164th Street. A witness situated at a point on Wilton Place some 300 feet south of the intersection testified she saw defendant's car slow down to about 10 miles per hour as it approached the intersection. This witness did not see the collision, but testified when defendant's car reached the intersection she did not observe any car enter the intersection from 164th Street.

The testimony of a police officer indicated that the point of impact occurred on the eastern half of the intersection. The photographs of the vehicles plainly disclose that the front of defendant's car crashed into the right side of the Stremel vehicle. There were no skid marks from either vehicle leading to the point of impact; there were some brush marks left by defendant's vehicle in its turning movement after the collision.

Plaintiff Uhl was riding to the right of the driver in the Stremel car. She did not see defendant's car prior to the impact. It is undisputed that she was not engaged in any joint or common enterprise with Mrs. Stremel and that she was merely an occupant of the car with no right of management or control of the vehicle.

Plaintiff's Injuries and Special Damages.

Plaintiff was hospitalized for seven weeks following the accident, during which time she was confined to her bed for five weeks. She sustained a fracture of the pelvis and the right clavicle, which required traction and the wearing of harness. Her right side was badly bruised and her back contused between the shoulder blades. She could not do housework for two months after her return from the hospital. The total special damages, consisting of medical, hospital and similar expenses, amounted to \$1,920.76.

The Appeal from the Judgment.

[1] Defendant contends that the judgment in favor of plaintiff and adverse to

defendant on her cross-complaint against the Stremels is not supported by the evidence. She argues that the evidence discloses that (1) Mrs. Stremel did not look before entering the intersection, or, having looked, was negligent in failing to see the northbound car, and (2) that Mrs. Stremel violated defendant's right of way, thus establishing Mrs. Stremel's negligence as the only negligence in the case. To adopt this theory and to reach defendant's conclusion, this court would be compelled to re-evaluate the evidence and the credibility of the witnesses and draw inferences contrary to those of the trier of the facts. That is not within the province of a reviewing court.

[2-4] It is fundamental that if there be evidence of facts supporting an inference favorable to the judgment, a reviewing court is without power to substitute its own deductions for those of the jury. It may reasonably be inferred from the evidence that, assuming that Mrs. Stremel was negligent, plaintiff was equally guilty of negligence which was a contributive and proximate cause of the accident. Defendant testified that though she was driving a mere fifteen miles an hour at the intersection, though she looked left on 164th Street in the direction of the Stremel vehicle, though her windshield was clear and her view unobstructed, she failed to see the vehicle with which she collided seconds later. The jury may well have concluded that defendant's testimony that she looked for cross traffic before entering the intersection was either unworthy of belief or that she was negligent in failing to see the approach of the Stremel car which must have been in her line of vision under the existing circumstances. *Powell v. Bartmess*, 139 Cal.App.2d 394, 400, 294 P.2d 150; *Huetter v. Andrews*, 91 Cal.App.2d 142, 146, 204 P.2d 655; *Berlin v. Violett*, 129 Cal.App. 337, 340, 18 P.2d 737. The inference is almost irresistible that defendant drove into the intersection oblivious of approaching traffic, for the front of her car smashed almost broadside into the Stremel vehicle when the latter had already

crossed into the east half of Wilton Place. Defendant's contention that she had the right of way, even if true, does not of itself absolve her of the necessity of using reasonable care in traversing an intersection. In *Powell v. Bartmess*, supra, 139 Cal. App.2d at page 401, 294 P.2d at page 154, this court discussed the same question in language apposite to this situation: "But even if it be granted, as plaintiff urges, that having entered the intersection first, she had the right of way, that fact alone does not exculpate her from negligence as a matter of law since a fact question concerning her conduct in the circumstances would still remain. [Citations.] As was said in *Donat v. Dillon*, supra (192 Cal. 426 [429], 221 P. [193] 194): 'Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended.' In *Allin v. Snively*, supra (100 Cal.App.2d 411 [414], 224 P.2d [113] 115), this court remarked: 'Under traffic conditions prevailing upon the highways of California ordinary care frequently requires the operator of an automobile who has the right of way to yield in order to avoid disastrous consequences although he may have entered an intersection first and therefore legally be entitled to the right of way. It may be negligence as a matter of fact for him to proceed into the path of a fast moving car.'" It being essentially a question of fact for the jury whether or not defendant was negligent in the manner in which she proceeded across the intersection, and there being substantial evidence to support its implied finding that she did not use the requisite care, we may not disturb the finding that her contributory negligence disentitled her to prevail in her action against Mrs. Stremel.

[5, 6] Defendant suggests that the jury was "bound to apply" the presumption that she was exercising due care because of testimony that she suffered from loss of memory as a result of the accident. The

jury was instructed on this phase of the case and defendant does not complain of the insufficiency of the instruction. However, this rebuttable presumption, assuming it to have been applicable in the present context, constituted merely one item of evidence, Code Civ.Proc., sec. 1957, to be weighed by the jury with the other direct, physical and circumstantial evidence. From the facts recounted above, it clearly appears that the circumstances and inferences pointing to defendant's negligence far outbalanced any presumption of care on her part and the jury was entitled to find accordingly. *Scott v. Burke*, 39 Cal.2d 388, 397-398, 247 P.2d 313; *Halstead v. Paul*, 129 Cal.App.2d 339, 341, 277 P.2d 43.

[7-9] So far as concerns the judgment in favor of plaintiff that is fully sustained by the evidence already set forth which reflects defendant's negligence, and by the complete absence of any contributory negligence on plaintiff's part. In her brief, defendant has charged Mrs. Stremel with the commission of various acts of negligence. Conceding, *arguendo*, that there was such negligence, the evidence plainly shows that such negligence concurred with that of defendant in proximately causing the accident. The rule is well established that where plaintiff is injured by the concurring negligence of two drivers, plaintiff, as a passenger in one of the vehicles who was herself free from negligence, may recover from the negligent driver of the other car. *Kelley v. Hodge Transportation System*, 197 Cal. 598, 605, 242 P. 76; *Hughes v. Quackenbush*, 1 Cal.App.2d 349, 356, 37 P.2d 99; *Fishman v. Silva*, 116 Cal.App. 1, 7, 2 P.2d 473; *Evans v. Mitchell*, 2 Cal. App.2d 702, 707, 38 P.2d 437. Plaintiff did not own the car, she did not exercise any control or management over the automobile, nor is it asserted she was engaged in any joint enterprise with Mrs. Stremel. Therefore the latter's negligence may not be imputed to plaintiff, who may recover unless it be shown that she was herself guilty of negligence. *Kelley v. Hodges Transportation System*, supra, 197 Cal. at page 604,

242 P. at page 78; *Thompson v. Fitzgerald*, 205 Cal. 563, 568, 271 P. 1072. Under no possible construction of the evidence can it be held that plaintiff was guilty of independent negligence. She violated no duty of care owed to herself or others "[nor is it] shown that she neglected to do anything that a reasonable person in her situation should have done or that she did anything that could be regarded as negligence on her part under the circumstances of the collision." *Kelley v. Hodge Transportation System*, supra, 197 Cal. at page 604, 242 P. at page 78. The judgment in favor of plaintiff is abundantly supported by the evidence of defendant's negligence, by the lack of contributory negligence on her part, and by the fact that any negligence on the part of Mrs. Stremel proximately causing the accident could not be imputed to her.

New Trial Limited to Damages Only.

Defendant's final contention is that the trial court abused its discretion in granting plaintiff a new trial on the sole issue of damages. Plaintiff was awarded judgment for \$2,000, which fully covered the amount of her special damages but allowed only \$79.24 general damages, despite injuries which put plaintiff in traction for five weeks. That the general damages awarded are disproportionately low is patent and the obvious inadequacy is the basis for the new trial order. We cannot conclude, contrary to the trial judge, that the jury compromised the question of liability by its inadequate award of general damages.

[10, 11] The rule is that the granting of a new trial limited to the issue of damages appropriately rests in the discretion of the trial court and its determination will not be reversed in the absence of an abuse of discretion. *Black v. Kiefer*, 127 Cal.App.2d 122, 124, 273 P.2d 537. An abuse of discretion is shown when the record discloses that the damages are inadequate, the issue of liability close, and there are other circumstances indicating that the verdict was probably the result of a compromise on liability issue. *Leipert v. Honold*, 39 Cal.2d

462, 247 P.2d 324, 29 A.L.R.2d 1185; *Hamasaki v. Flotho*, 39 Cal.2d 602, 248 P.2d 910; *Clifford v. Ruocco*, 39 Cal.2d 327, 246 P.2d 651; *Cary v. Wentzel*, 39 Cal.2d 491, 247 P.2d 341; *Rose v. Melody Lane*, 39 Cal.2d 481, 247 P.2d 335.

In the light of the record in this case, it would be entirely unwarranted to hold that the issue of liability was close with respect to plaintiff. On the contrary, so strongly do the circumstances proclaim negligence on the part of defendant that we are satisfied that the court soundly exercised its discretion in the premises. The facts show that despite excellent visibility, each driver entered the intersection, according to their testimony, without seeing the other car, without sounding their horns, and from the absence of any skid marks, without sudden resort to the brakes to avert the collision. The record shows that the Stremel car had already crossed into the east half of Wilton Place and that it was struck in the side by the front of defendant's car. Accepting defendant's testimony that she looked but did not see the Stremel car despite her clear view, and from the physical fact that her car ran into the Stremel vehicle, the conclusion is almost inescapable that she was negligent in traversing the intersection. *Linn v. Roby*, 129 Cal.App.2d 448, 452, 277 P.2d 67.

[12] The jury advisedly arrived at such a determination by its judgment adverse to her in her cross-complaint against Mrs. Stremel. Plaintiff, as we have seen, was not in the remotest degree guilty of independent negligence as a mere rider in the Stremel car. She was the innocent victim of the culpable negligence of two drivers who crossed an uncontrolled intersection seemingly without taking the most elementary precautions to avert or avoid the hazards of cross traffic. Under such circumstances, where defendant's negligence is plainly spelled out and there is no evidence tending to show contributory negligence on the part of plaintiff, liability is established and no abuse of discretion is shown in granting a new trial on the issue of

damages alone. *Patterson v. Rowe*, 113 Cal.App.2d 119, 247 P.2d 949; *Linn v. Roby*, supra.

The judgment and the order granting plaintiff Uhl a new trial on the issue only of damages are affirmed. The purported appeal from the order denying the motions of defendant Baldwin for a new trial is dismissed.

MOORE, P. J., and ASHBURN, J.,
concur.



145 Cal.App.2d 607

McMAHAN'S OF LONG BEACH, a California Corporation, Plaintiff and Appellant,

v.

McMAHAN SERVICE CORPORATION, a California Corporation, et al., Defendants,

McMahan Service Corporation, a California Corporation, Respondent.

Civ. 21846.

District Court of Appeal, Second District,
Division 2, California.

Nov. 2, 1956.

Action to enjoin defendants from using plaintiff's trade-name. The Superior Court of Los Angeles County, Joe Raycraft, J., granted defendants' motion to dismiss action for lack of prosecution and denied plaintiff's motion to strike order, entered subsequent to judgment, awarding defendants costs in the action. Plaintiff appealed from denial of its motion. The District Court of Appeal, Fox, J., held that where action was dismissed as to defendants for lack of prosecution, under the statute the defendants were entitled to necessary costs of the action, notwithstanding fact that defendants did not demand costs either in

their notice of motion to dismiss or in their supporting affidavits.

Order affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition ⇨101

Where action to enjoin defendants from using plaintiff's trade-name was dismissed as to defendants for lack of prosecution, under the statute the defendants were entitled to necessary costs of the action, even though defendants did not demand costs either in notice of motion to dismiss or in their supporting affidavit. West's Ann.Code Civ.Proc. § 1032 and subds. (a-c).

2. Costs ⇨199

Where trial judge discovered that order of dismissal did not expressly award costs allowed by statute as "of course" to defendants upon judgment of dismissal entered in their favor, he correctly concluded such omission was an inadvertent error and properly proceeded to rectify such inadvertence by subsequent nunc pro tunc order. West's Ann.Code Civ.Proc. §§ 581d, 1032 and subds. (a-c).

3. Costs ⇨48

Under statute allowing costs as of course to defendant who procures favorable judgment in special proceedings and in enumerated classes of action, "or as to whom the action is dismissed", defendant is entitled to his costs as a matter of right on dismissal of action. West's Ann.Code Civ.Proc. § 1032 and subd. (b).

Clock, Waestman & Clock, E. W. Sheridan, Long Beach, for appellant.

Stanley M. Arndt, Los Angeles, and John F. McCarthy, Long Beach, for respondent.

FOX, Justice.

In July, 1952, plaintiff brought this action to enjoin defendants from using plaintiff's trade name, or any simulation thereof, and for damages. The trial court issued a temporary injunction. An appeal was taken but it was later dismissed.

The case not having been brought to trial, the defendants, in March, 1955, moved to dismiss the action for lack of prosecution. Neither the notice of motion nor the affidavit made any reference to costs. The motion was granted on March 23d without an appearance in opposition. The minute order, which was entered on March 25th, did not expressly award costs to defendants. A formal judgment of dismissal, dated March 24th, contained a provision in longhand that defendants have judgment for their costs. This appears to have been written in under the direction of the trial judge. The judgment and defendants' memorandum of costs were filed on March 25th.

On April 20, 1955, the trial court, on its own motion, made a minute order amending the March 23, 1955, minute order *nunc pro tunc* by adding thereto the following: "Defendants are given judgment for their costs * * *."

In January, 1956, plaintiff noticed a motion¹ to strike the minute order of April 20, 1955, on the ground that it was "invalid and void on its face and was in excess of the jurisdiction of the court." This motion was denied on February 2d. It is from this order that plaintiff appeals.²

It is plaintiff's position that its suit was in equity; that therefore the award of

costs was discretionary under section 1032 (c), Code of Civil Procedure;³ that since defendants did not demand costs either in their notice of motion to dismiss or in their supporting affidavit, the court had no authority to award defendants their costs; and that the court had no jurisdiction to amend its order of March 23, 1955, by an *ex parte* order on April 20th.

[1] Defendant, McMahan Service Corporation, argues that it was entitled to its costs as "of course" under the express language of section 1032(b), Code of Civil Procedure; that the failure to expressly provide therefor in the order of March 23d was a clerical error and that the court had jurisdiction, *sua sponte*, to correct it.

We have concluded that the position of the defendant is sound and that the order must be affirmed.

Section 1032, Code of Civil Procedure, provides that "In the superior court, except as otherwise expressly provided, costs are allowed of course: * * * (b) To the defendant upon a judgment in his favor in special proceedings and in the actions mentioned in subdivision (a) of this section, *or as to whom the action is dismissed.*" (Emphasis added.)

Thus we have express statutory authority for the award of costs to a defendant

1. Although Russell C. Black was also a defendant, the notice of motion was addressed to defendant McMahan Service Corporation and its attorneys only. Black is therefore not involved in this appeal.

2. In view of the conclusion we have reached, it is unnecessary to determine whether the order of April 20, 1955, is appealable.

3. The material portions of section 1032, Code of Civil Procedure, read:

"In the superior court, except as otherwise expressly provided, costs are allowed of course:

"(a) To plaintiff upon a judgment in his favor: in an action for the recovery of real property; in an action to recover the possession of personal property; in an action for the recovery of money or damages; in a special proceeding; in an action which involves the title or pos-

session of real estate or the legality of a tax, impost, assessment, toll, or municipal fine.

"(b) To the defendant upon a judgment in his favor in special proceedings and in the actions mentioned in subdivision (a) of this section, *or as to whom the action is dismissed.* When there are several defendants in any action mentioned in subdivision (a) of this section, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor. [Italics added.]

"(c) In other actions than those mentioned in this section costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court. * * *"

upon the dismissal of the action. No qualifications or conditions are imposed. He is entitled to his costs as a matter of right. It therefore follows that upon the dismissal of this action defendant was entitled to its costs as "of course," i. e., as a matter of right under the above code section. On this point 13 Cal.Jur.2d, section 17, page 237, says: "A successful defendant who recovers a judgment in his favor in the superior court is entitled to recover his costs as a matter of course * * * (3) where the action is dismissed as to the defendant." In 16 Cal.Jur.2d, section 3, page 147, it is stated that "* * * when the defendant's motion to dismiss is granted, the defendant is entitled to recover his necessary costs * * *." Consequently it was not necessary for defendant to expressly ask for costs in its notice of motion to dismiss or for the court to expressly award costs in the order of dismissal. The omission, therefore, of the award of costs was clearly an inadvertence or clerical error and the ex parte order of April 20th was merely to correct the same and clarify the record, see *In re Estate of Goldberg*, 10 Cal.2d 709, 715-716, 76 P.2d 508; *Scribner v. Bertmann*, 129 Cal.App.2d 204, 210-212, 276 P.2d 697; *Freeman on Judgments*, Vol. 1 (5th Ed.), p. 302, and it in nowise constituted a discretionary judicial act initially awarding costs to defendants.

[2] The judge undoubtedly considered that the order of dismissal carried with it costs for defendants because when a formal judgment of dismissal⁴ was presented for his signature a day or so later he directed the court clerk to add in longhand that defendants were awarded their costs. So, when the trial judge discovered that the order of dismissal did not expressly award costs allowed as "of course" to defendants by statute he correctly concluded such an

omission was an inadvertent error and proceeded to rectify such inadvertence by the *nunc pro tunc* order of April 20th. *Harman v. Cabaniss*, 207 Cal. 60, 276 P. 569; *Scribner v. Bertmann*, supra, 129 Cal. App.2d at page 211, 276 P.2d at page 701. See *Coffee v. Johnson*, Co.Ct., 24 N.Y.S.2d 588, 589.

[3] Plaintiff argues that the italicized language quoted above from subdivision (b) of section 1032 authorizes costs as "of course" to a defendant only upon dismissal as to him in one of the classes of cases mentioned in subdivision (a) of that section. Obviously the language is not so limited. The italicized language was added in 1933. Stats.1933, ch. 744, sec. 191, p. 1901. Prior to the time when this language was incorporated into the statute, a defendant as to whom an action of the class mentioned in subdivision (a) was dismissed was entitled to his costs as "of course." *Spinks v. Superior Court*, 26 Cal.App. 793, 148 P. 798; *Spreckels v. Spreckels*, 172 Cal. 789, 158 P. 543. This naturally follows because a dismissal of an action with prejudice is in fact a judgment in defendant's favor, carrying with it the right to recover costs. *Fisher v. Eckert*, 94 Cal. App.2d 890, 894, 212 P.2d 64.

Thus the state of the law prior to 1933 was precisely that which plaintiff now urges upon us. By the addition in 1933⁵ of what would otherwise be unnecessary and superfluous language, it is reasonable to presume that the Legislature intended to enlarge the right to an award of costs to a defendant upon dismissal of the action because there is no good reason why such a defendant should not be entitled to his costs. This is sound policy and conforms to simple justice as between the parties. So, to effectuate this, the Legislature has established an additional category in which

4. By the provisions of section 581d, Code of Civil Procedure, the order of dismissal by the court upon its entry in the minutes constituted an effective judgment. The subsequent formal judgment was but a memorial thereof. *E. Clemens Horst Co. v. Federal etc., Co.*, 22 Cal. App.2d 548, 550, 71 P.2d 599; *Darling-*

ton v. Butler, 3 Cal.App. 448, 452, 86 P. 194.

5. In that year sections 1022, 1024 and 1026, Code of Civil Procedure, among others, were consolidated into the present section 1032, Code of Civil Procedure.

costs are awarded as a matter of right upon dismissal without regard to whether the action is legal or equitable. *Tonini v. Ericcsen*, 218 Cal. 39, 41, 21 P.2d 565.

It is apparent from the foregoing that subdivision (c) of section 1032 is not here applicable since dismissals are specifically provided for and governed by subdivision (b) of said section. *Merlino v. Fresno Macaroni Mfg. Co.*, 74 Cal.App.2d 120, 168 P.2d 182, relied on by plaintiff, lends no support for its position. That case does not deal with the instant problem nor does it remotely bear upon it.

The order of February 2, 1956 (designated "judgment" in the notice of appeal) is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



145 Cal.App.2d 556

HAROLD S. KARAGERIS, Plaintiff, Cross-Defendant, Appellant and Respondent,
v.

William KARAGERIS, Defendant, Cross-Complainant, Respondent and Appellant.
Civ. 8849.

District Court of Appeal, Third District,
California.
Nov. 1, 1956.

Action by a wife for divorce. Defendant husband filed a cross-complaint for divorce. From so much of a judgment of the Superior Court, Butte County, Dudley G. McGregor, J., granting each party a divorce, as declared certain property separate property of one or the other party, and other property community property to be divided between them equally by cash award of half of net value thereof to plaintiff, both parties appealed. The District

Court of Appeal, Van Dyke, P. J., held that neither plaintiff nor community had any claims to real and personal property purchased by defendant soon after his marriage with his separate funds, commingled with his brother's funds held in trust by defendant as brother's share of profits from defendant's operation of brother's store.

Judgment affirmed.

1. Property Ⓒ12

Generally, no one can be divested of his property in invitum without clear warrant of law therefor.

2. Property Ⓒ12

Ordinarily, owner of personal property cannot be divested of title thereto without his consent.

3. Property Ⓒ12

Possession of property right, acquired secretly or by false assertions or unknowingly surrendered by owner, does not deprive him of ownership thereof.

4. Property Ⓒ12

Title to personal property fraudulently or feloniously obtained does not pass to wrongdoer, where wrongful act is a crime at common law, and owner of property may peaceably take it from any person in whose hands he finds it.

5. Divorce Ⓒ249(3)

A wife, granted divorce, had no interest in funds held by husband in trust for his brother as share of profits from husband's operation of brother's store, if misappropriated by husband, who was accountable to brother therefor, whether husband still had funds in form received or had transmuted them into either real or personal property.

6. Divorce Ⓒ249(3)

Husband and Wife Ⓒ254

Neither wife, granted divorce, nor spouses' community had any claims to real and personal property purchased by husband, soon after his marriage, with his separate funds commingled with funds held

by him in trust for his brother as share of profits from husband's operation of brother's store.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for Harikleia Karageris.

Albert M. King, Raymond A. Leonard, Oroville, for William Karageris.

VAN DYKE, Presiding Justice.

Harikleia and William Karageris were husband and wife. They married February 1, 1945. In November of 1952 she sued William for divorce. He answered and cross-complained. Each alleged as to the other the infliction of extreme cruelty, and the trial court found the allegations of both in this respect to be true and granted a divorce to each. Both have appealed, but neither challenges the propriety of the interlocutory decree of divorce. Each challenges, however, that part of the judgment which declares certain property described in the decree to be the separate property of one or the other and declares what property constituted community. The trial court found certain described property to be community and divided it between them equally through the device of a cash award to Harikleia of one-half the net value.

William Karageris had been for years employed in a men's clothing store in Oroville owned by his brother Peter. Since 1926 William had operated the store for Peter under a power of attorney. Peter had returned to Greece, his native land, where he remained. William drew a salary of \$100 per month from the store. From time to time William sent funds to Peter derived from the profits of the business. But from 1939 through 1944, because of currency restrictions due to war, no money was sent. After 1944 William resumed sending money to Peter. As of January 1, 1951 William bought the store from Peter for the sum of \$15,000. The court found the purchase was made with community funds and that the store business, consisting

of stock on hand, furniture and fixtures, good will and store income accumulated after the purchase, was the sole community property owned by the parties. The court fixed the total value of this property at \$49,364.09. From the total valuation the court deducted certain living expenses and litigation costs of the parties, thus reducing the net value to \$34,211.88, and then directed that William pay one-half of that sum to Harikleia, whereupon the full title to the community property would be in him. There was evidence that from 1926, when Peter went to Greece, until 1939 the store was run by William with the assistance of a brother-in-law under an arrangement whereby, in addition to a salary, William and the brother-in-law were entitled each to one-third of the profits, the balance of the profits belonging to Peter. This arrangement ended in 1939, and William thereafter ran the store alone. When he resumed remittances to Peter in 1945, from 1945 through 1950 he sent various sums totaling approximately \$21,000. The total accumulations of store profit, however, exceeded that sum, although the proof was not certain as to just what profits came into the hands of William during the years 1939 to 1944, inclusive. The account books covering that period were lost. It was shown, however, that William had not fully accounted for and paid over to Peter the profits of the store which came into his hands. The trial court made a finding that from 1939 through 1950 William retained the net income from the store and held the same for the account of Peter, save and except the sum of \$21,000 paid by William to Peter from January 1, 1945 to December 31, 1950; that the balance of the store income approximated \$27,810.55; that it was no longer owed by William to Peter, and that William acquired title to this balance of store income on January 1, 1951 at the same time that he acquired title to the Karageris store. The court made no allocation of the store profits William had not turned over to Peter, except as is reflected in the findings as to separate property of William. Neither did the court find specifically

how or for what consideration William obtained title to Peter's funds. It is clear from the testimony of William, which is undisputed, that, during the years he received profits of the store for Peter's account, he commingled the money so received with his own and invested and reinvested the funds along with his own funds in the various properties which he owned at the time of the decree and which were declared to be his separate property. It also fairly appears that the commingling was so thorough that William would be unable at this time to follow the trust funds and segregate the interest of Peter, or show what trust funds went into the purchase of what properties.

It is the position of Harikleia, on appeal, that the store income from 1939 through 1950 which was retained by William is community property; further that any assets acquired with such store income are likewise community property, and she asks that the judgment be reversed and the cause remanded to the trial court for the purpose of ascertaining the amount of the store income acquired by William, the investments made by him of these funds and for a 50-50 division of these assets as community property. Harikleia relies on the finding of the court that William acquired title to the funds he held for Peter and of the properties in which he had invested those funds as of January 1, 1951 at the time he purchased the store. Harikleia argues that these properties held in trust for Peter by William were acquired by William "either as a part of the purchase of the store business as of January 1, 1951", or through misappropriation by William. She argues that in either case the whole is community property.

A review of the record has led us to the conclusion that the finding of the trial court that William acquired title from Peter to the trust funds and property involved, has no support in the record. First, as to misappropriation, there is no specific finding that William ever misappropriated the property of Peter. In fact, the finding is to the

contrary, for the finding that William acquired the trust property from Peter cannot be construed as a holding by the trial court that the acquisition was by misappropriation. Peter's money came into William's hands as Peter's personal property.

[1-4] It is stated in 73 C.J.S., Property, § 15(4) as follows:

"Generally, no one can be divested of his property in invitum, where there is not clear warrant of law therefor * * *. Ordinarily, the owner of personal property cannot be divested of title without his consent * * *. The possession of a property right acquired secretly or by false assertions or unknowingly surrendered by the owner does not deprive him of ownership.

"A person cannot acquire property by his own crime. Title to personal property fraudulently or feloniously obtained does not pass to a wrongdoer, where the wrongful act is a crime at common law; and where property has been obtained from the owner by such act, his unqualified ownership is not changed, and he may peaceably take it in whose hands he may find it. So, a thief can acquire no title to stolen property, * * *." See, also *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582, 29 L.R.A., N.S., 119, and *Kemp v. Ene-mark*, 194 Cal. 748, 752-753, 230 P. 441.

[5] If William has, in fact, misappropriated the trust funds of his brother, he has not gained title by his tortious acts and is still accountable to Peter for every dollar of store income which came into his hands and was not remitted by him, whether he now has the trust funds in the form received or has transmuted the funds into other forms of property, real or personal. Peter can follow those funds if he chooses into whatever form of property they have been invested. Furthermore, if in making such investments William has commingled his own separate property and can no longer identify and segregate from his own that which belongs to Peter, equity will yet

make Peter whole by an appropriate decree. Harikleia is not interested in such assets if William holds by misappropriation. Kemp v. Enemark, *supra*.

[6] Discarding misappropriation as a possible source of title, we examine the record to see what evidence of acquisition through lawful means can be found to support the trial court's finding that William in January of 1951 acquired the property of Peter. We find none. The best that counsel for Harikleia can say as to how William acquired, if he did acquire, the property of Peter, is that it was *either* by purchase or by misappropriation. It appears in the record that within a few months after William's marriage he purchased real and personal property at a cost of over \$40,000. William testified this was money of himself and money belonging to Peter that was used in the purchase of these properties, and there is no evidence to the contrary. He took title to the properties in his own name, and these same properties are still held by him. Peter may have claims to this property, but Harikleia and the community have none, since it clearly appears William took his separate funds commingled with Peter's funds to make the purchases. The trial court was not obliged to settle affairs between William and Peter and in this litigation could not have done so. We assume it made no effort in that direction. What it was concerned with was to ascertain what property was separate, so far as the community was concerned, and what property was community. Concerning the \$40,000 worth of property purchased by William within a few months of his marriage to Harikleia, her counsel say in her brief: "The testimony showed conclusively that these purchases were paid for 'out of the pot', and that William was using Peter's money in these investments. * * * It is significant that the defendant below (respondent here) made no attempt to explain

his acquisitions of the accumulated store income and made no attempt to segregate the assets of William which he had admittedly acquired with these funds." We think it unnecessary to relate in detail the evidence touching upon the handling by William of the trust funds belonging to Peter. It is enough to say that nothing in this record will support the trial court's finding that William ever acquired the trust funds for which he was accountable to his brother.

William has appealed and by his appeal challenges the trial court's holding that the Karageris store was community property. However, he states in his brief that: "When the plaintiff appealed from the judgment of the trial court the defendant filed a cross appeal upon grounds that had been pressed seriously in the trial of the case. However the defendant would not have taken an appeal from the judgment if plaintiff had not appealed, and he takes the position now that if the appellate court does not feel that the judgment should be reversed for the alleged errors claimed by the plaintiff, he is content to let the judgment stand rather than have the burden of a retrial of the case upon a reversal because of the errors claimed by the defendant." Since what this court has heretofore said necessitates an affirmance of the judgment, so far as is concerned the appeal of Harikleia, we think it unnecessary to discuss the merits of William's attack upon the court's holding that the store was community property, further than to say that our review of the record has convinced us the holding is sustained by the record.

The judgment appealed from is affirmed as against the attacks made by both appellants, Harikleia to recover her costs on appeal.

PEEK, J., and McMURRAY, J. pro tem., concur.

The CITY OF LOS ANGELES, a municipal corporation, Plaintiff and Appellant,

v.

BELRIDGE OIL COMPANY, a California corporation, Defendant and Respondent.*

Civ. 21778.

District Court of Appeal, Second District, Division 2, California.

Oct. 31, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Granted Dec. 24, 1956.

Suit by city to collect business license tax from oil company. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered judgment fixing tax in accordance with certain formula, and city appealed. The District Court of Appeal, Ashburn, J., held that Los Angeles tax on businesses engaged in selling at wholesale in city may constitutionally be measured by gross receipts attributable wholly or partly to sales activities within city, and only those gross receipts should be excluded which are not attributable in any measure to sales activities within city, and that ordinance did not countenance use of formula by which gross receipts attributable to sources within as against without city were purportedly determined by reference to ordinance provision that gross receipts should be determined by allocation upon basis of payroll, value and situs of tangible property, general expenses, or by reference to any of these or other factors, or by such other method of allocation as is fairly calculated to determine gross receipts derived from or attributable to sources within city.

Judgment reversed with instructions.

1. Licenses ⇐7(9)

Los Angeles tax on businesses engaged in selling at wholesale in city may constitutionally be measured by gross receipts attributable wholly or partly to sales activities within that city, and only those gross receipts should be excluded which are not attributable in any measure to sales activity within that city.

* Opinion vacated 309 P.2d 417.

2. Licenses ⇐7(8)

Fact that all gross income of oil company, whose total gross receipts attributable to selling in City of Los Angeles were subject to Los Angeles business license tax, would be taxable again by Kern County, in which all of its productive operations were located, would not impair right of Los Angeles to so measure its tax.

3. Licenses ⇐29

Ordinance, under which Los Angeles imposed tax on business engaged in selling at wholesale in city, did not countenance use of formula by which gross receipts attributable to sources within as against without city were purportedly determined by reference to ordinance provision that such gross receipts should be determined by allocation upon basis of payroll, value and situs of tangible property, general expenses, or by reference to any of these or other factors, or by such other method of allocation as is fairly calculated to determine gross receipts derived from or attributable to sources within city.

Roger Arnebergh, City Atty., Bourke Jones and James A. Doherty, Asst. City Attys., Los Angeles, for appellant.

Wellborn, Barrett & Rodi, Vernon Barrett, F. C. Lowell Head, Los Angeles, for respondent.

ASHBURN, Justice.

The problem here presented is the extent of liability of defendant for a tax under § 21.166 of the City of Los Angeles License Tax Ordinance No. 77000. On a first trial of the case it was held that defendant was not within the terms of the said section and hence not liable for the tax. The Supreme Court reversed in *City of Los Angeles v. Belridge Oil Co.*, 42 Cal.2d 823, 271 P.2d 5. It was a general reversal. Upon re-trial plaintiff contended that the tax is to be measured by all gross receipts of defendant which are attributable wholly or in part to selling activities conducted with-

in the city of Los Angeles; defendant asserted and now asserts that an apportionment of gross income is necessary as a result of the Supreme Court decision even though the entire amount is partially attributable to Los Angeles activities, and that it should be made according to a certain formula which was worked out at the trial.

Upon the former appeal the Supreme Court was confronted first with a question of construction of the ordinance. Section 21.166 provides: "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of \$8.00 for the first \$20,000, or less, of gross receipts, and, in addition * * *." All the facts had been stipulated in the lower court. It appeared that: "Defendant company is engaged in the production and sale of crude oil and natural gas. All of its wells are located in Kern County which is the scene of all productive operations. The field office of the defendant is located in Kern County while the main office is situated in the city of Los Angeles. Its various products which are marketed under long-term contracts, are delivered to the purchasers directly at the field plants and never enter the territorial limits of the city of Los Angeles." 42 Cal.2d at page 825, 271 P.2d at page 7. Also: "Negotiations for the sale of defendant's products are conducted in part at the main office, in part at the offices of purchasers and in part by mail, telegraph or telephone communications between the defendant's main office in Los Angeles and the customer. Defendant company signs all contracts at its main office." 42 Cal.2d at page 826, 271 P.2d at page 7. The stipulation itself says: "Substantially all said sales are made pursuant to the provisions of long-term contracts. All said contracts contain provisions for fixing the prices at which such substances are sold. * * * The contracts above-mentioned were negotiated and signed in

behalf of defendant solely by its president, vice presidents and secretary. Approximately 15 per cent of the negotiation of said contracts occurred at the head office, approximately 15 per cent thereof occurred in San Francisco, and approximately 70 per cent thereof occurred by telephonic, telegraphic and mail communication between Los Angeles and San Francisco. Said contracts were signed by defendant in Los Angeles and by the buyers in San Francisco."

In solving this question of ordinance construction in favor of plaintiff the court said: "Thus all businesses which are engaged in selling goods, wares or merchandise at wholesale in the City of Los Angeles and which are not licensed by other sections of the ordinance come within section 21.166. This is true regardless of whether they are engaged in 'manufacturing and selling' or merely 'selling.' The important thing is that they are engaged in selling within the City of Los Angeles. If they are so engaged, *all gross receipts attributable to selling in the City of Los Angeles are subject to the business license tax* provided for by section 21.166. The fact that the goods sold are produced in remote areas is unimportant. * * * The important thing is that the taxpayer is engaged in selling goods at wholesale in the City of Los Angeles. * * * The fact that an organization is engaged in selling in the city is sufficient and it is of no import that selling is but a small part of the total effort or that selling is not difficult for the instant company. * * * The purpose of the section was to place a business license tax on those activities which took place within the City of Los Angeles regardless of their relationship to activities outside the city." (Emphasis added.) 42 Cal.2d at pages 828-829, 271 P.2d at page 9.

The court then addressed itself to defendant's second contention, namely, "that even if section 21.166 is applicable, the city cannot constitutionally tax the total gross receipts of the company since such would be an attempt to impose a tax on business

carried on outside the city." 42 Cal.2d at page 831, 271 P.2d at page 10. It said: "This argument is based on the ground that since the total gross receipts include the proceeds of products produced and delivered outside the city the effect would be to allow a city to tax transactions occurring outside its boundaries. This argument seems to lose sight of the nature of section 21.166.

"The business license tax here sought to be collected is a privilege tax, exacted for the privilege of engaging in the activity of 'selling.' When this activity takes place within the city, the rate of tax may be measured by the gross receipts derived therefrom. *Union Pac. R. Co. v. City of Los Angeles*, 53 Cal.App.2d 825, 830, 128 P.2d 408. As stated by this court in *Martin Ship Service Co. v. City of Los Angeles*, 34 Cal.2d 793, 796, 215 P.2d 24, 26, 'In view of the recent decisions of the United States Supreme Court in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S.Ct. 1475 [92 L.Ed.1832], and *Central Greyhound Lines, Inc. [of New York] v. Mealey*, 334 U.S. 653, 68 S.Ct. 1260 [92 L.Ed. 1633], the city may clearly tax plaintiffs' local activities and the gross receipts therefrom.' In the case at bar it is true that some of these gross receipts are attributable to extraterritorial elements such as the production and delivery of the goods. However there is no constitutional objection to resorting to extraterritorial elements in determining the rate of tax. *Great Atlantic & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 [112 A.L.R. 293]; *Maxwell v. Bugbee*, 250 U.S. 525, 40 S.Ct. 2, 63 L. Ed. 1124; *Cedar Hill Cemetery Corp. v. District of Columbia*, 75 U.S.App.D.C. 84, 124 F.2d 286. The activity being taxed here is the activity of selling and such activity can be taxed by the city even though the goods never enter its territorial limits. *Keystone Metal Co. v. City of Pittsburgh*, supra, 374 Pa. 323, 97 A.2d 797.

"In the instant case we can find no objection, constitutional or otherwise, to the

imposition of a business license tax on the privilege of engaging in selling activities within the city. Likewise there is no objection to basing the rate of such tax on the gross receipts attributable to such selling activities, even though various extra-territorial events contribute to such gross receipts." 42 Cal.2d at page 831, 271 P.2d at page 10. It is well to emphasize at this point the fact that the court here holds as a matter of constitutional law that the license tax for doing business within the city may be constitutionally measured by the gross receipts "derived therefrom" or "attributable to such selling activities".

Next follows in the opinion a limitation upon the general proposition, so phrased that when applied to the facts developed at the re-trial it gave rise to the controversy presented on this appeal: "There is, however, one important limitation which should be pointed out and that is this; even though the city can tax the activity of selling it can only base the tax on such selling activities as are carried out within its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included. Such a construction necessarily follows from the fact that the business license tax is on the privilege of engaging in selling activities in the City of Los Angeles and as such should only be based upon such activities. * * * To allow a city to levy a license tax based upon gross receipts attributable to selling activities outside the city would be an unreasonable discrimination and a denial of equal protection of the law. See *Ferran v. City of Palo Alto*, 50 Cal.App.2d 374, 122 P.2d 965. If such taxation were allowed it would unjustly discriminate against those firms whose selling activities in Los Angeles compose but a small fraction of the total sales effort and whose gross receipts are in large part attributable to selling activities in other areas." 42 Cal.2d at pages

831-832, 271 P.2d at page 10. Again at page 833 of 42 Cal.2d at page 11 of 271 P.2d: "In the instant case a just and reasonable construction requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the City of Los Angeles."

The parties stipulated at the second trial, "that all of the gross receipts of defendant are attributable in part to its selling activities within the City of Los Angeles and in part to its selling activities without the City." The crux of the present controversy lies in the application of the stipulated facts to these two sentences of the opinion: "For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included." 42 Cal.2d at page 832, 271 P.2d at page 10. They seem to assume that sales activities within and outside the city of Los Angeles may be separately identified and the gross receipts thus allocated in accordance with the principles previously announced. There were no findings of fact in the record because the appeal arose upon a summary judgment. The stipulation of facts then before the court did not clarify the matter but left open the possibility of separate identification of proceeds of sales made within the city and those made outside its territory.

The word "attributable" is not a term of art, nor is it used in any such sense in the Supreme Court opinion. Webster's New International Dictionary defines the noun "attribute" as including the following connotations: "1. That which is attributed; as: * * * A quality considered as belonging to, or inherent in, a person or thing. * * * 4. *Logic*. Any quality or characteristic which may be predicated of some subject; specif., such a quality or characteristic as belongs to the subject essentially or necessarily." The idea of immediate relationship, cause and effect, "fiscal relation," as appellant phrases it, is ex-

pressed by the word "attributable" in the opinion; it seems to be the equivalent of the word "derived" in the phrase "gross receipts derived therefrom" as used on page 831 of 42 Cal.2d, on page 10 of 271 P.2d.

[1] It seems a fair interpretation of the opinion that the language just quoted from page 832 of 42 Cal.2d, page 10 of 271 P.2d means that the Los Angeles tax may be measured by gross receipts attributable wholly or partly to sales activities within that city, and that only those gross receipts should be excluded which are not attributable in any measure to sales activities within that city. The court is here engaged in a discussion of constitutional law, the phrasing of a constitutional limitation upon the constitutional principle just announced, namely, that the city of Los Angeles may measure its business license tax by the entire gross receipts derived from or attributable to sales activities within the city; and there is no basis for inferring an intent to qualify or limit beyond the necessities of constitutional exegesis.

[2] The argument that this would make all gross income taxable again by Kern County does not impair the view just expressed, for Mr. Justice Carter, the author of the Belridge opinion, also wrote *Fox Bakersfield Theatre Corp. v. City of Bakersfield*, 36 Cal.2d 136, 140, 141, 222 P.2d 879, 882, wherein it is said: "Taxation, other than of property, upon the same activity or incident for the same purpose by the same taxing agency, more than once in the same period, sometimes called double taxation, standing alone, is not forbidden by the constitutions, state or federal. * * * Our constitution provides that 'all property' in the state except as otherwise provided 'shall be taxed in proportion to its value'. Cal.Const., art. XIII, sec. 1. And under that provision it has been held that there could be no double taxation of *property*. * * * 'The mere fact that the state has imposed one excise under one act does not prevent the state from imposing another excise upon the same privilege for the

same period. Article XIII, section 1, of the State Constitution, has no application, because that section applies only to property taxes.' We think the Supreme Court, by its general reversal, left open as a factual question the problem of whether any portion of defendant's sales were not attributable to Los Angeles selling activities, and if so, how much.

When counsel came to applying the opinion to the facts they reached certain stipulations: "Oral stipulation in open court that the delivery of the goods to a purchaser by the defendant is one of the elements of a selling business and is included in the selling activities of the defendant.

"Oral stipulation in open court that all of the gross receipts of defendant are attributable in part to its selling activities within the City of Los Angeles and in part to its selling activities without the City.

[3] "Oral stipulation in open court that subject to the reservation that the plaintiff, the City of Los Angeles, does not agree that allocation, as required by the Court in its oral opinion of November 16, 1955, is necessary for determining the amount of tax due to the City from the defendant, and without foreclosing any right of the City of Los Angeles to maintain on appeal the position which it has maintained in this Court that there should be no allocation of receipts for purposes of determining the amount of the tax and that the measure of the tax should be defendant's entire gross receipts, the parties hereto stipulate as follows: (a) On the basis of all the stipulated facts, not more than 20% of defendant's total gross receipts for the years 1948 and 1949 are attributable to defendant's business in the City of Los Angeles under any method of allocation which is fairly calculated to determine the defendant's gross receipts derived from or attributable to sources within the City of Los Angeles and to determine the defendant's gross receipts derived from or attributable to sources outside the City of Los Angeles." Sub-

paragraph (b) is a repetition of (a) except for the substitution of the words "selling activities" for the word "business" which appears in (a). Subparagraph (d) reads: "Based upon the foregoing stipulations, it is agreed that, after allowing credit for all payments made by the defendant to the plaintiff as license taxes for the years 1949 and 1950, there remains due and owing to the City of Los Angeles the sum of \$536.43, including both principal and penalties." The court adopted this formula and rendered judgment against defendants for \$536.43. The stipulation as to the formula to be applied if allocation be found necessary was reached at a conference in chambers after the trial judge had ruled as follows: "Reading from Section 21.190, subsection (d)—and doing so without regard to whether or not that section applies to our instant case in so far as its application is concerned but only for the purpose of considering the matter of how an apportionment should be made—that section provides that, 'Such gross receipts shall be determined by an allocation upon the basis of payroll, value and situs of tangible property, general expenses, or by reference to any of these or other factors, or by such other method of allocation as is fairly calculated to determine the gross receipts derived from or attributable to sources within this city.' That seems a proper method of apportionment and a proper principle to follow." The stipulation was adequately protected by the express reservation of the contention that there was and is no room for any such allocation. We find in the Supreme Court opinion no basis, either in the words or the reasoning, for the application of the formula which was adopted below.

We conclude that the judgment is erroneous. It is reversed with instructions to enter judgment for plaintiff computed in accordance with § 21.166 for the years 1949 and 1950.

MOORE, P. J., and FOX, J., concur.

Ida LEWIS, Plaintiff and Respondent,

v.

Wm. H. NEBLETT, as Administrator of the Estate of Eddle Will Sellers, Sr., Deceased (substituted as defendant in place and stead of Harry Aldes, the former Administrator of said estate), Defendant and Appellant.*

Civ. 21547.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 2, 1956.

Hearing Granted Dec. 24, 1956.

Action to establish trust in real property standing in decedent's name at time of death. The Superior Court, Los Angeles County, John Gee Clark, J., entered judgment for plaintiff, and administrator appealed. The District Court of Appeal, White, P. J., held that stipulation of former administrator that action to impress trust should be tried after expiration of statutory five-year period was, under the circumstances, in excess of authority of such administrator and his attorney and was not effective to except action from operation of statute requiring dismissal of actions not brought to trial within five-years after filing unless parties have stipulated for extension.

Judgment reversed with directions to dismiss action.

1. Appeal and Error ⇨105, 870(2)

An appeal does not lie from an order denying motion to dismiss, but, on appeal from judgment, court may review such order. West's Ann.Code Civ.Proc., §§ 956, 963.

2. Dismissal and Nonsuit ⇨60(2)

Where statute providing that actions shall be dismissed unless brought to trial within five years after plaintiff filed action except where parties have stipulated that time may be extended is applicable, action must be dismissed if not brought to trial within five years after complaint is filed. West's Ann.Code Civ.Proc., § 583.

* Opinion vacated 311 P.2d 489.

3. Dismissal and Nonsuit ⇨50, 60(1)

Certain conditions may except an action from applicability of statute requiring dismissal of actions not brought to trial within five years after filing unless parties have stipulated for extension, and defendant may waive his rights to a dismissal under that statute. West's Ann.Code Civ. Proc., § 583.

4. Courts ⇨50

One of the reasons for creation of Law and Motion Department was to save time in trial departments and to make it unnecessary to have parties and witnesses present in court room during argument and decision of such motions as one to dismiss for failure to bring action to trial within five years. West's Ann.Code Civ.Proc., § 583.

5. Dismissal and Nonsuit ⇨63

Where intervenor moved for dismissal of action against administrator of estate of decedent for failure to bring action to trial within five years, it was not required that administrator move for dismissal upon same ground, authorities, and arguments as urged in intervenor's motion. West's Ann. Code Civ.Proc., § 583.

6. Dismissal and Nonsuit ⇨50

In action against administrator of estate of decedent to establish trust in real property standing in decedent's name at time of death, administrator's right to dismissal was not waived by proceeding with defense, after denial of intervenor's motion to dismiss for failure to bring action to trial within five years. West's Ann.Code Civ. Proc., § 583.

7. Appeal and Error ⇨870(2)

Upon appeal from judgment for plaintiff in action against administrator of decedent's estate to establish trust in real property standing in decedent's name at time of death, court's failure to dismiss action on intervenor's motion to dismiss for failure to bring action to trial within five years would be reviewed. West's Ann.Code Civ.Proc., § 583.

8. Dismissal and Nonsuit ⇨60(6)

Five year period within which an action may be tried may be extended by written stipulation of parties. West's Ann.Code Civ.Proc., § 583.

9. Dismissal and Nonsuit ⇨60(6)

Action against administrator of estate of decedent to establish trust in real property standing in decedent's name at time of death did not concern a creditor's claim and statute providing that no claim which is barred by statute of limitations shall be approved by administrator did not apply to administrator's stipulation to extend five year period allowed by statute to bring action to trial. West's Ann.Code Civ.Proc., § 583; West's Ann.Prob.Code, § 708.

10. Dismissal and Nonsuit ⇨60(1)

Courts prefer decisions on merits over decisions on technicalities, and statute requiring dismissal of actions not brought to trial within five years after filing unless parties stipulated for extension, like other statutes of limitation, operates regardless of merits or demerits of action. West's Ann.Code Civ.Proc., § 583.

11. Limitation of Actions ⇨1

Statutes of limitation are intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in enforcement thereof.

12. Dismissal and Nonsuit ⇨60(1)

Statute requiring dismissal of actions not brought to trial within five years after filing unless parties have stipulated for extension, was enacted as matter of public policy to fix time within which plaintiff should be required to bring an action to trial. West's Ann.Code Civ.Proc., § 583.

13. Executors and Administrators ⇨75

An administrator's power to deal with property of an estate is limited, and his first duty is to preserve estate's assets for creditors and heirs of decedent.

14. Executors and Administrators ⇨59

Until it has been decided contra by a court of competent jurisdiction, property

possessed by decedent is presumed to have been his.

15. Executors and Administrators ⇨453(1)

An administrator who has a defense is not authorized to default in an action involving either property of the estate or property claimed to have been held in trust by decedent.

16. Executors and Administrators ⇨450

If administrator merely fails to defend an action involving property of estate or property claimed to have been held in trust by decedent, court wherein action is pending may presume that administrator is doing his duty and that he is defaulting in good faith in order to save estate expense of useless litigation.

17. Executors and Administrators ⇨457

If administrator fails to defend action involving property of estate or property claimed to have been held in trust by decedent, heirs may seek to enforce repayment by administrator and may object to his accounting for that purpose.

18. Executors and Administrators ⇨433

Where statute requiring dismissal of actions not brought to trial within five years after filing unless parties have stipulated for extension provided absolute defense to action to establish trust in real property standing in name of decedent at time of death, it was duty of administrator to use that defense. West's Ann.Code Civ.Proc., § 583.

19. Executors and Administrators ⇨433

An administrator has no authority to favor a plaintiff at expense of creditors and heirs by stipulation that action should be tried after expiration of statutory five year period. West's Ann.Code Civ.Proc., § 583.

20. Executors and Administrators ⇨433

Where stipulation of administrator's predecessor that action to impress trust against real property in name of decedent at time of death should be tried after expiration of statutory five-year period was filed five years and almost six months after filing of complaint under the circumstances,

stipulation was in excess of authority of administrator's predecessor and was not effective to except action from operation of statute requiring dismissal of actions not brought to trial within five years after filing unless parties have stipulated for extension. West's Ann.Code Civ.Proc., § 583.

Wm. H. Neblett, Harry W. Dudley, Los Angeles, for appellant.

Leonard D. Nasatir, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant, William H. Neblett, Administrator of the Estate of Eddie Will Sellers, Sr., Deceased, has appealed from the judgment for plaintiff in her action to establish a trust in certain real property standing in decedent's name at the time of his death.

The first ground urged by appellant for reversal is that Section 583 of the Code of Civil Procedure required that the court dismiss the action before trial and its failure to do so was prejudicial error. Respondent contends that said section is not applicable to the instant action for two reasons: (1) defendant made no motion to dismiss before or at the time of trial; and (2) the written stipulation of plaintiff's attorney and the attorney for the former administrator, then the defendant in the instant action, was filed before trial.

October 19, 1949, the complaint was filed naming as defendant Bessie Sellers, Administratrix of the Estate of Eddie Will Sellers, Deceased. Mrs. Sellers was such administratrix from July 12, 1949 until June 4, 1954, when she was removed by court order. Harry Aides was appointed August 4, 1954, and served as such administrator until April 29, 1955, when he resigned with the approval of the court.

Section 583 of the Code of Civil Procedure provides that any action "shall be dismissed * * * by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties

have filed a stipulation in writing that the time may be extended. * * *"

October 19, 1954, the five year period from the filing of the complaint expired.

October 21, 1954, Bessie Sellers filed her complaint in intervention alleging that she, the surviving spouse of decedent, and their minor son, as his heirs, are the real parties in interest, denying some of the allegations of the complaint, and praying that plaintiff take nothing.

April 4, 1955, when the case was called for trial, a written stipulation signed by the then attorney for plaintiff and the attorney for Harry Aides, who was then the administrator and the defendant herein, was filed. That stipulation provides that the trial "be continued until May 23, 1955, or as soon thereafter as may be convenient to the court". On the same day when the continuance was being considered, the court declined to rule on the written objections of the intervenor, Bessie Sellers, and stated that the trial would be continued to May 3, 1955, which would allow sufficient time for a motion to dismiss under Section 583 to be made in the Law and Motion Department.

April 15, 1955, notice of motion to dismiss for failure to bring the action to trial within five years, supporting affidavit and points and authorities were served and filed by intervenor.

April 28, 1955, the motion was denied.

April 29, 1955, William H. Neblett was appointed to succeed Harry Aides as administrator and substituted as defendant in this action.

May 3, 1955, the cause was called for trial and on motion of plaintiff it was then continued to May 26, and the actual trial was commenced May 27th,

[1] An appeal does not lie from an order denying motion to dismiss. Code Civ. Proc., § 963; *Parker v. Owen*, 83 Cal.App. 2d 474, 189 P.2d 81; *Eistrat v. Humiston*, 129 Cal.App.2d 463, 464, 277 P.2d 463; *Obergfell v. Obergfell*, 134 Cal.App.2d 541, 545, 286 P.2d 462. On appeal from the

judgment, however, the court may review such an order as one "which substantially affects the rights of a party." Code Civ. Proc., § 956.

[2] There is no question but that any action to which said section 583 is applicable must be dismissed if not brought to trial within five years after the complaint is filed. *Anderson v. Superior Court*, 187 Cal. 95, 97, 200 P. 963; *Pacific Greyhound Lines v. Superior Court*, 28 Cal.2d 61, 63, 168 P.2d 665.

[3] Certain conditions, none of which have been shown to exist in the instant action, may except an action from the application of section 583, *Christin v. Superior Court*, 9 Cal.2d 526, 530, 71 P.2d 205, 112 A.L.R. 1153; and defendant may waive his rights to a dismissal under the terms of the section.

[4-7] One of the reasons for the creation of the Law and Motion Department was to save time in the trial departments and to make it unnecessary to have the parties and witnesses present in the court room during the argument and decision of such motions as the one made by intervenor in the instant action. The trial judge has before him the record of the making and disposition of such motions. It is not required or expected that motions disposed of before trial shall be repeated at the trial. Nor was it required that defendant, himself, move for dismissal upon the same ground, authorities and arguments as urged in intervenor's motion. The manner in which the expiration of said five year period is brought to the attention of the court is immaterial. When the court becomes aware of the facts it must, if they come within the purview of the statute, dismiss the action. *Smith v. Bear Valley, etc. Co.*, 26 Cal.2d 590, 601, 160 P.2d 1, and cases there cited; *Hunt v. United Artists*, 79 Cal.App.2d 619, 626, 180 P.2d 460. In the instant action, defendant's right to a dismissal was not waived by his proceeding with the defense, and the court's failure to dismiss will be reviewed upon this appeal.

[8] Said five year period within which an action may be tried may be extended by the written stipulation of the parties. Code Civ.Proc., § 583; *Rio Vista Mining Co. v. Superior Court*, 187 Cal. 1, 2, 200 P. 616.

In the instant action when the trial was to commence on April 4, 1955, five years and almost six months after the filing of the complaint, the intervenor objected. The stipulation relied upon by respondent to extend the five year period was filed on that day—whether before or after intervenor's objections is not shown by the record on appeal. However, if an effective stipulation was filed first, the motion to dismiss was properly denied; and, if an effective stipulation was filed after the motion to dismiss was made, the motion was waived and it was proper to proceed with the trial. *Rio Vista Mining Co. v. Superior Court*, 187 Cal. 1, 5, 200 P. 616; *Koehler v. Peckham*, 11 Cal.App.2d 481, 483, 54 P.2d 500.

At that time, appellant was the attorney of record for intervenor and not yet a party to the action. The stipulation was not signed by appellant or by his client. It is contended by appellant that Harry Aides, his predecessor as administrator and as defendant in this action, had no power to waive the rights of the beneficiaries of decedent's estate under section 583, and that consequently the stipulation signed by him was of no force or effect and did not relieve the court of its duty to dismiss the instant action.

[9] It is conceded by respondent that an administrator has no power to waive a statute of limitations with respect to any creditor's claim filed against an estate, Probate Code, section 708. The instant action does not concern a creditor's claim and section 708 of the Probate Code cannot be applied to the facts now engaging our attention.

In *Bryson v. Hill*, 107 Cal.App. 158, 290 P. 52, defendant executor failed to plead the bar of the statute of limitations in an action to establish a trust in personal property possessed by decedent at the time of his death. Judgment for defendant was affirm-

ed on appeal, and, 107 Cal.App. at page 160, 290 P. at page 53, the court said: "And, while the bar of the statute was not pleaded by the defendant executor, it could not be waived by him * * *." See *Reay v. Heazelton*, 128 Cal. 335, 60 P. 977, and *Vrooman v. Li Po Tai*, 113 Cal. 302, 306, 45 P. 470. As said in *Jacobson v. Mead*, 12 Cal.App. 2d 75, 80, 55 P.2d 285, 287, "'The personal privilege of waiving the statute of limitations expired with the decedent and was not transmitted to the administrator or any other person to be exercised for the benefit of barred claimants to the prejudice of creditors.'"

Respondent urges that section 583 of the Code of Civil Procedure is not a statute of limitations, and that the rule laid down in the cases hereinbefore discussed is inapplicable to the instant action.

[10-12] Courts prefer decisions on the merits over decisions on technicalities. Section 583, like other statutes of limitation, operates regardless of the merits or demerits of an action. *City of Los Angeles v. Superior Court*, 185 Cal. 405, 414, 197 P. 79; *Bell v. Solomons*, 162 Cal. 105, 121 P. 377; *Superior Oil Co. v. Superior Court*, 6 Cal.2d 113, 117-119, 56 P.2d 950. Statutes of limitation are "intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof." *Neff v. New York Life Ins. Co.*, 30 Cal.2d 165, 169, 180 P.2d 900, 903, 171 A.L.R. 563. In our opinion, Section 583 was also enacted as a matter of public policy to fix the time within which plaintiff should be required to bring an action to trial.

[13-20] An administrator's power to deal with the property of an estate is limited. His first duty is to preserve the estate's assets for the creditors and heirs of decedent. Until it has been decided contra by a court of competent jurisdiction, the property possessed by decedent is presumed to

have been his. An administrator who has a defense is not authorized to default in an action involving either the property of the estate or property claimed to have been held in trust by decedent. If the administrator merely fails to defend such an action, the court wherein it is pending may presume that he is doing his duty and that he is defaulting in good faith in order to save the estate expense of useless litigation. Then the heirs may seek to enforce repayment by the administrator and may object to his accounting for that purpose. In *re Estate of McSweeney*, 123 Cal.App.2d 787, 793, 268 P.2d 107. Not so, in the instant action. Here section 583 provided the estate with an absolute defense against plaintiff's action and it was the duty of the administrator to use that defense. In *re Estate of Sidebotham*, 138 Cal.App.2d 412, 416, 291 P.2d 965. The stipulation of the administrator that the action should be tried after the expiration of the statutory five year period was an attempt to waive the rights of decedent's creditors and heirs. Both the plaintiff and the court are charged with knowledge that an administrator has no authority to so favor a plaintiff at the expense of the creditors and heirs. Therefore, under the facts of the instant action, we are persuaded that the stipulation relied upon by respondent was in excess of the authority of the administrator and/or his attorney. The stipulation was not effective and did not except the action from the operation of section 583 of the Code of Civil Procedure. The action should have been dismissed before trial.

Having decided that the action should have been dismissed before trial, discussion of the numerous other specifications of error becomes unnecessary.

The judgment is reversed with directions to the court below to dismiss the action.

DORAN and FOURT, JJ., concur.

Morris LAVINE, Plaintiff and Appellant,
v.

Roger JESSUP, Herbert Legg, Leonard Roach and William A. Smith, Individually and as members and former members of the Los Angeles County Board of Supervisors; County of Los Angeles, a Public Corporation and Body Politic; Walt Briggs and Jack Hazzard, Individually and as Partners and Sole Owners of the stock of the Civic Center Auto Park, Inc.; Civic Center Auto Park, Inc.; John Anson Ford, Kenneth Hahn and Burton Chase, as Members of the Los Angeles County Board of Supervisors and Individually; et al., Defendants.

Roger Jessup, Herbert Legg, Leonard Roach, William A. Smith, Deceased; County of Los Angeles; Walter M. Briggs, sued as Walt Briggs; and Civic Center Auto Parks, a corporation, sued as Civic Center Auto Park, Inc., Respondents.*

Civ. 21759.

District Court of Appeal, Second District,
Division 1, California.

Nov. 2, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Granted Dec. 19, 1956.

Proceeding on motion to dismiss appeal from judgment of the Superior Court of Los Angeles County, Bayard Rhone, J., that dismissed appellant's fourth amended complaint. The District Court of Appeal, White, P. J., held that where trial court's action in sustaining demurrer to fourth amended complaint without leave to amend was immediately entered in the minutes of the court and subsequently court signed a formal judgment of dismissal, since formal judgment was contemplated by the parties time for filing notice of appeal was to be computed from date such formal judgment was signed and filed.

Motion denied.

Appeal and Error ☞423(2)

Where trial court granted order sustaining demurrer to fourth amended complaint without leave to amend and such order was entered in minutes of court on such date and court subsequently signed a

formal judgment of dismissal and filed same, time within which notice of appeal had to be filed, was to be computed from the date of entry and filing of formal judgment rather than entry of order on court minutes. West's Ann.Rules on Appeal, rules 2, 3; West's Ann.Code Civ.Proc., §§ 581d, 668.

Morris Lavine, Los Angeles, in pro. per.

Harold W. Kennedy, County Counsel, Iver E. Skjeie, Deputy County Counsel, Los Angeles, for respondents, Roger Jessup, Herbert Legg, Leonard Roach, William A. Smith, deceased, and County of Los Angeles.

Wm. J. Cusack, Los Angeles, for respondents, Walt Briggs, and Civic Center Auto Parks.

WHITE, Presiding Justice.

Respondents move to dismiss the appeal herein upon the ground that the notice of appeal from the order dismissing appellant's fourth amended complaint was filed more than 60 days after the entry of such order.

The record reflects that on November 8, 1955, the court granted the motions of respondents, Walter M. Briggs and Civic Center Auto Parks, a corporation, sued herein as Civic Center Auto Park, Inc., to dismiss appellant's fourth amended complaint and sustained without leave to amend, the demurrer of said respondents.

On the same date the court granted the motion of the remaining respondents "to strike fourth amended complaint and/or to dismiss action", and also sustained, without leave to amend, the demurrer of said last-named respondents. The foregoing order was entered November 10, 1955.

On November 22, 1955 the court signed and filed its "Judgment of Dismissal" which recited that the foregoing motions and demurrers having come on regularly for hearing on November 8, 1955, and "the court having sustained said demurrers without leave to amend and having granted said

* Opinion vacated 311 P.2d 8.

motions by order duly made. *Now Therefore, It Is Ordered, Adjudged and Decreed* that plaintiff's Fourth Amended Complaint be, and the same is hereby stricken and the action dismissed" as to all respondents. This judgment was entered on November 28, 1955. On January 19, 1956, there was filed in the Office of the County Clerk of Los Angeles County, appellant's notice of appeal "from the judgment and order filed November 22, 1955 and entered November 28, 1955 sustaining the demurrers in the above-entitled action without leave to amend and striking the last amended complaint from the files".

It is respondents' contention that the foregoing order of the trial court dismissing appellant's fourth amended complaint was a final judgment and that time for appeal therefrom expired 60 days after November 10, 1955, the date of the entry of the order of dismissal in the minutes of the court, or on the 9th day of January, 1956. Appellant argues that the final action in this case was the signing and filing of the formal judgment of dismissal and that until such formal judgment was signed the order upon which it was based was interlocutory in character and that no appeal lies from such an order.

Rule 2 of Rules on Appeal provides that notice of appeal shall be filed within 60 days after the entry of judgment unless the time is extended, as provided in Rule 3. Rule 2 also provides that the "date of entry" of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes, unless such minute order as entered expressly directs that a written order be prepared, signed and filed.

Respondents rely on the provisions of Section 581d of the Code of Civil Procedure which provides in part as follows:

"All dismissals ordered by the court shall be entered upon the minutes thereof or in the docket in the justice court, as the case may be, and such orders when so entered shall constitute judgments and be effective for all purposes, * * *."

We are satisfied that the rule for dismissals under Section 581d of the Code of Civil Procedure does not apply to the instant case wherein the ruling of the court was a final judgment on the pleadings of the relative rights of the parties insofar as this action is concerned. We are also persuaded that the case of *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, 152 Cal. 344, at page 347, 92 P. 868, is directly in point and the opinion in that case discusses at length why Section 581 et seq. of the Code of Civil Procedure do not apply to or embrace a court's action on the sustaining of a demurrer without leave to amend, and it repeatedly speaks of those sections as "special provisions", making it clear that they are exceptional. Also, at 2 Cal.Jur., pp. 402-403, in discussing dismissals under Section 581 et seq. of the Code of Civil Procedure, where minute orders are treated for purposes of appeal the same as final judgments, it is said: "This rule does not, however, apply to a judgment on a demurrer, though the judgment declares that the action be dismissed, for whether a judgment on demurrer declares that the plaintiff take nothing, or that the action abate, or that the action be dismissed, it is a final judgment on the pleadings of the relative rights of the parties so far as the particular action is concerned, and, therefore, no appeal lies from such a judgment until it is entered in the judgment-book." Citing *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.*, supra.

Where as here, a formal judgment was contemplated by the parties and later signed by the judge it is *prima facie* the decision or judgment of the court rather than a minute order, and satisfies the requirements of Rule 2 of Rules on Appeal. Since such formal judgment was signed and filed November 22, 1955 and entered in the "Judgment Book" as provided by Section 668 of the Code of Civil Procedure on November 28, 1955, it is manifest that the notice of appeal filed January 19, 1956 was timely.

Appellant's request to supplement his opening brief to set forth additional grounds

why the court below erred in sustaining the demurrer to the fourth amended complaint without leave to amend, and entering a judgment of dismissal as to the fourth amended complaint, and to amend the prayer of said opening brief is granted, and appellant may have 30 days from and after the filing of this opinion within which so to do.

The motion to dismiss the appeal is denied.

DORAN and FOURT, JJ., concur.



Russell W. MOONEY and William K. Hern-
don, Petitioners and Respondents,

v.

BARTENDERS UNION LOCAL NO. 284, an
unincorporated association, and Earl Hy-
att, Secretary-Treasurer of Bartenders
Union Local No. 284, an unincorporated as-
sociation, Defendants and Appellants.*

Civ. 21568.

District Court of Appeal, Second District,
Division 1, California.

Oct. 29, 1956.

Rehearing Denied Nov. 21, 1956.

Hearing Granted Dec. 24, 1956.

Proceeding for writ of mandate to permit member of union to inspect books of account, records, papers and documents of said union during certain period. The Superior Court of Los Angeles County, Clarence M. Hanson, J., granted requested writ of mandate and union appealed. The District Court of Appeal, Fourt, J., held that where union member merely sought to annoy and harass union by such inspection, and had failed to exhaust remedies provided within union itself for such inspection, and in addition failed to allege any necessity for such inspection, writ of mandate would not lie.

Reversed and remanded with directions.

* Opinion vacated 313 P.2d 857.

1. Labor Relations ⇨92

Constitution and bylaws of international and local unions constituted a contract between members of union and the unincorporated association and were binding upon the members, and such constitution and bylaws must of necessity be read together to determine their meaning and force.

2. Contracts ⇨143, 152

A court in interpreting a contract should follow statutes providing that language of a contract must control its interpretation when its diction is clear, reasonable and explicit and is in harmony with general purpose of the agreement, and should not make a new contract or rewrite or alter by construction what has been agreed to by the contracting parties. West's Ann.Civ.Code, §§ 1638, 1641.

3. Mandamus ⇨1, 168(4)

Mandamus is an extraordinary remedy which is equitable in nature and the necessity of issuing the writ should be clearly established.

4. Mandamus ⇨7, 10, 168(2)

The granting of a writ of mandate is discretionary and will be granted only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if said writ is denied, and thus a petitioner upon application must show that as a result of a failure to grant such writ, he will suffer some substantial damage.

5. Mandamus ⇨12

Mandamus lies only to enforce performance of an act which the law enjoins.

6. Mandamus ⇨122

Mandate is available in California against an unincorporated association.

7. Mandamus ⇨154(4)

Although expulsion from a union would ordinarily seriously affect a workman's livelihood and injury from such course of conduct for all intents and purposes, would be irreparable and mandamus would quite properly lie, such fact does not mean that right should be extended

to include right to examine all and every book, record, document and account of a union over a nine-year period and such right should especially not be extended to include such examination in absence of any pleading in reference to the necessity for it.

8. Mandamus ⇨164(4)

Affirmative allegations of an answer to mandamus if not demurrable, are to be taken as true, unless they are countervailed by proof presented by the petitioner.

9. Labor Relations ⇨100

Member of union is not entitled to inspect books of the labor union on ground union has attributes of partnership and therefore, because partner has right to have access to and inspect books of partnership, union member has right to inspect books of union, as a labor union is not a partnership. West's Ann. Corporation Code, § 15019.

10. Associations ⇨7

Statute authorizing shareholder of corporation to inspect records of such corporation has no application to unincorporated associations. West's Ann. Corporation Code, § 3003.

11. Mandamus ⇨13, 15, 154(4)

Where union member, who sought inspection of books of account, records, papers and documents of the union, merely sought such inspection to harass and annoy union, and therefore came into court with unclean hands, and also had failed to exhaust remedies within union itself to obtain such inspection, and in addition failed to allege any serious necessity for such inspection, writ of mandate permitting such inspection would not lie.

Alexander H. Schullman, Abe Mutchnik, Los Angeles, for appellants.

Harry W. Dudley, Los Angeles, for respondents.

Elmer H. V. Hoffman, Los Angeles, amicus curiae.

FOURT, Justice.

This is an appeal from a judgment wherein it was directed that a writ of mandate issue in favor of respondent Russell W. Mooney to permit him and/or his agent "to inspect all books of account, records, papers and documents of said (appellant) Union from July 1, 1947, to the date of this judgment, and to permit said (respondent Mooney) and/or his said agent to make copies of all or any part of said books of account, records, papers and documents, * * *."

Respondent Mooney is a member of the appellant Union in good standing. The appellant Union is a local subsidiary of the Hotel and Restaurant Employees and Bartenders International Union, A. F. L., with headquarters in Cincinnati, Ohio.

Mooney filed a petition for a writ of mandate on July 21, 1955, and prayed for an order substantially like the one which was granted. The petition set forth that he was entitled to examine the items in question "by virtue of * * * membership in said Union".

The Union filed an answer and a demurrer to the petition, simultaneously, on August 23, 1955. In the answer it was set forth that "at all times, monthly and quarterly reports setting forth the monthly records from the books and records of the Union showing statement of receipts and disbursements and statement of financial condition, and quarterly and audit report is prepared by a certified public accountant, and that both the monthly and quarterly reports are read at the meetings of the membership of the respondent union and then posted, available for the inspection of the general membership. Respondents further allege that such monthly and quarterly reports at all times have been read at all such meetings of the membership and have been available and now are available to petitioners, and that in fact petitioner Russell W. Mooney has read and made copies, as respondents are informed and believe, and therefore allege, of the monthly and quarterly report within the

last twelve months of the respondent union."

It was further set forth that respondents had failed to exhaust their internal remedies within the International, that respondents were on a "fishing expedition", and that respondents came into court with "unclean hands". In this connection, appellants allege: "That petitioner Russell W. Mooney has for many years harassed, vexed, annoyed and sued the respondent union, Local No. 284 at great cost to the union, has publicly defamed the local and its officers without in fact, as required by the Constitution of the International, 'Exhibit D' hereof, filing any charges against any officers or taking any action within the Union or the International; that the present petition is but an additional factor to expose the respondent union local to great expense in defending the action, without any purpose whatsoever consistent with the right of membership. That in addition, petitioner Russell W. Mooney has engaged in assault and battery with a member of the respondent union based upon petitioner's action previously filed, as set forth above in Superior Court; and that all these things have been done for the purpose of damaging, affecting, injuring and harassing the union and preventing its operation in the ordinary course of business; and that therefore, petitioners came into court with unclean hands and their petition should be denied."

The matter was submitted to the trial judge without argument on August 24, 1955, and on the same day the judge issued an order that the demurrer be overruled and that the writ be granted. Findings of fact and conclusions of law were filed on September 6, 1955. In the findings the judge found, among other things, that the reports to the general meetings alleged were not sufficient to preclude a member from inspecting the books of account, records, papers and documents of said Union and "that it is not true that the quarterly financial reports and monthly reports mentioned in paragraph III and IV of the answer herein set forth sufficient detail with

respect to the financial business of respondent Union so as to properly advise each and every member of respondent Union."

The findings then set forth, in effect, that respondents had exhausted their internal remedies within the Local and International by stating, "* * * but that there are no internal remedies provided by respondent Union or its said parent organization for the purpose of affording a member of respondent Union an inspection of the books of accounts, records, papers and/or documents of respondent Union."

Thereafter, it was found that it was not true that respondents were on a "fishing expedition", or that they had come into court with unclean hands.

[1] Appellants first contend that the constitution of the International and the bylaws of the Local constitute a contract between the Union and the respondents, and exactly define the rights and powers in reference to the examination of the books, etc., of the Local. The articles and the constitution and the bylaws of the International and Local do constitute a contract between the members and the unincorporated association and are binding upon the respondents. *De Mille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 146, 187 P.2d 769, 175 A.L.R. 382. The constitution and bylaws must of necessity be read together to determine their meaning and force. The documents in question appear to us to be clear and unambiguous and spell out the rights and duties of the respective parties. It was appropriately said in *Sass v. Hank*, 108 Cal.App.2d 207, 215, 238 P.2d 652, 657:

[2] "The language of a contract must control its interpretation when its diction is clear, reasonable and explicit and is in harmony with the general purpose of the agreement. Civil Code, secs. 1638, 1641. It is the function of a court to follow this rule and not to make a new contract or to rewrite or alter by construction what has been agreed to by the contracting parties."

And in *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal.App.2d 141, 147, 113 P.2d 878, 881, the court stated:

"Moreover, as set forth in 12 *American Jurisprudence*, page 749: 'A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties.'"

[3] Appellants then contend that the respondents made no showing of any equitable right to the relief sought, their being no pleading or proof of any necessity or imminent, irreparable damage. Mandamus is an extraordinary remedy which is equitable in nature and the necessity of issuing the writ should be clearly established. In *Ault v. Council of City of San Rafael*, 17 Cal.2d 415, at page 417, 110 P.2d 379, at page 380, the court said:

[4] "The granting of a writ of mandate is discretionary and it will be granted only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if said writ is denied. [Citing cases.] It therefore follows that a petitioner upon application must show that as a result of a failure to grant such writ, he will suffer some substantial damage."

[5] Further, the cases are clear to the effect that mandamus lies only to enforce the performance of an act which the law enjoins. *Bollotin v. Workman Service Co.*, 128 Cal.App.2d 339, 275 P.2d 599; *Noble v. California Prune & Apricot Growers Association*, 98 Cal.App. 230, 276 P. 636.

Cal. Rep. 301-302 P.2d—69

In 137 A.L.R. 311, 312, the general rule with reference to the use of mandamus against unincorporated associations or its officers is stated as follows:

"As a general proposition the proper function of mandamus is to compel inferior or subordinate tribunals and all others exercising public authority to do their duty. It is not available as a remedy between individuals to enforce purely private rights, and as a general rule, will not lie to compel the performance of purely contractual obligations. 34 Am.Jur. 879, *Mandamus*, § 91.

"Specifically, as to unincorporated associations, it has been held generally, although not universally, that mandamus will not lie against an unincorporated association or its officers, and will not be awarded to regulate the internal affairs of the association or to review the decisions of its self-created tribunal, at least in the absence of statutory authorization."

The rule in California is set forth clearly in *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal.2d 134, 140, 231 P.2d 6, 9, 21 A.L.R.2d 1387, where it is said:

[6] "It is clear that mandate is available in this state against an unincorporated association. [Citing cases.]"

In six of the cases cited the problem dealt with the expulsion of a member; in one the question was in reference to the removal of an officer of the union from his office and damages for the unexpired term; and one was with reference to an out-of-state applicant seeking membership where the court held that to prevail he must show that he is entitled to membership and that he is being arbitrarily kept out. There is, however, a marked difference between the cases just referred to and the case at hand.

[7] Expulsion from a union would ordinarily seriously affect a workingman's very livelihood and the injury from such a course of conduct, for all intents and purposes, would be irreparable and mandamus quite properly should lie. However, that does not mean that the right

should be extended to include the right to examine all and every book, record, document and account of a union over a nine-year period. And certainly the right should not be extended in the absence of any pleading in reference to the necessity therefor.

[8] Appellants also contend that respondents come into this case with "unclean hands". The allegations of appellants in their answer in this connection were in no way controverted, and the rule is that affirmative allegations of an answer, if not demurrable, are to be taken as true, unless they are countervailed by proof presented by the petitioner. *Loveland v. City of Oakland*, 69 Cal.App.2d 399, 404, 159 P.2d 70; *Vanderbush v. Board of Public Works*, 62 Cal.App. 771, 775, 217 P. 785; *Friedland v. Superior Court*, 67 Cal.App.2d 619, 623, 155 P.2d 90. As said in *Brown v. Superior Court*, 10 Cal.App.2d 365, 368, 52 P.2d 256, 258:

"The application for the writ [of mandate] having been submitted on the petition and the answer thereto, we must accept the allegations in the answer as true."

Appellants also assert that the respondents have a further source of remedy within the International itself, and therefore their resort to the courts is premature. The respondent appealed to the General President of the International, and received a reply to the effect that he could inspect the quarterly financial reports of the Local at any time, and that with regard

to any other records of the Local Union, those were the property of the Local and inspection of them was subject to the policy of the Local Union. The court's finding in this connection apparently failed to take into consideration the sections of the constitution set forth below.¹ There was no showing whatsoever in this case that respondents sought to take their grievance to the General Executive Board as is required by the constitution. The Supreme Court recently stated in *Holderby v. International Union, etc., Engrs.*, 45 Cal.2d 843, at page 846, 291 P.2d 463, at page 466:

"It is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance. [Citing cases.] This rule is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (see 2 Cal.Jur.2d 304), and to the rule requiring the parties to a contract for arbitration of disputes to exhaust those remedies before seeking judicial relief. [Citing cases.] Such rules are based on a practical approach to the solution of internal problems, complaints and grievances that arise between parties functioning pursuant to special and complex agreements or other arrangements. They make possible the settlement of such matters by simple, expeditious and inexpensive procedures, and

1. Article XX, Sec. 20. "*Obligation to Exhaust Remedies.* Every member or affiliate of the International Union feeling aggrieved by any action taken or failure to act by the International Union, its officers, or any subordinate affiliate of the International Union, or the officers or members thereof, with respect to any matter or thing relating to or affecting the affairs of such International Union or affiliate or with respect to the trial of charges or appeals therefrom, shall be required to exhaust all remedies of appeal and protest permitted

such member or affiliate under the terms of this Constitution before resorting to any court or other tribunal."

Article XX, Sec. 12. " * * * Decisions of the General President may be appealed to the General Executive Board, and Decisions of the General Executive Board may be appealed to the Convention."

Article XX, Sec. 13. " * * * A member shall be deemed to have exhausted his remedies of appeal, in accordance with the requirements of Section 20 hereof, following an appeal to the General Executive Board."

by persons who, generally, are familiar therewith. Such internal remedies are designed not only to promote the settlement of grievances but also to promote more harmonious relationships, and the courts look with favor upon them."

[9] The respondents admit that there is no statute in this state giving the member of an unincorporated association the right to inspect its books and records. They do, however, contend that because an incorporated association partakes of some of the attributes of a partnership, and a partner has a right to have access to and inspect the books of the partnership, Corporations Code, § 15019, therefore, a member of an unincorporated association should have the same right. A complete answer to such contention is made in the cases cited by respondents. In *Deeney v. Hotel & Office Employees' Union, etc.*, 57 Cal.App.Supp.2d 1023, 1026-1027, 134 P.2d 328, 330, the court said:

"* * * labor unions not being organized to carry on a business for profit do not constitute partnerships. Civ.Code, section 2400. Also see *Brower v. Crimmins*, 67 Misc. 68, 121 N.Y.S. 648.

"A contention somewhat similar to the one here made by defendants was advanced in the comparatively recent New York case of *People v. Herbert*, 162 Misc. 817, 295 N.Y.S. 251, 253. The defendants in that case had been indicted for the embezzlement of funds of a certain union. They set up the defense that they were not subject to prosecution by reason of the fact that the union was a partnership and that they, being members of that partnership, had title to the funds of the union jointly with all of the members. The court held that the contention was unsound. Said the court:

"It may be conceded that partnerships and labor unions have some characteristics in common. Thus, they are both unincorporated associations; and their members have a peculiarly distinctive form of joint title to their respective property, although

in neither case is the title that of joint tenants or of tenants in common.

"But there are at the same time certain important differences between them. The purpose of a partnership is essentially to enable its members, as principals, to conduct a lawful business, trade, or profession. Such business, trade, or profession is to be carried on for the pecuniary gain of the partners. No one may become a partner without the consent of all the partners. In our state, this rule is a statutory one, for the Partnership Law, § 40, subd. 7, provides that: "No person can become a member of a partnership without the consent of all the partners."

"This principle of personal selection of one's partners is substantially the doctrine of *delectus personarum*. Sugarman, *Law of Partnership*, § 22. The number of members in a partnership is invariably small.

"On the other hand, a labor union is a combination of working men formed, not for the conduct of a lawful business, trade or profession for the pecuniary gain of its members; but for the purpose of securing, by united action, the most favorable wages and conditions of labor, and of otherwise improving their economic and social status.

* * * It is well known that the membership of labor unions in many instances runs into the thousands; their members are widely scattered and have not the facilities and opportunities for daily collaboration which partners have. Furthermore, the principle of personal selection which is an indispensable one in the case of a partnership does not apply to a labor union, for it is not required that one may become a member thereof only with the consent of all the other members."

In 5 Cal.Jur.2d 499, in the article on "Associations and Clubs", there is language appropriate to the point, where it is said:

"In the case of unincorporated nonprofit associations the statute provides that the members are not personally liable on certain types of contracts. These are debts or liabilities contracted or incurred by the

association in the acquisition of land or leases or the purchase, leasing, designing, planning, architectural supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purpose of the organization. (Corp. Code Sec. 21100.) However, the members may assume a personal liability, by a written contract, note, or memorandum which specifically identifies the contract assumed and is signed by the assuming party or by his agent. (Corp. Code Sec. 21101.)

"The rule is declared by statute that no presumption or inference exists that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association or signing its bylaws. (Corp. Code Sec. 21102.)"

And on page 493 (5 Cal.Jur.2d) it is said:

"In any case, the property of an association is in fact the property of its members, owned beneficially by them in equal shares and devoted to their common use. The interest of each member is subject to the right of the trustees, governing committee, or other board of control, to make such use or disposition of the property as the laws of the organization provide, and the members have no severable or individual interest therein."

Here there is no showing whatsoever that as a member of the appellant Union, respondents are personally liable to anyone upon any contract or otherwise.

[10] Respondents would have the court apply the rules of section 3003 of the Corporations Code, which has to do with corporations, to unincorporated associations. That section makes no mention of unincorporated associations and we have no doubt that if the Legislature had intended to include such groups under the rules therein set forth, it would have said so.

[11] For the reasons herein set forth we are of the opinion that the writ of mandate should not lie under the facts and circumstances as are present in this case.

The judgment is reversed and the cause remanded with directions to the court below to deny the writ of mandate prayed for.

WHITE, P. J., and DORAN, J., concur.



145 Cal.App.2d 640

Orville SPRINGER, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Appellant.

Civ. 8734.

District Court of Appeal, Third District, California.

Nov. 5, 1956.

Suit under Federal Employers' Liability Act for personal injuries sustained by employee. From a judgment of the Superior Court, Sacramento County, John Quincy Brown, J., for the employee, the employer appealed. The District Court of Appeal, Peek, J., held that where complaint alleged general damages as well as special damages for loss of earnings and for future medical expense but the amounts of these items were left blank, answer denied special and general damages, and during trial no question was raised concerning the medical proof offered showing employee might develop traumatic arthritis and ankylosis of the knee joint, employer for the first time on appeal could not complain that such evidence lacked the necessary degree of certainty.

Judgment and orders affirmed.

1. Master and Servant §286(17)

In action under Federal Employers' Liability Act for personal injuries sustained when employee fell from ladder on

which he was standing in order to rivet sheets on employer's box car, question of whether employer railroad had reasonably complied with all of its duties in providing employee with safe appliances and equipment and with a safe place to work, was for the jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and Servant ⇨90, 96(1)

The Federal Employers' Liability Act does not make the employer the insurer of the safety of his employees, but employer is liable for its negligence which is in whole or in part the cause of the injury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⇨228(1) Negligence ⇨101

Under Federal Employers' Liability Act, unless conduct of employee was the sole and proximate cause of his injuries, employee's contributory negligence would not bar recovery but is merely a ground for diminishing the amount of recovery. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Appeal and Error ⇨204(7)

Where complaint alleged general and special damages for loss of earnings and for future medical expenses sustained when employee fell from ladder but the amounts of these items were left blank, employer's answer merely denied the same, and during trial no question was raised by employer to medical evidence that employee might develop traumatic arthritis and ankylosis of the knee joint, employer could not complain for the first time on appeal that such evidence lacked the necessary degree of certainty.

Devlin, Diepenbrock & Wulff, Sacramento, for appellants.

Thomas C. Perkins, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendant from certain orders and the judgment rendered at

the conclusion of the trial of an action brought by plaintiff under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. The action arose out of an injury suffered by plaintiff when he fell from a ladder while doing repair work on a box car in defendant's Sacramento shops. Following a verdict in plaintiff's favor, defendant moved for a judgment notwithstanding the verdict, which was denied. After the entry of judgment, defendant renewed its motion for judgment notwithstanding the verdict and moved for a new trial. Both motions were denied and defendant appealed. We have concluded the trial court was correct, and the judgment must be sustained.

Plaintiff's complaint contained three causes of action: First, that " * * * plaintiff was required to and was engaged in standing on a ladder riveting sheets on defendant's box car; that due to and as a direct and proximate result of negligence of defendant in said matters plaintiff was caused to fall * * *;" second, that " * * * at said time and place defendant was negligent in failing to provide plaintiff with safe appliances and equipment with which to perform his work and duties * * *;" and third, that " * * * at said time and place defendant negligently failed to provide plaintiff a safe place in which to work * * *" As to each count, plaintiff alleged general damages as well as special damages for loss of earnings and for future medical expense. The amounts of these items were left blank. At the time of trial plaintiff inserted the amount of special damages claimed for lost earnings, but in both the body of the complaint and in the prayer, he left blank the amount sought for future medical expense. Defendant's answer denied generally the allegations of the complaint.

On appeal defendant contends (1) that there was no substantial evidence of negligence under any of the three causes of action set forth; (2) that at least one of the three causes was improperly submitted to the jury; and (3) that it was prejudicially

improper for the court to instruct the jury that it could return a verdict including damages for future medical expense.

The record, viewed in the light most favorable to plaintiff, discloses that for some days prior to the accident plaintiff, with three other employees, had been engaged in repairing one of defendant's box cars, and in particular in riveting steel side plates, 42 to 45 inches wide, on said car. The flooring of the car at the end where plaintiff was working had been removed. In order to carry out his duties as a riveter, he had placed two "grain boards" lengthwise on the exposed steel frame of the car. These boards were approximately seven feet long and from 18 to 24 inches wide. In order to reach the top row of rivets on the steel plate which was then being put in place, plaintiff had placed a ladder on the two grain boards. At the base of the ladder there were prongs to hold it securely on the boards. The crew with which plaintiff was working consisted of one man to heat the rivets, another one to place the rivets in the plates and a third man to hold the rivets in place while plaintiff riveted them from the inside of the car. Plaintiff, as the riveter, worked alone in the car, and the remaining members of the crew worked on the outside. The speed at which plaintiff worked was controlled by the speed at which the rivets were inserted from the outside. By placing the grain boards lengthwise of the car it was easier for him to keep pace with the crew since it was necessary to move the ladder only as he progressed along the top row of rivets, whereas had the grain boards been placed crosswise, it would have been necessary to move them as well as the ladder each time his position was changed. Plaintiff was approximately five feet, 10 inches tall and weighed 210 to 215 pounds. At the time of the accident he was using a riveting gun weighing 45 to 50 pounds, to which was attached a 50-foot hose of undisclosed weight. Plaintiff had worked continually as a riveter for approximately five or six months and for nearly a year before had worked intermittently in this

same capacity. He had not been instructed how to rivet or how to place the grain boards in any particular fashion while riveting from the inside of a car. One Gorman who bucked the rivets from the outside of the car and alternated with plaintiff in that job and in driving the rivets, testified he likewise had received no instruction in these matters. However, at the time of his employment plaintiff had received and read a pamphlet entitled, "Safe Working Methods for the Guidance of Employees in Maintenance and Equipment Department." It was therein set forth in part that ladders should be securely placed to prevent slipping or falling, and when used on concrete, metal, tile or other hard surfaces, the same should be secured by chains or ropes to prevent slipping and should not be placed in any precarious position when used. One of defendant's witnesses testified that there were times when a "standee" could not be used, and when such an occasion arose another employee would hold the ladder.

Both plaintiff and Gorman testified that for at least a week prior to the accident plaintiff had riveted from a ladder set on grain boards, placed lengthwise on the underframe; that it was necessary to follow this practice in order to reach the rivets along the top of the plate and to keep pace with other members of the gang outside the car. James Kirby, who had left defendant's employ approximately nine months before the accident, and who had been a welder for defendant, testified that in defendant's shop he had observed riveting from a ladder placed on grain boards lengthwise in a car. Frank Miller, the foreman directly in charge of plaintiff's crew, testified in his deposition that it would be necessary to use a ladder to drive the top rivets. At the trial, when his attention was directed to his former testimony he said, "Yes, he was working in an unsafe manner. If I replied in that way I made that statement as referring to our safety rules." Another member of plaintiff's riveting gang at the time of the accident, Albert Sylve, testified that in order

to drive certain rivets, a ladder was necessary. The record further developed that it was the duty of the foreman, Miller, to see that the riveting job was properly set up. He testified that three weeks prior to the accident he had observed plaintiff riveting from a ladder and had requested him to get a "standee." Miller's testimony in this regard was corroborated by the witness Goodnight, a lead workman. A standee as referred to by Miller is a four-legged wooden platform approximately eight feet long by 20 inches wide with legs tapering to approximately a three-foot spread at the bottom, and is from four to six feet high. The foreman testified further that on the morning of the accident he saw plaintiff two or three times prior to the injury and the last occasion was approximately 15 minutes to one-half hour before the accident. He observed the two grain boards placed lengthwise on the under-frame but he did not see any standee in the car. A further witness for defendant, Harry J. Hitke, general foreman, together with Miller testified that the custom and practice in defendant's shop at the time of the accident was to rivet from standees and never from ladders.

In support of its first contention, that there was no substantial evidence of any negligence on its part under any cause of action which was a proximate cause of plaintiff's injury, defendant argues that the plaintiff was not required to use a ladder for riveting; that it had provided plaintiff with reasonably safe appliances and equipment; and that defendant is not liable for the dangers inherent in the repair of a box car or resulting from plaintiff's arrangement of his equipment; and that plaintiff's conduct was the sole and proximate cause of the injury.

[1-3] Despite the conflicts, it cannot be said that there was not sufficiently substantial evidence on each of the three causes to justify submitting each to the jury. Necessarily, therefore, this court cannot hold as a matter of law that the defendant

railroad had reasonably complied with all of its duties in providing plaintiff with safe appliances and equipment and with a safe place in which to work, or that the injuries were caused solely by plaintiff's conduct. The province of this court in reviewing the evidence on appeal is the same as under the federal rule, *Waddell v. Chicago & E. I. R. Co.*, 7 Cir., 142 F.2d 309, and while it is true that the act does not make the employer the insurer of the safety of his employees, nevertheless he is liable for his negligence which must be in whole or in part the cause of the injury. *Ellis v. Union Pacific R. Co.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572. Under this rule the contributory negligence of an employee is merely a ground for diminishing the amount of recovery. Hence, even assuming that the acts of plaintiff contributed to the accident, unless it could be said as a matter of law that such acts were the sole and proximate cause of his injuries, his contributory negligence would not bar a recovery. But as we have previously noted, there was ample evidence from which the jury could infer that plaintiff's duties compelled him to use the equipment as he did, and that the defendant, having knowledge of the conditions existing where plaintiff was working, did not exercise due care under the circumstances.

What has heretofore been said concerning defendant's first contention is likewise decisive of its second. It is defendant's argument that this case must be reversed because "* * *" at least one of the several counts was improperly submitted to the jury." The essence of defendant's contention in this regard as stated is: "Assuming that it [this court] found only one cause of action unsubstantiated, the controlling federal rule requires a reversal." Whether we agree with the cases cited and relied upon by defendant becomes immaterial since, as we have heretofore concluded, each cause was amply supported, and hence any further discussion concerning this contention would be wholly academic in that it would of necessity be predicated

upon an assumption not borne out by the record that at least one cause was not substantiated by the evidence.

[4] It is defendant's final contention that "[i]t was prejudicially improper to instruct that the jury could return a verdict including damages for future medical expenses, because they were misleadingly pleaded, not proved as to necessity or amount, and there was no trial of the issue." Again we find no error in this regard. It is true that the complaint provided generally for the recovery of medical expense but left a blank for the insertion of the amount thereof, as well as a blank for the amount of alleged earnings lost. At the time of trial plaintiff inserted the amount of special damages claimed for loss of earnings, but left blank both in the body of the complaint and in the prayer the amount of alleged future expense. At the conclusion of the trial the court instructed the jury in part as follows:

"* * * you shall determine each of the items of claimed detriment which I now am about to mention, *provided* that you find it to have been suffered by him, and as a proximate result of the concurring negligence of the plaintiff and the defendant.

"The reasonable value, *not exceeding the cost* to said plaintiff, of the examinations, attention and care by physicians and surgeons reasonably certain to be required, and to be given in his future treatment, *if any*; and including in such care X-ray pictures, *if any*, reasonably necessary.

"The reasonable value not exceeding the cost to said plaintiff of the services of nurses, attendants and hospital accommodations, and care, reasonably certain to be required or to be given in his future treatment, *if any*." (Emphasis added.)

At the outset it is difficult to understand why this particular form of pleading was followed by plaintiff since, if future medi-

cal expense was anticipated, the exact amount thereof could not have been known beforehand. However, as previously noted, plaintiff's complaint alleged that further treatment would be necessary in an amount not then ascertainable and that when it was so ascertained, such amount would be inserted in the complaint. The prayer also left a blank for insertion of such amount. Defendant did not question the propriety of such allegations but merely answered denying the same and praying that plaintiff take nothing. On the issues so joined, the cause proceeded to trial. During the course of the examination of an orthopedic surgeon called by plaintiff, it was disclosed that plaintiff's condition might become worse and that traumatic arthritis might develop. The doctor called by defendant testified that plaintiff might develop an ankylosis of the knee joint. No question was raised by defendant when either of the doctors called so testified.

Thus, since it appears that from the outset defendant was advised that plaintiff would claim future damages as a proximate result of his injury and since evidence was introduced in support thereof, it cannot now for the first time on appeal complain that such evidence lacks the necessary degree of certainty. *McDonald v. Standard Gas Engine Co.*, 8 Cal.App.2d 464, "* * * none of the evidence quoted was objected to. No ruling was asked of or made by the trial court." Defendants introduced no evidence rebutting the above excerpts. Under these circumstances we think the provisions of section 3283 of the Civil Code were complied with." *McDonald v. Standard Gas Engine Co.*, *supra*, 8 Cal.App.2d at page 477, 47 P.2d at page 783. This rule has also been followed in the federal courts. See *Reading Co. v. Geary*, 4 Cir., 47 F.2d 142, 79 A.L.R. 226.

The judgment and orders are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Irving ARENSON, Plaintiff and Appellant,

v.

NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO., a California corporation, Defendant and Respondent. *

Civ. 21839.

District Court of Appeal, Second District,
Division 2, California.

Oct. 31, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Granted Dec. 24, 1956.

Action by attorney to recover attorney's fees from his client's insurer, which refused to defend action although obligated to do so under policy. The Superior Court of Los Angeles County, Philip H. Richards, J., entered judgment awarding attorney a fee of \$175, with interest at rate of six per cent, and attorney appealed. The District Court of Appeal, Ashburn, J., held that record disclosed trial judge did not abuse his discretion in fixing the attorney's fee at \$175, and that error in judgment which carried only six per cent interest instead of the statutory seven per cent orally awarded by the court, would be corrected.

Judgment affirmed as modified.

Fox, J., dissented.

1. Attorney and Client ⇨140

The nature of litigation, its importance and difficulty, the time consumed, attorney's overhead expense, the skill required and employed, attention given, attorney's professional standing, success or failure of his efforts, contingent character of his compensation, the agreed fee and his age and experience are elements properly considered in fixing reasonable attorney fee.

2. Appeal and Error ⇨1013

It is not the province of a reviewing court to reweigh evidence except to the extent of determining whether there was an abuse of discretion in the trial judge's assessment of the value of attorney's services.

* Opinion vacated 310 P.2d 961.

3. Attorney and Client ⇨140

One of the most important elements that goes into the make-up of a quantum meruit award for attorney's services is the value of the issue litigated.

4. Attorney and Client ⇨141

In action by attorney to recover his fees from his client's insurer, which, although obligated to defend action in which the fees were incurred, refused to do so, record disclosed trial judge did not abuse his discretion in fixing attorney's fee at \$175.

5. Witnesses ⇨16

Attorney suing client's insurer for services in defending municipal court action against client was not entitled to subpoena duces tecum requiring insurer to produce records of amounts paid for legal services in other municipal court actions.

6. Judgment ⇨314

Where trial court orally awarded interest in suit at statutory rate of seven per cent per annum, but judgment as signed carried interest at only six per cent, judgment would be corrected so as to award interest at seven per cent.

William Katz, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, by Charles Agor Harrison, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff-appellant challenges upon this appeal an award of attorney fees made to cover services rendered by his attorney in defense of an action brought against him, one which defendant National Automobile and Casualty Insurance Company was obligated to defend under a policy issued by it and which it mistakenly refused to defend. The award is in the sum of \$175 which appellant's counsel brands as "a plain and palpable abuse of discretion" and "such an unreasonable and arbitrary decision as to shock the conscience."

Plaintiff's minor son set fire to his classroom, causing damage in the amount of

\$255.16. The property belonged to the Los Angeles City School District of Los Angeles County and it sued this plaintiff, Irving Arenson, under § 16074, Education Code, which, so far as pertinent, provides: "Any pupil who wilfully cuts, defaces, or otherwise injures in any way any property, real or personal, belonging to a school district is liable to suspension or expulsion, and the parent or guardian shall be liable for all damages so caused by the pupil. * * *". The district alleged the boy's tort to have been wilful. Arenson was covered (as it was ultimately determined) by a comprehensive insurance policy issued by defendant herein. He demanded that the insurance company defend the action but it refused. Arenson then hired an attorney who defended the case for him on a quantum meruit basis.

The attorney immediately conceived the statute to be unconstitutional as an unreasonable and arbitrary classification of boys attending public school as distinguished from all other boys; he fought the case through on that basis. After judgment had been rendered in the municipal court for \$255.16 and costs, he took an appeal to the appellate department of the Los Angeles superior court. That department reversed the judgment, saying: "We regard the statute here involved, Education Code section 16074, as valid. But the evidence is not sufficient to show that the damage complained of was caused by any act of defendants' child. It was error to admit evidence of statements made by that child the next day after the damage occurred. He was not a defendant to the action, these statements were not a part of the *res gestae*,

and they were inadmissible hearsay." For some reason, which does not satisfactorily appear,¹ counsel stipulated to an amendment of the settled statement on appeal and upon that basis the school district obtained a rehearing and reargument of the case. Thereupon the appellate department affirmed the judgment saying, in part: "As now before us the record shows facts, established by stipulation of the parties, from which the trial court could infer that injury to the school property was caused by a fire that had been started by the wilful act of the defendants' son acting jointly with another pupil of the school. With such a record the error committed in receiving the hearsay statement from the police officer is without prejudice. * * * We entertain no doubt about the constitutionality of section 16074 of the Education Code." That ended the case and fixed the date for termination of the services to be compensated through the award which is now under discussion.

Plaintiff thereupon sued defendant insurance company seeking a judgment that it was obligated to pay the municipal court judgment, plus an attorney fee of \$2,000. The superior court held that the defense of the school district's claim against plaintiff was not covered by the policy. The district court of appeal affirmed 276 P.2d 140, but the Supreme Court reversed the judgment in *Arenson v. Nat. Automobile & Cas. Ins. Co.*, 286 P.2d 816, 45 Cal.2d 81. The opinion concluded with this statement: "Plaintiff is entitled to recover the principal amount of the judgment against him with interest together with court costs and attorneys' fees properly incurred by him

1. The attorney testified, at the trial which led to the judgment now under review, with respect to the reason for the change of the record: "Because of the fact that that would have meant a retrial of the action and there wasn't any question with respect to what the facts could or would establish. County Counsel and counsel for the defendants entered into a stipulation to amend the then record on appeal in certain respects, so that a petition for re-hearing could be filed before the Appellate Department of the Su-

perior Court based upon the facts as they would have been developed had we gone back for a re-trial and re-corrected these errors and then presented the matter again to the Court so that we could get a decision that would be determinative of the problem from the standpoint of the actual legal liability, because either the section was not constitutional or because under the facts they could not recover and not merely have procedural errors that could be corrected. Those procedural errors were eliminated."

in defense of the school district's claim." 45 Cal.2d at page 84, 286 P.2d at page 819.

Upon retrial the court had before it the records of the municipal court and the appellate department of the superior court and the testimony of the attorney. He detailed his services, which were centered upon the constitutional point raised by him, and valued them at \$2,152.50. As above indicated, the trial judge appraised those services at \$175, which sum includes the appeal to the appellate department.

[1] The elements properly considered in fixing a reasonable attorney fee are summarized in 6 Cal.Jur.2d § 181, p. 379: "What constitutes a reasonable fee in a particular case depends on various factors, such as the nature of the litigation; its importance to the parties; its difficulty; the time consumed; the overhead expense of the attorney; the skill required, the skill employed, and the attention given; the attorney's standing in the profession; the success or failure of the attorney's efforts; the contingent character of any compensation due for his services; the fee agreed upon by the parties; and the attorney's age and experience in the type of work for which he claims compensation." Of course the trial judge is not bound by the expert testimony. In *Theisen v. Keough*, 115 Cal. App. 353, 362, 1 P.2d 1015, 1019, it is said: "It is too well settled to require citation that the value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the nature and extent of such services, its own experience furnishes it with every element necessary to fix their value. *Spencer v. Collins*, 156 Cal. 298, at page 307, 104 P. 320, 20 Ann.Cas. 49."

[2-4] It is not the province of a reviewing court to reweigh the evidence except to the extent of determining whether there was an abuse of discretion in the trial judge's assessment of the value of the services in question. "One of the most important elements that goes to the make-up of a quantum meruit award is the value of the issue litigated. * * * The judge

needs only the approximate value of the land in order to estimate the effect the element of value should have in fixing a reasonable fee." *United States v. Preston*, 9 Cir., 202 F.2d 740, 741. The amount for which Arenson was sued was \$255.16, plus costs. So far as disclosed by this record he was interested in one thing, relief from that asserted obligation. If it had been paid without contest by the insurance company that would have been satisfactory to him. Indeed, his lawyer wrote the company warning it that large attorney fees would be incurred unless the claim was paid or settled: "This letter is intended to put you on notice of the fact that the reasonable amount of attorneys fees incurred and to be incurred by the Arenson's in the defense of the action against them will be much greater than the total amount of the claim, in order that you may prefer to settle or satisfy the claim of the Los Angeles School District rather than to expose yourself to the additional claim which will be made against you for the services yet to be rendered to Mr. and Mrs. Arenson in said action, and the costs, fees and expenses, including attorneys fees, which will necessarily be incurred by them." There is nothing to show or suggest that the client was interested in establishing any point of constitutional law or that the insurance company, which was supposed to carry the burden ultimately, was interested in any elaborate litigation. The point was raised and nurtured by Arenson's counsel. The fact that the expense was to be paid by the insurer afforded no justification for incurring costs or rendering services out of proportion to the amount involved in the litigation. 45 C.J.S., Insurance, § 934, p. 1062, speaking of an insurer's refusal to defend, says: "Accordingly in such a case insured may employ an attorney to defend the suit, and should use reasonable care and diligence in conducting the defense, being under a duty to conduct it in such a manner as to make the loss as small as he reasonably can". This language also appears in 36 C.J. § 104, p. 1113, and is quoted by the court in *Aetna Life Ins. Co. v.*

Heiden, 184 Ark. 291, 42 S.W.2d 392, 394. Southern Ry. News Co. v. Fidelity & Casualty Co., Ky., 83 S.W. 620, 622: "Appellant [plaintiff-insured], after having notified appellee that the liability had been incurred by reason of the injury, was bound to make the loss as small as possible, so far as it reasonably could, although appellee did not avail itself of the provision in the policy to personally conduct the defense to the suit."

The terse comments of the appellate department of the superior court indicate how serious the judges thought the constitutional point raised by Arenson's attorney. The case was reversed in that department on the ground, among others, that the evidence was insufficient to sustain the finding of liability. The record was then changed by stipulation in such manner that it resulted in a holding that the evidence was legally sufficient and Arenson was liable. The judge at the trial below well could have viewed this as unnecessary, ill-advised and not beneficial to the attorney's client or the insurance company. Counsel testified that he had repeatedly billed his client, Arenson, for the amount now claimed, but also said he knew his financial condition and did not expect to get that amount from him. Any services which may have been rendered to the end of punishing the insurance company cannot be compensated, and it cannot be said upon this record that the trial judge was not warranted in rejecting a large part of the attorney's services upon that theory. We do not find any abuse of discretion in the fixing of the attorney fee in this case.

[5] Appellant complains of the quashing of a subpoena duces tecum which he had caused to be served on defendant requiring it to produce its files of actions pending in the municipal court in the years 1951

to 1955, inclusive, in which it had employed counsel for or on behalf of the defendant or had itself defended, together with its records of the services rendered by counsel, the bills and statements submitted by such counsel, the ledger, cash disbursement book, or other record showing the amounts paid by defendant for the services so rendered. The court held these matters to be immaterial. The argument is that they would have thrown light upon the value of the services now under consideration. Manifestly, they would not have been admissible. The ruling is correct.

[6] A small mistake crept into the judgment however. The court orally awarded interest at the statutory rate of seven per cent per annum, but the judgment as signed carries interest at six per cent. Appellant computes the difference to be \$8.18 and the findings and judgment should be corrected accordingly.

The conclusions of law are amended by substituting the phrase, "with interest thereon at the rate of 7% per annum, from May 14, 1953, amounting to \$51.38," for the phrase, "with interest thereon at the rate of 6% per annum, from May 14, 1953, amounting to \$43.20." The judgment is modified by substituting the sum of \$496.54 in place of \$488.36.

As thus modified the judgment is affirmed.

MOORE, P. J., concurs.

FOX, Justice.

I dissent.

In my view of the record, an award of \$175 to plaintiff as attorney's fee for the trial and subsequent appeal of the municipal court case places an unconscionably low value on the services of capable legal counsel.

**TORRANCE UNIFIED SCHOOL DISTRICT
OF LOS ANGELES COUNTY, Plain-
tiff and Respondent,**

v.

**Hilarlo S. ALWAG, Emma A. Alwag, State of
California, Milton Kauffman Construction
Corporation (sued herein as Doe One) to
Doe One Hundred, Inclusive, and All Per-
sons Unknown Claiming any Title or Inter-
est In or to the Property, Defendants,**

**Hilarlo S. Alwag and Emma A. Alwag,
Appellants.**

Civ. 21649.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 2, 1956.

**As Modified on Denial of Rehearing
Nov. 28, 1956.**

Hearing Denied Dec. 24, 1956.

Condemnation action instituted by school district. After action was dismissed by school district, the Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment denying award of attorney's fees, and defendant appealed. The District Court of Appeal, Moore, P. J., held that where school district dismissed condemnation action because state highway department was going to condemn portion of land for highway purposes, there was an abandonment of action within statute requiring condemner to pay attorney's fees where action is abandoned.

Reversed in part.

1. Costs ☞172

Ordinarily, fees paid to attorneys are not recoverable from the opposing party as costs, damages or otherwise, in absence of an express statutory or contractual authority.

2. Eminent Domain ☞166, 171

An action to condemn property is an exercise by a public body of its sovereign power to force the sale of land, and once the action is commenced, the property owner is entitled to defend in order to insure payment of a fair price for his premises.

3. Eminent Domain ☞246(3)

Where school district dismissed condemnation action on ground that state

highway department was going to condemn a portion of the same land for highway purposes, there was an "abandonment of proceeding" within statute requiring condemner to pay landowners' attorney's fees where action is abandoned. West's Ann. Code Civ.Proc., § 1255a.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment of Proceeding".

Solomon R. Spector, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel,
Lloyd S. Davis, Deputy County Counsel,
Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from a judgment denying defendant an award of attorney's fees upon the dismissal of a condemnation action by the condemner.

Respondent sued appellants to condemn certain premises for the purpose of constructing a school building thereon. After answer by appellants and the setting of a date for trial, respondent dismissed the action for reasons stated in the affidavit of John B. Anson, Deputy County Counsel, one of the attorneys for the school district.

The affidavit stated, in substance, that the action was dismissed on the motion of the "Board of Education of the Torrance Unified School District" upon its being advised by the State Division of Highways that the state planned to condemn a strip of land running through the middle of subject property for use as a portion of a through highway. Since such a use would be paramount to that contemplated by the school district, and the presence of a highway bisecting the property would render it wholly unsuitable for school purposes, respondent determined it to be impractical and fiscally unwise to pursue its proceedings under eminent domain. Subsequent to the dismissal, the state did in fact institute its action to condemn a strip through the same premises. Appellants moved the

trial court to tax costs of the action and attorneys' fees against respondent. The court ordered respondent to pay costs but left each party to bear the expense of his own attorney's fees.

The sole issue presented here is: *Did the dismissal of the action by respondent constitute an "abandonment of the proceedings" within the meaning of Code of Civil Procedure section 1255a, thereby entitling appellants to an award of "their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees"?*

[1] Ordinarily, fees paid to attorneys are not recoverable from the opposing party as costs, damages or otherwise, in the absence of express statutory or contractual authority. *LeFave v. Dimond*, 46 Cal.2d —, 299 P.2d 858. Therefore, appellants may recover fees only in the event the dismissal was an "abandonment of the proceedings." Respondent contends that (1) the section should be so construed as to provide for an award to defendants of their attorneys' reasonable charges only when the action is instituted and dismissed *in bad faith*; (2) the district terminated the action only upon discovery that the property would no longer be desirable for school purposes; (3) no circumstances indicate a bad faith intent to injure the property owners. Such theory finds some support in the apparent purpose of the section. At one time, certain instrumentalities possessing the power of eminent domain were abusing the privilege by bringing successive actions to condemn parcels of land with no intention of prosecuting to a conclusion. Thereby they "expensed" the property owner into submission to whatever terms should be offered. To defeat this practice, the Legislature provided that the condemner should stand the expense of litigation begun and then abandoned. *City of Los Angeles v. Abbott*, 217 Cal. 184, 200, 17 P.2d 993; *Whittier Union High School District v. Beck*, 45 Cal. App.2d 736, 739, 114 P.2d 731; *City of*

Sacramento v. Swanston, 29 Cal.App. 212, 222, 155 P. 101; *Pacific Gas & Electric Co. v. Chubb*, 24 Cal.App. 265, 270, 141 P. 36. No facts here indicate any such evil practice on the part of respondent.

The strongest case for this proposition is *Whittier Union High School District v. Beck*, supra. There the action was dismissed after the condemner had purchased the subject property by contract during the pendency of the suit. The court disallowed recovery of fees, commenting that "plaintiff's good faith in the instant case was shown when the property was actually purchased." [45 Cal.App.2d 739, 114 P.2d 733.]

However, when the Legislature promulgated the section it could well have used words such as "in bad faith" or "without just cause" if that was truly meant to be the test. Had that been done, the statute would have codified general American case law that a condemner who institutes and dismisses his action in bad faith is liable for resultant damages to the property owner. (*Eminent Domain*, 18 Am.Jur. § 371, p. 1014; note, 121 A.L.R. 12, 84 et seq.) Instead, it was provided that attorney fees should be paid by the condemner whenever the action should be "abandoned." "Abandonment includes the intention to abandon, and the external act by which such intention is carried into effect. * * * The characteristic element of abandonment is the voluntary relinquishment * * * the intentional relinquishment of a known right." *City of Los Angeles v. Abbott*, 129 Cal.App. 144, 148-149, 18 P.2d 785, 787.

Applying this definition, or one essentially similar, it has been held that when the plaintiff instrumentality discontinues its action under the duress of an injunction, the action has not been "abandoned" and thus the defendant is not entitled to recover attorneys' fees under section 1255a. *City of Los Angeles v. Agardy*, 1 Cal.2d 76, 79, 33 P.2d 834; *City of Los Angeles v. Abbott*, supra, 217 Cal. 184, 197, 17 P.2d 993; *City of Los Angeles v. Abbott*, supra, 129 Cal.App. 144, 18 P.2d 785. The ra-

tionale of those decisions is that the dismissal in each instance was *involuntary*.

Here, the board of education was not prevented by external force from carrying on the action. The litigation was terminated by dismissal because of threatened action by the State Division of Highways which would have destroyed or impaired the worth of the land for the use intended by respondent at the outset. In this sense, the dismissal was "voluntary"; in other words, entered after due deliberation by respondent as to the profitability of proceeding. It was a voluntary relinquishment of the known right to continue the suit, and thus was abandonment of the action. A dismissal of a suit is not involuntary merely because taken pursuant to a compelling reason. The decision by the board to discontinue its efforts to condemn the premises may have been quite wise under the circumstances, but this fact does not put the hapless property owner to the burden of his defense. To argue that this action was not "abandoned" because it had lost its value would be tantamount to contending that property is not abandoned which is discarded because of its worthlessness to its owner.

[2] An action to condemn property is not of the same nature as ordinary civil litigation. Here there is no defendant alleged to have perpetrated some wrong upon the plaintiff. Rather, it is the exercise by a public body of its sovereign power to force the sale of land. Once the action is commenced, the property owner is entitled to defend in order to insure payment of a fair price for his premises. Many factors might intervene between the institution of the proceeding and its fruition, any one of which might cause the condemner to re-evaluate the desirability of the subject property for its contemplated use. Such intervention would not be the fault of the defendant nor would it render the plaintiff unable to continue its action. Section

1255a equitably provides that should the plaintiff elect to change its mind and abandon the action, the innocent property owner must be reimbursed the costs of defense thrust upon him.

[3] A further factor here reinforces the conclusion that appellants are entitled to recover their lawyers' fees incurred on account of the condemnation proceedings. The record indicates that the State had resolved to direct a freeway over the subject property one month before the filing of this action. If the board was aware of this resolution at the time of instituting these proceedings, its action was tantamount to bad faith. But even if unaware of such resolution, respondent was in a better position than appellant property owners to acquire information of the state plan. One branch of a government is more likely to be aware of the activities of another than are merely private citizens. *United States v. National Exchange Bank*, 270 U.S. 527, 46 S.Ct. 388, 70 L.Ed. 717.

Nothing in this opinion is intended to be inconsistent with the holding in *Whittier Union High School District v. Beck*, supra, 45 Cal.App.2d 736, 114 P.2d 731, to the effect that an action has not been "abandoned" when discontinued because of the purchase of the property by the condemner. Under circumstances like those therein described, there is no property to condemn, no defendant property owner to be forced to sell. The condemner had become owner of the object of its litigation through the voluntary sale of the property to the plaintiff by the defendant.

The judgment is reversed insofar as it denies defendants recovery of their reasonable attorneys' fees incurred on account of the condemnatory proceedings. The trial court is directed to determine the amount of such fees and to tax the same as costs in favor of defendants.

FOX and ASHBURN, JJ., concur.

145 Cal.App.2d 631

John J. KERR, Plaintiff and Respondent,

v.

KEY SYSTEM TRANSIT LINES, a corporation, and C. N. Brown, Defendants

and Appellants.

No. 16969.

District Court of Appeal, First District,
Division 1, California.

Nov. 5, 1956.

Rehearing Denied Dec. 5, 1956.

Hearing Denied Jan. 4, 1957.

Action against bus company and driver for injuries sustained by passenger when bus allegedly started with such a jerk that passenger was thrown to the floor. The Superior Court, Alameda County, Cecil Mosbacher, J., entered judgment on a verdict in favor of plaintiff, and defendants appealed. The District Court of Appeal, Bray, J., held that commencing *res ipsa loquitur* instruction with statement that inference that proximate cause of occurrence was some breach of duty by defendants arose from the happening of accident as established by the evidence was not improper, since the evidence established without question that movement of bus caused passenger to fall, and that, even if evidence raised a question as to whether fall was caused by movement of bus, instruction was not prejudicial to defendants, in view of other instructions given.

Judgment affirmed.

1. Carriers ⇨318(4)

In action against bus company and driver for injuries sustained by passenger when bus allegedly started with such a jerk that passenger was thrown to the floor, evidence established without question that movement of bus caused passenger to fall.

2. Carriers ⇨321(21)

In action against bus company and driver for injuries sustained by passenger when bus allegedly started with such a jerk that passenger was thrown to the floor, commencing *res ipsa loquitur* instruction with statement that inference that proximate cause of occurrence was some breach

of duty by defendants arose from the happening of accident as established by the evidence was not improper, where the evidence established without question that movement of bus caused passenger to fall.

3. Trial ⇨296(3)

In action against bus company and driver for injuries sustained by passenger when bus allegedly started with such a jerk that passenger was thrown to the floor, commencing *res ipsa loquitur* instruction with statement that inference that proximate cause of occurrence was some breach of duty by defendants arose from the happening of accident as established by the evidence was not prejudicial to defendants, even if the evidence raised a question as to whether passenger's injury was caused by movement of bus, in view of other instructions given.

4. Carriers ⇨321(9)

In action against bus company and driver for injuries sustained by passenger, instruction that duty of exercising utmost care in operation of bus involved such constant supervision and observation of passengers as would insure accurate information to bus employees as to condition and position of passengers and that such condition and position were facts which must be considered in operating bus in accordance with care required by law, was not objectionable as being argumentative or as making bus company an insurer of passengers.

Donahue, Richards, Rowell & Gallagher, Oakland, for appellants.

Nichols, Richard, Williams, Morgan & Digardi, Jesse Nichols, Anthony R. Brookman, T. L. Christianson, Oakland, for respondent.

BRAY, Justice.

Defendants appeal from a judgment on a jury verdict in favor of plaintiff in the sum of \$9000. The sole question raised is that three instructions (two on *res ipsa*

loquitur, and one on the duty of a common carrier) were erroneous.

Facts.

Plaintiff was a passenger on a Key System bus going south on Washington Street, Oakland. The bus stopped at the near side of 12th Street because of railroad tracks. Plaintiff stood up to ring the bell to indicate that he desired to get off the bus on the far side of that street. He testified that the bus started with such a jerk that he lost his grip on the handle of the seat, was thrown to the floor on his back and was injured.

In his deposition the bus operator, Brown, corroborated plaintiff as to the position of the bus when plaintiff fell. Brown stated that he had stopped on the near side of 12th Street for the tracks and that just as the bus was crossing them he heard plaintiff fall. At the trial he testified that after stopping for the tracks, the bus proceeded across them to the far side of 12th Street, discharged two passengers and had started up when he first learned that plaintiff "was down" on the floor; that plaintiff then accused him of being "rough in the handling of the coach." In his deposition he testified that he did not stop on the far side of 12th Street as there were no passengers to get off. Brown at no time denied that the bus had jerked. The nearest he came to doing so was his statement "as I approached the intersection at 12th and Washington I stopped for the tracks, then I *gradually* crossed the tracks and stopped at the coach stop on the other side of the tracks. Q. Yes. A. And I *gradually* moved in." (Emphasis added.)

1. Res Ipsa Loquitur.

[1,2] Defendants admit the propriety of giving instructions on this subject, but claim that those given were erroneous. Instruction 1 on this subject commences: "From the happening of the accident involved in this case *as established by the evidence* there arises an inference that the proximate cause of the occurrence was some breach of duty required by law on the part of the defendants." (Emphasis

added.) Defendants contend that the italicized portion of this instruction took from the jury the right to determine whether there was any unusual motion on the part of the vehicle, the operator thereof having testified to gradually crossing the tracks, which they claim in effect was testimony that there was no "unusual motion" of the vehicle when plaintiff fell. Ordinarily the *res ipsa loquitur* instruction commences with some such statement as "If, and only in the event, you should find that there was an accidental occurrence *as claimed by the plaintiff* * * *" (See BAJI p. 319.) However, if the evidence establishes without contradiction that an accident happened in the manner justifying the instruction, with resulting injury to plaintiff, the form used here may be proper. (See BAJI p. 321.) Here the evidence established without question that the motion of the bus caused plaintiff's fall. Defendants contend that to justify the above portion of the instruction, the evidence must be uncontradicted that the movement of the bus must be "unusual" because it was stated in *McIntosh v. Los Angeles Ry. Corp.*, 1936, 7 Cal.2d 90, 95, 59 P.2d 959, that passengers must assume the risks from ordinary movements of the vehicle. In the later case of *Mudrick v. Market Street Ry. Co.*, 1938, 11 Cal.2d 724, at page 733, 81 P.2d 950, at page 955, 118 A.L.R. 533, the Supreme Court pointed out that there was no question in the *McIntosh* case involving the *res ipsa loquitur* rule. In holding in the *Mudrick* case that the movement of the vehicle causing the injury does not have to be "unusual" to justify the application of the doctrine the court quoted with approval from *Steele v. Pacific Elec. Ry. Co.*, 168 Cal. 375, 143 P. 718, "if injury 'came from the movement of the car by those in charge of it * * * the law then presumes *prima facie*, that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the *prima facie* case thus made'", pointing out that both that case and *Wyatt v. Pacific Elec.*

Ry. Co., 156 Cal. 170, 103 P. 892, were authority for the proposition that the movement of the vehicle did not have to be "unusual." In *Jorgensen v. East Bay Transit Co.*, 1941, 46 Cal.App.2d 189, 115 P.2d 556, there is language that would seem to conflict with the rule above stated. However, the language is based upon *McIntosh v. Los Angeles Ry. Corp.*, supra, 7 Cal.2d 90, 59 P.2d 959, which the Supreme Court said in *Mudrick v. Market Street Ry. Co.*, 11 Cal.2d 724, 81 P.2d 950, supra, was not a *res ipsa* case, and did not conflict with the above stated rule.

[3] In *Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 432, 260 P.2d 63, the court criticized the use of similar language to that used in the instruction in question here, for the reason that "there was evidence from which it might be reasonably inferred that no accident in fact occurred * * *." 41 Cal.2d at page 435, 260 P.2d at page 64. Such is not the situation in our case. It is significant that in the *Hardin* case the court did not hold that the giving of the erroneous instruction was prejudicial, saying, 41 Cal.2d at page 436, 260 P.2d at page 65: "The erroneous assumption contained in the *res ipsa loquitur* instruction is indirect and inferential * * *" and that there were other instructions telling the jury there was a dispute as to whether an accident had occurred. In our case, had there been a question as to whether plaintiff's injury was caused by the movement of the vehicle, the giving of the instruction would still not have been prejudicial. In other instructions the jury were instructed that if the testimony of any witness was contrary to the physical facts such testimony must be disregarded, that defendants contended that the accident was an unavoidable one, that defendants' liability must be determined in the light of defendants' duty as stated by the court, that in order to impose liability on defendants their breach of duty must have been a proximate cause of plaintiff's injury, that if the evidence shows that the injury was caused by defendants' act in operating its coach

there is an inference of breach of duty which imposed on defendants the burden of showing that they did exercise the utmost care and diligence, and that if defendants exercised the care required or if any failure of defendants to exercise such care was not a proximate cause of the accident, the verdict must be for defendants.

Defendants find no fault with the balance of the *res ipsa loquitur* instruction above mentioned nor with the second instruction on the doctrine, other than their claim that both instructions were erroneously premised by the introduction above quoted.

2. Duty of a Common Carrier.

[4] The court instructed that defendants owed plaintiff the duty of exercising the utmost care in the operation of their motor coach. Then followed the criticized portion of the instruction: "It involves such constant supervision and observation over and of its passengers as will insure accurate information to its employees as to the condition and position of the passengers. The condition and position of the passengers are facts which must be considered by the defendants in operating their motor coach in accordance with the care required under the law." Defendants contend that this portion was argumentative and stated in effect that the Key System was an insurer of its passengers. We make no such interpretation. The word "insure" in the phrase "as will insure accurate information to its employees" in no wise contains the element of insurance of the passengers. Obviously the word "insure" as used here connotes the meaning "provide." The court did instruct that the Key System "were not the guarantors" of plaintiff's safety and that "they did not warrant such safety in the sense of a guarantee."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

145 Cal.App.2d 649

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joe VERA, Defendant and Appellant.

Cr. 5479.

District Court of Appeal, Second District,
Division 3, California.

Nov. 7, 1956.

Prosecution for assault on a nine and a half year old child by inflicting injury to her body by use of a garden hose. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and denied defendant's motion for new trial, and he appealed. The District Court of Appeal, Vallée, J., held that where cross-examination of witness for State was in part an attempt to show that her testimony that defendant had caused injury to victim of his alleged assault was of recent fabrication, testimony of other witnesses as to prior conversations with the witness was admissible for sole purpose of refuting inferences of subsequent fabrication and to show a prior state of mind consistent with that shown by witness when testifying at trial of defendant.

Judgment and order denying new trial affirmed.

1. Witnesses ⇨395

Where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial.

2. Witnesses ⇨395

Where cross-examination of witness for State was in part an attempt to show that her testimony that defendant had caused injury to victim of his alleged assault was of recent fabrication, testimony of other witnesses as to prior conversations with the witness was admissible for sole purpose of refuting inferences of subse-

quent fabrication and to show a prior state of mind consistent with that shown by witness when testifying at trial of defendant.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged in Count I with having assaulted Celia Sanchez by inflicting injury upon her right leg by use of a stick; in Count II with having assaulted her by inflicting injury to her left arm by jumping on it; in Count III with having assaulted her by inflicting injury to her legs, back, and other parts of her body by use of a garden hose; in Count IV with having assaulted her by knocking out her teeth; and in Count V with having committed acts denounced by section 288 of the Penal Code upon her. In the counts charging assault it was alleged it was by force likely to produce great bodily injury. At the first trial of the charges the jury disagreed. At the second trial with a jury defendant was acquitted of the offenses charged in counts I, II, IV, and V and convicted of the offense charged in Count III. He appeals from the judgment and the order denying his motion for a new trial.

Defendant is the husband of Trinidad Vera. Celia and Jessie Sanchez are Trinidad's children by a prior marriage. Celia was 9½ and Jessie 12 years of age at the times in question. Defendant, Trinidad, Celia, Jessie, and six children of defendant and Trinidad lived together in Norwalk.

Prior to the present prosecution Trinidad had been convicted by a jury of having assaulted Celia by inflicting injury to various parts of her body by use of a garden hose. At the trial of that charge Celia and Jessie testified it was their mother, Trinidad, who had beaten Celia with a rubber hose. Defendant also so testified at

that trial. After Trinidad had been convicted of that and other offenses, defendant was charged with the offenses noted above.

At the trial of the present case Trinidad testified against defendant. On direct examination she testified that on one occasion in 1954 defendant had hit Celia on the head and on the side of the shoulders with a long stick; he had hit Celia "a lot of times" on the back and "all over the body" with a rubber hose; on more than one occasion he had twisted Celia's arm. She also testified that at the time she was arrested she told the police she was the only one who had hit Celia, that she had beaten her with a rubber hose for two or three months before her arrest; she had knocked Celia's teeth out, causing her to bleed, and had opened a wound in her scalp with the rubber hose; she had burned her with an iron, broken her arm, and bitten her nails off. She also had told the police at that time that defendant had not done any of these things—that she alone "had been responsible for all the beatings." She testified at the trial of the present case that she had lied to the police at that time. She had been confined about eight months in a state institution for women at the time she testified at the latter trial.

On cross-examination Trinidad testified she heard defendant testify against her at her preliminary hearing; she "wasn't mad" at him after she heard him testify; during the trial of the case against her she had not said that if she ever got her hands on defendant she would kill him; she asked "to come in to testify against him"; about two weeks before she testified an officer told her she did not have to testify against him if she did not want to; she wanted to testify against him. Trinidad further testified that the first time after her arrest she told anybody that defendant had been inflicting injuries on Celia was at her preliminary hearing; she told the policewoman who took her there.

On redirect examination Trinidad testified this was not the first time she ever told

any one defendant had struck Celia; at her preliminary hearing she told Officers Uttke and Barner that defendant "had also hit Celia"; she talked to a public defender before her preliminary hearing; she had no objection to the public defender disclosing any information she related to him. Whereupon the following occurred:

"Q. By Mr. Busch: Mrs. Vera, this conversation that you had with Josephine Uttke and Mrs., or Miss Barner, on April 28, 1954, was that before Joe Vera testified against you at the preliminary hearing? A. To be honest, I don't remember whether it was before or after.

"Q. Do you recall whether or not your preliminary hearing was on May 6th, 1954? A. I know it was in May, but I don't remember the date.

"Q. And was the conversation that you had with your lawyer, was that before Mr. Vera testified against you in the preliminary, or testified in the preliminary hearing? A. No, because I talked to him before.

"Q. You talked to the lawyer before Mr. Vera testified? A. Yes.

"Mr. Marcus: Your Honor, may my objection be noted to this entire line of interrogation at this time?

"The Court: So far as relates to subject matter as to statements made in the past on the same subject matter, I think it all comes within the rule as to, let's call it rehabilitation. If there is any additional objection, why you can introduce it as we go along.

"Go ahead. * * *

"Q. By Mr. Busch: Did you have a conversation with your attorney, the Public Defender, before the preliminary, wherein you discussed whether or not Joe Vera hit Celia? A. Yes.

"Q. And did you have a conversation with your attorney before the preliminary hearing wherein it was discussed whether or not Celia had ever complained to you that Joe Vera had molested her? A. Yes."

On recross-examination Trinidad testified that at her preliminary hearing she told the public defender defendant "had committed the act upon Celia"; she realized then "that the promise Mr. Vera had made me to get me an attorney had turned me down."

As part of the People's case in chief, after Trinidad had testified, Josephine Uttke, a deputy sheriff, over objection, was permitted to testify that when Trinidad saw defendant in the courtroom before her preliminary hearing she said, "'You know, he's responsible for most of this.' And I said, 'What do you mean by that?' She said, 'He tried to molest her.' And, when she told me about it, which is referring to Celia, she said, 'Since then, he has been very mean to her, and he has beat her up as much as I have.' And I said, 'Well, you think he's responsible for this, too?' And she said, 'Yes, I do.'" In the presence of Sergeant Barner, another deputy sheriff, Trinidad said, "'My husband Joe is responsible as much for this as I am. He tried to molest the girl, and she told me it, and since then, he has been very mean and vicious to her, and he has beat her up as much as I have.'"

Sergeant Barner, also over objection, testified, "I asked Mrs. Vera what it was she wanted to talk to me about, and she told me that she hadn't told us the whole truth, that Joe was responsible for part of Celia's injuries. I asked her was [sic] he had done, and she said, well, he had mistreated Celia the same as she had, and I asked her how it had come about. She said that Celia had told her that Joe had molested her, and after that Joe had started whipping her and using the hose on her. I asked her why she hadn't told us that before. She said because she was afraid of him, and because he had told her that, due to his previous record, it would go harder on him. I told her to be sure that she told her attorney about that, and that was about the sum and substance of the conversation, because right after that her Public Defender wanted to talk to her."

The deputy public defender who represented Trinidad at her preliminary hearing testified, over objection, that prior to that hearing Trinidad told him defendant had struck Celia with a rubber hose, injuring her eye, breaking her nose, and knocking out two of her upper incisors, and "she also said that about a week prior to her arrest that she had the feeling that Joe was concerned about the possibility of Celia's condition being discovered, and told her at that time that if any arrest were made, that she should take the full responsibility, that because of his prior record things would be much hotter for him than for her if he were arrested; and that if it should occur he would get a lawyer for her, and see that she was taken care of."

The only assignment of error is that the court erred in permitting Trinidad to testify to her conversations with Officers Uttke and Barner and the public defender and in permitting them to testify to those conversations.

We are compelled to hold the court did not err in admitting the testimony. The precise question was decided adversely to defendant's contention by the Supreme Court in the recent case of *People v. Walsh*, 47 Cal.2d 36, 301 P.2d 247, a prosecution for bribery. The court declared, 47 Cal.2d at page 40, 301 P.2d at page 250:

"The defendants next urge that the court committed prejudicial error in admitting certain evidence claimed to be self-serving and hearsay. The contention arises out of attempts by the prosecution to rehabilitate their witnesses Stubblefield and Griffin. On cross-examination of these witnesses the defendants attempted to show that their testimony might have been fabricated and that they might have been biased and prejudiced towards the defendants. On redirect examination of the witness Stubblefield, the prosecution was allowed, over objection, to introduce certain prior consistent

statements of the witness for rehabilitating his testimony. The court at that time instructed the jury that the evidence was being admitted not to prove the truth of the statements but for the limited purpose of refuting any suggestions or inferences that the witness had 'fabricated' his testimony at the trial or that his testimony had been actuated by bias or ulterior motives. The rehabilitating evidence showed that Stubblefield had placed an endorsement on the back of the \$125 check before he cashed it, reading 'paid Vince Walsh \$125.00 for fixing job 38 & Pacific, San Pedro job.' Also evidence was introduced to the effect that Stubblefield had, on a prior occasion, told his general contractor that he had paid the inspector \$125 to clear the job.

"Likewise there was an attempt on cross-examination to impeach the testimony of the prosecution's witness Griffin and to show a recent fabrication on his part. As rehabilitating evidence, after such cross-examination, the prosecution introduced a check stub made out by Griffin at the time he wrote the \$50 check with the notation thereon 'L. A. City Inst. Pay-off \$50.00', and he was allowed to explain that 'Inst.' meant 'Inspector.' Also, a store clerk who had cashed the check testified that Griffin had remarked at the time that it was for the purpose of a pay-off. Again, the jury was admonished by the court that this evidence was admitted for the limited purpose of 'refuting the suggestions or inferences, if any, that this witness had beforehand or at the trial fabricated his testimony, or that his testimony was actuated by bias or ulterior motives, and it is introduced and received into evidence to prove the state of mind of this witness on a date prior to this trial for the purpose of determining whether his state of mind at that time was the same as disclosed at

this trial, and to prove that his testimony at this trial was not a fabrication.'

"At the conclusion of the trial the court instructed the jury again as to the limited purposes for which rehabilitating evidence had been admitted, using substantially the same language as above set forth and as approved in *People v. Weatherford*, 78 Cal.App. 2d 669, 697, 178 P.2d 816.

"It is the rule generally and in this state that where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial, 'not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purposes of the case.' *People v. Kynette*, 15 Cal.2d 731, 753-754, 104 P.2d 794, 806; see also *Sweazey v. Valley Transport, Inc.*, 6 Wash.2d 324, 107 P.2d 567, 111 P.2d 1010 [140 A.L.R. 1]; 140 A.L.R. 93.

"The defendants contend that the court improperly applied the 'prior consistent statement' rule; that an express limitation upon the use of this exception to the hearsay rule is that such prior remarks must have been made 'prior to the time the motive of interest existed', *People v. Kynette*, supra, 15 Cal.2d 731, 754, 104 P.2d 794, 806; *Mason v. Vestal*, 88 Cal. 396, 398, 26 P. 213 [22 Am.St.Rep. 310]; *Barkly v. Copeland*, 74 Cal. 1, 5, 15 P. 307 [5 Am.St.Rep. 413]; that it is evident that these witnesses were as much biased and prejudiced at the time they made the prior statements as they were during the trial, and that the jury was confused and misled by the instructions of the court that the evi-

dence was admissible to refute inferences that the witnesses had 'at this trial' fabricated their testimony or that 'at this trial' their testimony was actuated by bias or ulterior motives. * *

"[47 Cal.2d at page 43, 301 P.2d at page 251.] With reference to the questioned rulings and instructions it is to be noted that it is not necessary that the party desiring to impeach should expressly state that he seeks to prove a fabrication of recent date. It is sufficient if the record indicates a purpose to prove a recent fabrication. *Davis v. Tanner*, 88 Cal.App. 67, 78-79, 262 P. 1106; *Griffin v. Boston*, 188 Mass. 475, 74 N.E. 687; *Baber v. Broadway & S. A. R. Co.*, 9 Misc. 20, 29 N.Y.S. 40; *Sweazey v. Valley Transport, Inc.*, supra, 6 Wash.2d 324, 107 P.2d 567; 111 P.2d 1010 [140 A.L.R. 1]; 140 A.L.R. 152 and cases collected at pages 153-154. In the present case inferences of fabrication since the alleged bribes could be fairly drawn by the jurors in addition to those which would tend merely to impeach the witnesses' general reputations or otherwise cast doubt upon their testimony. We find no error in admitting evidence of prior consistent statements for the limited purpose of refuting inferences of subsequent fabrication and to show a prior state of mind consistent with that shown by the witnesses when testifying."

[1,2] The cross-examination of Trinidad was in part an attempt to show that her testimony that defendant had caused the injuries to Celia was of recent fabrication brought about by the fact that defendant had testified against her at her preliminary hearing and at the trial of the charges against her. Thus, under the rule "that where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of

the witness at the trial" as applied by the Supreme Court in *Walsh*, the testimony of Officers Uttke and Barner and of the public defender as to the conversations with Trinidad before her preliminary hearing were admissible for the sole purpose "of refuting inferences of subsequent fabrication and to show a prior state of mind consistent with that shown" by her when testifying at the trial of defendant.

The judgment and the order denying a new trial are affirmed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment. It is well settled that where the circumstances are such as to reasonably support a claim that the testimony of a witness at the trial is a recent fabrication evidence that the witness previously made statements substantially corresponding with his testimony may be received to meet the claim of recent fabrication. There is a vast difference between a claim of recent fabrication and the usual cross-examination, the invariable purpose of which is, of course, to discover any untruth in the testimony. If no facts are brought out to indicate that the testimony may be of recent invention, and not merely untruthful, the rule has no application. I can think of no more dangerous or unsupportable rule of evidence than one that would permit the testimony of a witness to be bolstered by evidence that he had previously made statements consistent with his testimony for the sole reason that he had been cross-examined with the hope of proving the falsity of his testimony. I do not believe that it will ever become the law in California that the testimony of every prosecuting witness whose veracity is challenged can be fortified by evidence that on a former occasion he wrote down in a diary, or on a calendar or some scrap of paper his unsworn version of the occurrence. Such an extraordinary departure from the fundamental rules of evidence would open the way to the unlimited manufacture of evidence. No jus-

tification for it can be found in the mere fact that the witness was cross-examined, not as to facts of recent occurrence which might have influenced his testimony, but only as to testimony given in the course of his direct examination.

It is clear to me that the majority opinion does not impliedly endorse the proposition that rehabilitating evidence may be received when there is in evidence no circumstance or event of recent occurrence, such as a desire for revenge, self-interest or pressure, which might have caused the witness to give testimony he would not have given otherwise. But I would point out that the opinion should be carefully read in the light of all the facts of the present case, as they are stated, for an understanding of the reasons for affirmation of the judgment.



145 Cal.App.2d 612

In the Matter of the ESTATE of Dorothy DUNCAN, also known as Dorothy Duncan Pidge, Deceased

Jacques B. SNYDER, Contestant and Appellant,

v.

**MOTION PICTURE RELIEF FUND, Inc.,
Legatee and Respondent,**

**Charles Goldring, Petitioner and Respondent.
Civ. 21891.**

District Court of Appeal, Second District,
Division 2, California.
Nov. 2, 1956.

Proceeding to determine heirship and construe will. From adverse judgment of the Superior Court, Los Angeles County, Clyde C. Triplett, J., heir appealed. The District Court of Appeal, Moore, P. J., held that where testatrix' holographic will contained a residuary clause providing that

whatever money is left "I would like to help, perhaps a secretary," at a designated charity, such residuary clause would be construed as a gift to named charity and phrase "perhaps a secretary" as merely precatory words.

Affirmed.

1. Wills ⇨675

Precatory words in a will suffice to create a binding trust only when it clearly appears that the testator intends to impose an imperative obligation and to exclude the exercise of discretion by the person to whom they are addressed.

2. Trusts ⇨172

Precatory words restrict discretion of one who is admittedly a trustee only when they are of such a nature that they show intent to impose an imperative obligation and to exclude the exercise of discretion.

3. Wills ⇨675

Where testatrix' holographic will contained a residuary clause providing that whatever money is left "I would like to help, perhaps a secretary," at a designated charity, clause would be construed as a gift to the named charity and the phrase "perhaps a secretary" as merely precatory. West's Ann.Prob.Code, § 102.

4. Charities ⇨31

Gifts to charity are highly favored and bequests for such purpose will be liberally construed in order to effectuate the intent of the testator.

5. Wills ⇨448, 449

Whenever a disputed word or phrase in a will may be given either of two meanings, that should be given which will prevent intestacy, total or partial. West's Ann.Prob.Code, § 102.

Willard R. Decker, Azusa, and Robert S. Dickerman, Los Angeles, for appellant.

Alpern & Vallier, by Robert Vallier, Los Angeles, for Motion Picture Relief Fund, Inc., respondent.

MOORE, Presiding Justice.

From a judgment determining heirship, Jacques Snyder appeals.

In her lifetime, decedent executed a holographic will. After making a number of bequests of \$100 each and of treasured possessions of adornment, she closed with a residuary clause in the following words:

"If, after everything is paid up—that is, my debts—whatever money is left I would like to help, perhaps a secretary, at the Motion Picture Relief Fund."

After an order for partial distribution had been made, the executor petitioned for a determination of heirship. He alleged that the Motion Picture Relief Fund is incorporated and is licensed as a charitable nonprofit organization and prayed the court to determine and declare the rights of all persons to decedent's estate and to whom distribution should be made. Jacques B. Snyder, legatee of his grandfather's portrait, filed his "statement of claim of interest in estate."

After trial, the court found upon substantial evidence that decedent left but one living relative, to wit, the same Jacques B. Snyder, her first cousin; that at the time testatrix drew her will there existed the Motion Picture Relief Fund, Inc. which provides health and welfare services, assistance and benefits to indigent persons employed or formerly employed in motion picture industry who are in need thereof; that a person is so employed, irrespective of his occupation, if he contributes substantially to the making of film; secretaries who meet this test form a clearly identifiable class of persons eligible for relief from the Fund; that the Fund relies upon voluntary contributions and bequests in order to carry on its work, although this is not a condition for receiving or qualifying for its benefits; that testatrix was a secretary and was so employed for approximately 22 years; that the rights of persons or organizations claiming an interest in the residue of decedent's estate have not heretofore been determined by any judg-

ment; that the only parties claiming an interest therein are the said Fund, Snyder and the executor, as trustee for secretaries as a class who are members of the Fund.

The court thereupon concluded that the testatrix intended to bequeath the entire residuum of her estate to Motion Picture Relief Fund, Inc.; that the words "perhaps a secretary" are precatory only and are to be disregarded; that their omission leaves the testatrix' intent unimpaired; that the residual bequest to the Fund is valid and it is entitled to distribution of the full balance of the net distributable estate pursuant thereto, free and clear of any obligation as to the use of the proceeds, funds and property thereof except for the charitable purposes of the Fund; that Snyder is not entitled to share in the estate of decedent except as the legatee of the portrait of his grandfather; that the entire estate is fully disposed of by decedent's will and there is no intestacy from which heirs at law might otherwise take.

Construction of the Will

Appellant's argument is a simple one: The language "perhaps a secretary" is not precatory but is a mandate that the beneficiary be a secretary employed "at the Motion Picture Relief Fund"; therefore, the trust is not sustainable as a private trust since the beneficiary is unidentified, nor as a charitable trust since the beneficiary is in the singular rather than the requisite "*indefinite number of persons*". In re Estate of Huebner, 127 Cal.App. 244, 246, 15 P.2d 758, 759. However, this chain of reasoning must fail because of our construction of the will.

The language does not indicate a desire to aid a secretary employed at the Fund, but rather an inclination to provide further funds for use in carrying out the charitable purposes of the organization in extending relief to employees of the motion picture industry who are now in need. The testatrix expressly desired that her money "help * * * at the Motion Picture Relief Fund." To construe a secretary rather

than the Fund as the primary beneficiary would pervert the plain meaning of the testament. The main portion of the sentence is the gift to the Fund. "[P]erhaps a secretary" was only a parenthetical expression enclosed in commas and not necessary to the sense of the sentence. When the circumstances surrounding the bequest are considered, it seems clear that the testatrix intended the Fund to have the benefit of her moneys but hoped that the needy persons who would receive the benefit of her sums would be secretaries, undoubtedly because she, herself, had been a secretary.

[1-3] The question is whether the testatrix intended her request relative to a "secretary" to be more than mere hope or desire. It has been held that precatory words in a will suffice to create a binding trust only when it clearly appears that the testator intends to impose an imperative obligation and to exclude the exercise of discretion by the person to whom they are addressed. *In re Estate of Hood*, 57 Cal. App.2d 782, 785, 135 P.2d 383. Similarly, precatory words restrict the discretion of one who is admittedly a trustee only when they are of such a nature. We are not convinced that the trial court erred in determining that the primary intent of the testatrix was to further the work of the Fund without imposing binding restrictions upon its use of the bequeathed sums.

[4,5] Gifts to charity are highly favored. Bequests for such purpose will be liberally construed in order to effectuate the intent of the testator. *In re Estate of Davison*, 96 Cal.App.2d 263, 270, 215 P.2d 504; *In re Estate of Yule*, 57 Cal.App.2d 652, 654, 135 P.2d 386. Whenever a disputed word or phrase may be given either of two meanings, that should be given which will prevent intestacy, total or partial. Prob.Code, § 102; *In re Estate of Farely*, 214 Cal. 199, 206, 4 P.2d 948; *In re Estate of Gracey*, 200 Cal. 482, 492, 253 P. 921. Since the wording "perhaps a secretary" may be construed as merely pre-

atory, and thereby validate the trust without entanglement in the rule of the Huebner case, supra, the foregoing rules of construction suggest that interpretation.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



Dennis S. NEFF and Geraldine L. Neff,
Plaintiffs and Respondents,

v.

Clement L. ERNST, Administrator with the
Will Annexed, of the Estate of Daniel L.
Ernst, deceased, substituted in place of
Daniel L. Ernst, Defendant and Appellant.*

Civ. 21523.

District Court of Appeal, Second District,
Division 2, California.

Oct. 29, 1956.

Hearing Granted Dec. 24, 1956.

Action wherein the Superior Court of Los Angeles County, Leon T. David, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Ashburn, J., held that extrinsic evidence sustained finding that parties to ambiguous deed had intended grant to include title to one-half of vacated streets adjoining described premises.

Affirmed.

1. Boundaries ⇨20(1)

Civil Code section, making transfer of land bounded by highway effective to pass title to center thereof, applies even where street has been vacated prior to transfer. West's Ann.Civ.Code, § 1112.

2. Boundaries ⇨20(1)

Evidence ⇨461(4)

Fact that deed expressly conveyed vacated alley while remaining silent as to va-

* Opinion vacated 311 P.2d 849.

cated streets adjoining property conveyed did not clearly evince intention not to convey half of street; but such circumstance did raise an ambiguity in deed, in the resolution of which extrinsic evidence could properly be considered. West's Ann.Civ. Code, § 1112.

3. Deeds ⇨109

Extrinsic evidence may be received in aid of interpretation of an ambiguous deed.

4. Boundaries ⇨37(4)

Extrinsic evidence sustained finding that parties to ambiguous deed had intended grant to include title to one-half of vacated streets adjoining described premises. West's Ann.Civ.Code, § 1112.

5. Easements ⇨17(4)

When one lays out tract of land into lots and streets and sells lots by reference to map which exhibits lots and streets as they lie with relation to each other, purchasers of such lots have a private easement, in streets adjoining their respective lots and all other streets in tract, for ingress and egress and for any use proper to private way; and such private easement is entirely independent of fact of dedication to public use, and is a private appurtenance to lots, of which owners cannot be divested except by due process of law; and a subsequent deed for one of such lots, referring to map for description, carries such appurtenance as incident to lot. West's Ann.Civ. Code, § 1104.

6. Easements ⇨15

Civil Code section, giving transferee benefit of certain easements attached to property, is rule of general application, not confined to street-bounded lots of subdivision. West's Ann.Civ.Code, § 1104.

7. Appeal and Error ⇨790(2)

Motion for new trial is independent of and collateral to appeal from judgment, and power of trial judge to entertain and pass upon motion is not affected by such an appeal; but if motion is granted pending appeal, judgment is vacated, and appeal becomes moot and should be dismissed. West's Ann.Code Civ.Proc., § 662.

8. Appeal and Error ⇨438

Where original judgment was entered on April 20, and new trial motion was argued and submitted on May 31, appeal from original judgment taken thereafter, but prior to ruling on motion, did not deprive trial judge of jurisdiction to deny motion and make revised findings and judgment. West's Ann.Code Civ.Proc., § 662.

9. Action ⇨2

A "cause of action" is the right to enforce an existing obligation; and remedy is not of essence, but when obligation is established an appropriate remedy flows as an incident thereto.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Action".

10. Pleading ⇨248(17)

When basic facts are the same, shifting from one theory of liability to another is not substitution of new cause of action; and amendment substituting allegation of fee (in vacated street lying between lands of parties) for original averment of easement constituted merely a shifting of theories, and allowing same was not improper. West's Ann.Code Civ.Proc., § 580.

11. Equity ⇨39(1)

A court of equity which has taken jurisdiction of cause has duty to hold it for purpose of administering complete relief, and an obligation to make such an award.

12. Judgment ⇨251(1)

When chancellor sees that plaintiff seeking declaratory relief has proved himself owner of fee, it is his duty to render judgment accordingly, even though plaintiff's attorney has mistakenly alleged ownership to be of an easement.

13. Equity ⇨39(1)

Court of equity has power to do complete justice based upon record before it.

14. Statutes ⇨265

Statute should not be construed as an attempt to divest existing rights unless an intention so to do plainly appears. West's Ann.Civ.Code, § 812.

15. Easements \S 26(1)

Civil Code section extinguishing private easements upon vacation or abandonment of street was not intended to divest existing rights. West's Ann.Civ.Code, \S 812.

Caryl Warner, Los Angeles, for appellant.

William G. Bolton and John A. Michael, Inglewood, for respondents.

ASHBURN, Justice.

Defendant ¹ appeals from a judgment declaring plaintiffs ² to be the owners of half of certain vacated streets adjoining subdivision lots sold to Mr. Neff and conveyed by lot and map reference, the deed having been made subsequent to the street vacation.

In the year 1902 one Benjamin Hiss caused to be recorded a subdivision map of "Second Addition to Hermosa Beach." He was then the owner of the entire property. One block, designated as 72, contained 12 lots (Nos. 1-12, inclusive) lying on the north side of Pier Avenue. On the west side they were bounded by Bard Street and on the north by Oak Street. Through the center of the block ran an east-west alley which separated the north tier of lots (1-6) from the south tier (7-12). The lots immediately adjoining Bard Street were numbers 1 and 12, each being 80 feet on Bard Street; the alley, 20 feet wide, lay between them. Lots 1 to 6 were bounded on the north by Oak Street.

In 1916 Hiss procured the vacation of Bard Street from a point located 100 feet north of Pier Avenue to its junction with Oak Street; also the vacation of Oak Street and the said alley. This left the block bounded on the west and north by the

vacated portions of streets. Hiss owned the lots surrounding the vacated streets on the west and north. Indeed he still owned the entire tract and of course the title to the vacated portions of streets and the alley reverted to him upon vacation.

In 1927 he erected a permanent building upon lots 1, 2, 3, 10, 11 and 12, and a portion of the vacated alley. His interest in all the property passed to California Bank in 1932 and it, while still the owner of the entire tract, sold and conveyed to plaintiff Neff a portion thereof which was described in the deed "as Lots 1 to 12, inclusive, in Block 72, of the Second Addition to Hermosa Beach, as per map recorded in Book 3, Pages 11 and 12 of Maps, in the Office of the County Recorder of said County; also the vacated alley lying between the southerly lines of said Lots 1 to 6, inclusive, and the northerly lines of said lots 7 to 12, inclusive. * * * also subject * * * to other matters of record." The bank later conveyed to Ernst's predecessor in interest the lots surrounding the vacated streets, describing them by lot numbers and reference to the map; the deed also included a Parcel 2: "Also Oak Street, vacated, lying West of the West line of West Railroad Drive and that part of Bard Street, vacated, lying North of a line distant 100 feet North of the North line of Pier Avenue, formerly Santa Fe Avenue." Defendant Ernst acquired the same property under the same description in 1946.

In 1953 he began constructing and thereafter pursued to completion a substantial brick building extending over the vacated portion of Bard Street, its easterly line being not more than two or three feet from the westerly wall of plaintiff's building. The Ernst building and brick wall extended north to Oak Street (vacated), and defend-

1. During the progress of this action defendant-appellant Daniel L. Ernst died; Clement L. Ernst, his administrator with the will annexed, has been substituted as defendant-appellant. However, for convenience, Daniel L. Ernst will be indicated by the use of the word defendant or appellant herein.

2. The original purchaser and grantee is Dennis S. Neff; he later placed the property in joint tenancy with his wife; the word plaintiff will refer to Mr. Neff unless otherwise indicated by the text.

ant also built along the south line of Oak Street (vacated) a brick wall six feet high, thus blocking plaintiff's entrance to his property throughout the entire length of the vacated portions of Bard and Oak Streets. The new building overlaps plaintiff's for a distance of 21' 9" and renders unusable three garages on the west side thereof, making it impossible to open the doors.

By revised findings and judgment the court decreed that plaintiffs are the owners of one-half the width of each of the vacated streets, and that plaintiffs and defendant are each "vested with a private right-of-way for purposes of ingress, egress and ordinary incidents of travel, over that area of Bard Street owned by the other, in and to which the public easement has been vacated." Also that plaintiffs are vested with an easement over the vacated portion of Bard Street "for the passage of the natural flow of surface water from the plaintiffs' premises." It is further adjudged that defendant's building had been constructed and maintained "wrongfully, unlawfully, and wilfully upon the property of plaintiff", and that "defendant is ordered forthwith to commence and diligently accomplish the removal and abatement of the said walls and structures and to complete the said removal within sixty days from notice of entry of judgment." Plaintiffs also were awarded other appropriate injunctive relief.

[1] Appellant, relying upon the concluding phrase of Civil Code, § 1112, claims error in the holding that plaintiffs' title extends to the middle of the vacated streets. The section reads: "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." It is established law in this state that this rule applies although the street has been vacated prior to the sale in question. *Anderson v. Citizens' Sav. & Trust Co.*, 185 Cal. 386, 393, 197 P. 113; *Pinsky v. Sloat*, 130 Cal.App.2d

579, 585, 279 P.2d 584. In the *Anderson* case it is said: "By such a description a street is created as between the grantor and the grantee, regardless of whether or not there is an existing dedication as between the grantor and the public. This is the settled law of this state. * * * It may well be—in fact it is certain that it would be—that in such a case the grantor would reserve an easement over the fee in the street for its use for street purposes appurtenant to other nearby property which he might retain, and to which the use of the street as such would be of value." 185 Cal. at page 393, 197 P. at page 117. Also: "We hold, then, that in the absence of any circumstances showing clearly that the parties intended otherwise, the deed by Martin to Lempertz, describing the lot by reference to the map of the tract operated to convey as a part of the lot the fee in Martin to the center line of the streets, which the map showed as bounding the lots, although such streets had been previously abandoned as public streets." 185 Cal. at page 396, 197 P. at page 118. It is also pointed out that the ultimate question is the "intent of the parties as expressed in the deed * * and the rule which we have been discussing and which we have adopted is after all but a rule of construction, to be followed if, as is usually the case, there is nothing which points plainly and certainly to a contrary intention, but not to be followed if there is." 185 Cal. at page 397, 197 P. at page 118. Again it is said that the grantor's "intention in this respect is to be ascertained by what she said in the deed as construed in the light of the circumstances under which it was made and her conduct with reference to it * * *." 185 Cal. at page 397, 197 P. at page 118. A strong presumption exists to the effect that the parties to such a description intend the grantee's title to extend to the center of the street, *Brown v. Bachelder*, 214 Cal. 753, 755, 7 P.2d 1027; *Allan v. City & County of San Francisco*, 7 Cal.2d 642, 649, 61 P.2d 1175; *Machado v. Title Guarantee and T. Co.*, 15 Cal.2d 180, 183, 99 P.2d 245, and a clear showing is necessary to the estab-

lishment of a contrary intention. *Anderson v. Citizens Sav. & Trust Co.*, supra, 185 Cal. 386, at pages 393, 396, 397, 197 P. 113, at pages 116, 118; *Pinsky v. Sloat*, supra, 130 Cal.App.2d 579, at pages 583, 585, 279 P.2d 584, at pages 586, 588; *McIntire v. Wasson*, 125 Cal.App.2d 371, 377, 270 P. 2d 32; 11 C.J.S., Boundaries, § 35, p. 583.

[2-4] Appellant argues that such showing exists at bar because the grant to Neff expressly conveys the vacated alley and is silent with respect to vacated portions of adjoining streets. This circumstance raises an ambiguity in the deed, certainly not a clear showing of intention. (As to what constitutes an ambiguity in a written instrument, see *Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke Co.*, 46 Cal.2d 517, 297 P.2d 428. This is clearly a case in which extrinsic evidence is properly considered in arriving at the intent of the parties to the deed, for it is well-settled that such proof may be received in aid of the interpretation of an ambiguous deed. *Anderson v. Citizens Sav. etc. Co.*, supra, 185 Cal. 386, 397, 197 P. 113; *People v. Ocean Shore Railroad*, 32 Cal.2d 406, 414, 196 P.2d 570, 6 A.L.R.2d 1179; *Hay v. Allen*, 112 Cal. App.2d 676, 682, 247 P.2d 94; 15 Cal.Jur. 2d § 122, p. 522, § 126, p. 527, § 157, p. 560; 8 Am.Jur. § 37, p. 775; 11 C.J.S., Boundaries, § 105, p. 699. The *Pinsky* case, supra, is not to the contrary; the language there used concerning parol evidence was related to a deed which was found to be "complete, clear, definite, certain, and unambiguous." 185 Cal. at page 589, 279 P.2d at page 591. The record before us discloses circumstances persuasive of the correctness of the trial judge's finding.

The building on the Neff land was constructed by Hiss in 1927, when he owned the entire tract. Although Bard Street had been vacated opposite the portion which he devoted to the three garages, he placed the building right on the line. Bard Street, though vacated, was an oiled road and was used just as if it were a public street. Hiss, his successor Neff, and their tenants, used that vacated street over the years for

ingress and egress to the garages and to the northerly portion of the Neff property (lots 1 to 6). The garage doors would not open without crossing the east line of Bard Street and the garages could not be used without the aid of that road for ingress and egress. The northerly lots could not be used conveniently without the same access to a roadway. The California Bank, as successor to Hiss, was charged with knowledge of these physical conditions. It is difficult to conceive of its intending that the purchaser of lots 1 and 12 would not have, in the future as in the past, the full use of the adjoining roadway which, to all appearances, was a public street. It would seem that plaintiffs, if advised that any such problem ever would arise, would have declined to consummate the deal. The evidence amply sustains the court's finding: "That it was the intention of the grantor, California Bank, and of the grantee, plaintiff, as determined from the terms of the said grant to which Paragraph 1 refers, that the title of the plaintiff Dennis S. Neff should include the fee title in and to the adjacent portions of Bard Street and of Oak Street (including the area in and to which the public easement was vacated). * * *."

The map to which the Neff deed referred did not show any vacation of Bard and Oak Streets; it was the one which dedicated them to public use. Arguments built upon the assumption that the deed reference carried constructive notice to the grantee that the disputed portions of these streets had been vacated, are misplaced and need no further comment.

[5] So far as concerns the adjudication that plaintiffs and defendant each have an easement to use for street purposes the half of the vacated road belonging to the other, the law seems also clear. It is stated in *Danielson v. Sykes*, 157 Cal. 686, 689-690, 109 P. 87, 88, 28 L.R.A., N.S., 1024, as follows: "It is a thoroughly established proposition in this state that, when one lays out a tract of land into lots and streets and sells the lots by reference to a map which

exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law. * * * A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot." Moreover, this easement extends to all streets in the tract. 157 Cal. at page 691, 109 P. 87. To the same effect are *Fristoe v. Drapeau*, 35 Cal.2d 5, 9, 215 P.2d 729; *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 650, 234 P.2d 625, 40 A.L.R.2d 1238; *Day v. Robison*, 131 Cal.App.2d 622, 625, 281 P. 2d 13. The trial court's ruling in this respect was correct.

[6] The application to the present situation of the Danielson rule, which is confined to conveyances of lots bounded by public highways, renders unnecessary to a correct decision of this appeal a discussion of arguments about necessity or convenience requisite to an easement under § 1104, Civil Code,² which is a rule of general application, not confined to street-bounded lots of a subdivision.

It is argued that the court was without jurisdiction to make revised findings and judgment. The original judgment was entered on April 20, 1955; defendant made a motion for new trial which was argued and submitted on May 31, 1955. The original judgment declared title to all of vacated portions of Bard Street and Oak Street to be in the defendant subject to an easement in plaintiffs to use the entire vacated portion of Bard Street for ingress and egress as an appurtenance to their

land. Upon the argument of the motion defendant's counsel urged, among other things, that there was error in the findings and judgment because the deed to Neff carried title to the middle of the vacated street and therefore the finding of title in defendant subject to an easement in plaintiffs was contrary to law. This question was discussed by counsel for both parties and the court submitted the matter in order to consider the effect of the *Anderson* and *Pinsky* cases, *supra*. This was on May 31, 1955. Before a ruling on the motion was made defendant appealed from the judgment on June 6, 1955. On June 9th the trial judge denied the motion for new trial, ordered the complaint amended to conform to the proof, and made revised findings and judgment to the effect that Neff's title extends to the middle of the vacated street and carries with it an easement to use the entire street for ordinary travel purposes. Appellant says that his appeal of June 6th transferred the entire cause to the Supreme Court and that the action of June 9th was wholly without jurisdiction and void. His counsel relies upon *Wagner v. Shapona*, 123 Cal.App.2d 451, 464, 267 P.2d 378, which supports his contention. No petition for hearing was filed in that case and we are unable to accept its ruling for reasons presently stated.

[7, 8] It long has been the law of this state that a motion for new trial is independent of and collateral to an appeal from the judgment, and that the power of the trial judge to entertain and pass upon the motion is not affected by such an appeal. If the motion is granted pending the appeal the judgment is vacated, the appeal becomes moot and should be dismissed. 1 Hayne on New Trial and Appeal, § 2, pp. 14-16; *San Jose Safe-Deposit Bank of Savings v. Bk. of Madera*, 121 Cal. 543, 545, 54 P. 85; *Hatfield v. Levy Brothers*,

2. Civ.Code, § 1104: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same

extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

18 Cal.2d 798, 807-808, 117 P.2d 841. In *Re Estate of Waters*, 181 Cal. 584, 588, 185 P. 951, 953, the Supreme Court, in denying a rehearing, said: "[W]e are entirely satisfied that in no case does the fact that an appeal has been taken from a judgment operate to divest the trial court of power to entertain and determine a motion for a new trial in the matter in which the judgment was given. The amendments of 1915 have in no respect changed our established law in this regard." The addition of power to vacate or modify which was conferred by § 662, Code of Civil Procedure,³ has not changed the rule. This court so held in *Rutledge v. Rutledge*, 119 Cal.App.2d 114, 117, 259 P.2d 79, 81, saying, through Mr. Justice McComb:

"Since the adoption of section 662 of the Code of Civil Procedure in 1929, the trial court has been authorized upon the denying of a motion for a new trial to amend its findings of fact, conclusions of law and enter a new and different judgment. (*California Machinery [& Supply] Co. v. University City Syndicate, Inc.*, 3 Cal.App.2d 425, 426 [1], 428 [3], 39 P.2d 853; *Spier v. Lang*, 4 Cal.2d 711, 714, 53 P.2d 138.)

"The taking of an appeal from the original judgment does not deprive the trial court of the power thus conferred. Since the original judgment is non-appealable, the amended judgment is the one from which an appeal may be taken."

See also, *Rutledge v. Rutledge*, 119 Cal. App.2d 112, 259 P.2d 78. The same ruling was made in *Free v. Furr*, 140 Cal.App.2d 378, 295 P.2d 134, and hearing was denied by the Supreme Court. The contrary ruling of the *Wagner* case, *supra*, rests upon certain decisions which do not involve the

effect of an appeal upon a motion for a new trial. Therefore it is not persuasive. We reiterate the holding in the *Rutledge* case, *supra*, which means that the court did not act without jurisdiction in the present instance.

It is also contended that the order of June 9th directing amendments to the complaint to conform to the proof is erroneous because (1) the amendments do not in fact conform to the proof, (2) they substitute a new cause of action, and (3) inject new issues and new findings upon which defendant has never had a trial, thus depriving him of due process of law.

It appears that the original complaint asserted no claim that plaintiffs owned the fee to one-half of the vacated streets, but alleged an appurtenant easement to use the same; the original findings uphold the easement and state that Ernst owns the vacated portions of the streets; the judgment reflects the same view, enjoins interference with the exercise of plaintiffs' rights as dominant tenant and orders removal of defendant's building and other obstructions. The amendments to the complaint which were ordered by the court aver that title of plaintiffs extends to the center of the vacated streets. The revised findings and judgment find and decree that to be a fact; an easement to use the whole of the vacated streets is also adjudicated and protected by appropriate injunction.

[9-12] Certain fundamentals should be here recognized. A cause of action is the right to enforce an existing obligation; the remedy is not of the essence; when the obligation is established an appropriate remedy flows as an incident thereto. *Frost v. Witter*, 132 Cal. 421, 426, 64 P. 705; *Klopstock v. Superior Court*, 17 Cal.

3. Code Civ.Proc. § 662: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the

findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."

2d 13, 20, 108 P.2d 906, 135 A.L.R. 318; *Smith v. Los Angeles Bookbinders Union*, 133 Cal.App.2d 486, 495, 284 P.2d 194, 199. In the last cited case it is said: "When the basic facts are the same a shifting from one theory of liability to another is not the substitution of a new cause of action. *Oberkotter v. Woolman*, 187 Cal. 500, 504, 202 P. 669; *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 718, 128 P. 2d 522, 141 A.L.R. 1358; *Barr v. Carroll*, 128 Cal.App.2d 23, 33-34, 274 P.2d 717." Plaintiffs' cause of action at bar was the enforcement of rights growing out of their deed, whether those rights spell an easement or a fee title, or both. Their original averment of an easement and later alleging a fee was merely a shifting of theories which, as shown by the quotation from the *Smith* case, supra, is not improper. Section 580, Code of Civil Procedure, provides that the relief in a default case cannot exceed the demand of the complaint; "but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." A court of equity which has taken jurisdiction of a cause has a duty to hold it for the purpose of administering complete relief, and an obligation to make such an award. *Walsh v. Majors*, 4 Cal. 2d 384, 398, 49 P.2d 598; *Newport v. Hatton*, 195 Cal. 132, 153, 231 P. 987. When the chancellor sees that plaintiff has proved himself the owner of a fee it is his duty to render such a judgment, even though plaintiff's attorney has mistakenly alleged it to be an easement. The amendments at bar did not introduce a new cause of action and the relief granted did not go beyond the province of the equity court.

Moreover, the claim that the judgment is based upon issues not tried, and that it does not actually conform to the proof, is not well grounded. The deeds which begot this controversy were received in evidence without objection and most of the surrounding circumstances were proved in the same manner. The facts were fully canvassed, and it makes little real difference whether plaintiffs own the fee to one-half of the street subject to a right of user for street purposes by defendant, or whether Ernst, the defendant, has the fee title to the whole street but is subject to a right of plaintiffs to use the entire strip for street purposes. The amendments do conform to the proof because they aver the correct legal effect of the deeds when read in the light of competent extrinsic evidence.

[13] The proof discloses that the normal flow of surface waters over the Neff land is to the northwest; that that corner is the low spot in which the waters tend to congregate; that defendant's wall prevents their normal flow onto his land. The judgment declares that plaintiffs have an easement to maintain such normal flow (which is sound, see *LeBrun v. Richards*, 210 Cal. 308, 313, 291 P. 825, 72 A.L.R. 336), and enjoins further obstruction thereof, which is but an exercise of the power of a court of equity to do complete justice based upon the record before it.

[14, 15] Appellant also relies upon § 812, Civil Code, which is set forth in the margin.⁴ This enactment appears not to have been construed by the courts. Its terms preclude application at bar, for it expressly excepts "a private easement neces-

4. Civ.Code, § 812: "The vacation or abandonment, pursuant to law, of streets and highways shall extinguish all private easements therein claimed by reason of the purchase of any lot by reference to a map or plat upon which such streets or highways are shown, other than a private easement necessary for the purpose of ingress and egress to any such lot from or to a public street or highway, except as to any person claiming such easement who, within two years from the effective date

of such vacation or abandonment or within two years from the date of the enactment of this section, whichever is later, shall have recorded in the office of the recorder of the county in which such vacated or abandoned streets or highways are located a verified notice of his claim to such easement over all or any part of any such street or highway which is particularly described in such notice. Nothing in this section shall be construed to create any such private easement, nor

sary for the purpose of ingress and egress to any such lot from or to a public street or highway". Moreover, plaintiffs' right to a fee title vested in 1938 and § 812 was enacted in 1949. It is not to be construed as an attempt to divest existing rights unless an intention so to do plainly appears, and we cannot say that such is the case here. 23 Cal.Jur. § 26, p. 629; Aetna Cas. & Surety Co. v. Industrial Acc. Comm., 30 Cal.2d 388, 393, 182 P.2d 159.

The foregoing discussion adequately disposes of other points made by counsel.

The appeal from the judgment entered on April 20, 1955 is dismissed. The revised judgment entered on June 10, 1955 is affirmed.

MOORE, P. J., and FOX, J., concur.



August Maurice NARDONI, Brazeli Nardoni, Frank Earl Alexander and Charles August Archambault, Appellants,

v.

F. Britton McCONNELL, Insurance Commissioner of the State of California, Successor to John R. Maloney, Respondent. *

Civ. 21267.

District Court of Appeal, Second District,
Division 3, California.

Nov. 1, 1956.

Rehearing Denied Nov. 27, 1956.

Hearing Granted Dec. 24, 1956.

Mandamus proceeding was brought by bail agents against the Insurance Commissioner to compel the Insurance Commissioner to vacate his order of revocation of licenses of two of the agents and the suspension of the licenses of the other two agents. The Superior Court of Los Angeles

County, Bayard Rhone, J., entered judgment adverse to the bail agents, and they appealed. The District Court of Appeal, Shinn, P. J., held that the Insurance Commissioner should not have revoked licenses of bail agents to act as insurance agents and broker and life agent, because of their violations of duty as bail agents, where there was no finding that they had engaged in a fraudulent practice or had conducted their business in a dishonest manner, and violations of their statutory duties as bail agents had no connection with their duties as insurance agents, and that licenses of bail agents as bail agents should not have been revoked, but should merely have been suspended.

Judgment affirmed in part and reversed in part.

1. Mandamus ☞174

In mandamus proceeding by bail agents against the Insurance Commissioner to compel the Insurance Commissioner to vacate his order of revocation of licenses of two of the brokers and the suspension of the licenses of the other two brokers, trial court was required to exercise its independent judgment in deciding the factual issues. West's Ann.Code Civ.Proc., § 1094.5 and subd. (c).

2. Appeal and Error ☞757(3)

Where appellants contended on appeal that evidence was not sufficient to sustain finding of trial court that a certain arrangement existed, but appellants in their briefs did not set forth the substance of the evidence tending to prove or disprove the existence of such an arrangement, the District Court of Appeal would not consider the claim of insufficiency of the evidence to support the finding and would not make an independent study of the record to inform itself as to the merits of the objection of the insufficiency of the evidence. ☞

to extend any such private easement now recognized by law, nor to make the rights of the public in or to any street or high-

* Opinion vacated 310 P.2d 644.

way subordinate to any such private easement."

3. Licenses ⇨38

Hearsay evidence alone is insufficient to support revocation of a license. West's Ann.Gov.Code, § 11513(c).

4. Bail ⇨60

In proceeding before Insurance Commissioner for revocation of licenses of two of the brokers and the suspension of the licenses of the other two brokers, hearsay testimony, which helped to explain the conduct of the bail agents and the parties with whom they were dealing, was properly received. West's Ann.Gov.Code, § 11513(c).

5. Mandamus ⇨168(4)

In mandamus proceeding by bail agents against the Insurance Commissioner to compel the Insurance Commissioner to vacate his order of revocation of licenses of two of the brokers and the suspension of the licenses of the other two brokers, evidence sustained findings that bail agents violated the Administrative Code.

6. Mandamus ⇨168(3)

In mandamus proceeding by bail agents against the Insurance Commissioner to compel the Insurance Commissioner to vacate his order of revocation of licenses of two of the brokers and the suspension of the licenses of the other two brokers, trial court properly excluded evidence of the good reputation and character of the bail agents, where the bail agents were not accused of being persons of bad character or of having dealt dishonestly with clients.

7. Mandamus ⇨176

Where an administrative board has found the commission by a licensee of two or more offenses, which would justify disciplinary action, and has made a single order of suspension or revocation for multiple offenses, and court has determined the finding of guilt as to one or more of the charges to be contrary to the weight of the evidence, the matter will be referred to the board for reconsideration. West's Ann.Code Civ. Proc., § 1094.5(e).

8. Insurance ⇨12

The Insurance Commissioner should not have revoked licenses of bail agents to

act as insurance agent and broker and life agent, because of their violations of duty as bail agents, where there was no finding that they had engaged in a fraudulent practice or had conducted their business in a dishonest manner, and violations of their statutory duties as bail agents had no connection with their duties as insurance agents. West's Ann.Insurance Code, § 1731(d, e, g, i, j).

9. Bail ⇨60

Where bail agents, whose licenses had been revoked because of violations of the Administrative Code, were not guilty of any fraudulent practices and did not conduct their business in a dishonest manner, their licenses should not have been revoked, but should have merely been suspended.

Bernard C. Brennan, William E. Cornell, and Blase A. Bonpane, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

August M. Nardoni was a duly licensed bail agent, insurance agent, insurance broker and life agent under the rules and regulations of the insurance Code and insurance laws of the state. Brazell Nardoni was a licensed bail agent and insurance agent. The two were partners in the bail bond business in Los Angeles; August conducted a separate business as insurance agent, insurance broker and life agent and Brazell conducted a separate business as insurance agent only. Frank E. Alexander and Charles A. Archambault were licensed as bail agents and were employees of the Nardonis. Separate accusations were filed against the four charging separate violations of the Insurance Code and the California Administrative Code. The accused answered; the four proceedings were consolidated for hearing and a hearing was duly had before the Department of Insurance and evidence was taken before a hearing officer; the matter was submitted;

the hearing officer issued his proposed decision; it was adopted by the Insurance Commissioner and pursuant thereto all licenses held by August M. Nardoni and all those held by Brazell Nardoni were revoked; the licenses held by Frank E. Alexander and Charles A. Archambault were suspended for three months. The licensees petitioned for reconsideration which was denied and they petitioned the superior court for a writ of mandate; an alternative

writ was issued; the Insurance Commissioner answered; trial was had and findings and judgment were entered in favor of the commissioner. The findings of the court were that all the findings of the hearing officer as adopted by the commissioner were justified and supported by the weight of the evidence. The court's findings of violations and the principal code sections are set out in the margin.^{1, 2} The conclusions of the court were to the general effect that

1. "That the respondent Insurance Commissioner rightfully and properly found and determined, and the court now finds:
 - "(A) That petitioner August Nardoni has violated the following provisions of Title 10 of the California Administrative Code:

"(1) Section 2077, in that he recommended attorneys at law to various persons;

"(2) Section 2078, in that he indirectly assisted in the preparation of a petition for and the securing of writs of habeas corpus by furnishing facilities to attorneys in his bailbond office for the preparation of such documents;

"(3) Section 2079, in that he solicited and negotiated for bail with persons whom the arrestee had not specifically authorized and designated in writing;

"(4) Section 2091, in that he had some arrangement with one Frank E. Vargas, a member of the Los Angeles Police Department, to furnish information relative to the arrest or incarceration of any person in jail;

"(5) Section 2101, in that he failed to set forth on his records the correct information as to the source from which notice or knowledge leading to the solicitation or negotiation of bail was received;

"(6) Section 2073, in that he permitted persons to solicit or negotiate with respect to execution of bail at a time when he knew such persons were not licensed by the Department of Insurance to transact bail;

"(7) Section 2100, in that undertakings of bail were issued prior to obtaining a full and complete written application therefor;

"(8) Sections 2086 and 2087, in that he failed to file with the Department of Insurance a complete listing of all persons in his employ, setting forth the residence address, date of employment, the duties, basis of compensation, and the date and reason for termination of such employment.

"(B) That petitioner Brazell Nardoni

has violated the provisions of Title 10 of the California Administrative Code:

"(1) Section 2077, in that he recommended attorneys at law to various persons;

"(2) Section 2078, in that he indirectly assisted in the preparation of a petition for and the securing of writs of habeas corpus by furnishing facilities to attorneys in his bail bond office for the preparation of such documents;

"(3) Section 2079, in that he solicited and negotiated for bail with persons whom the arrestee had not specifically authorized and designated in writing;

"(4) Section 2091, in that he had some arrangement with one Frank E. Vargas, a member of the Los Angeles Police Department, to furnish information relative to the arrest or incarceration of any person in jail;

"(5) Section 2101, in that he failed to set forth on his records the correct information as to the source from which notice of knowledge leading to the solicitation or negotiation of bail was received;

"(6) Section 2073, in that he permitted persons to solicit or negotiate with respect to execution of bail at a time when he knew such persons were not licensed by the Department of Insurance to transact bail;

"(7) Section 2100, in that undertakings of bail were issued prior to obtaining a full and complete written application therefor;

"(8) Sections 2086 and 2087, in that he failed to file with the Department of Insurance a complete listing of all persons in his employ, setting forth the residence address, date of employment, the duties, basis of compensation, and the date and reason for termination of such employment.

"(C) That petitioner Frank Earl Alexander has violated the provisions of Title 10 of the California Administrative Code as follows:

"Section 2101, in that he failed to set forth on his records the correct information as to the source from which notice

the facts found justified the order of the commissioner as to each of the petitioners and that they had been accorded in all respects a fair hearing. Judgment was entered denying the petition for peremptory writ of mandate. The petitioners appeal.

The trial court received in evidence the entire record of the proceedings before the Insurance Commissioner which included the testimony of several witnesses in ad-

dition to the stipulation. The findings of the court recite that petitioners made a motion and offer to introduce into evidence at the trial oral testimony concerning their general reputation and character and that the motion and offer were denied. Appellants did not testify at any time.

In the hearing before the hearing officer all parties executed a stipulation consisting of 60 pages with 55 exhibits attached. The

or knowledge leading to the solicitation or negotiation of bail was received.

"(D) That petitioner Charles August Archambault has violated the following provisions of Title 10 of the California Administrative Code:

"(1) Section 2079, in that he solicited and negotiated for bail with persons whom the arrestee had not specifically authorized and designated in writing;

"(2) Section 2101, in that he failed to set forth on his records the correct information as to the source from which notice or knowledge leading to the solicitation or negotiation of bail was received."

2. "California Administrative Code—Title 10

"2073. No bail agent or bail permittee shall directly or indirectly permit any person on his behalf to solicit or negotiate in respect to execution or delivery of a bail bond or to execute or deliver a bail bond unless such person be licensed as provided in Article 1, Chapter 7, Part 2, Division 1 of the Insurance Code of the State of California. The fact that services are rendered gratuitously or otherwise shall not affect the application of this rule.

"2077. No bail agent, bail permittee, or bail solicitor shall in any manner directly or indirectly suggest to any person the name of, or recommend, any attorney or attorneys at law. Nothing contained in this rule shall prevent a bail licensee from following any procedure prescribed by the local Bar Association or the State Bar of California.

"2078. No bail agent, bail permittee, or bail solicitor, shall prepare or make a petition for a writ of habeas corpus for, or on behalf of, an arrestee or in any manner directly or indirectly assist in the preparation of a petition for, or otherwise aid in the securing of a writ of habeas corpus. Nothing contained in this rule shall prevent the posting of bail in connection with a writ of habeas corpus when done by a licensed agent or licensed permittee.

"2079. No bail agent, bail permittee, or bail solicitor shall solicit or negotiate for a bail bond except with: (a) The arrestee. (b) The arrestee's attorney at law. (c) An adult member of the arrestee's family at the arrestee's residence address. (d) Such other person as the arrestee shall specifically authorize and designate in writing.

"2091. No bail agent, bail permittee, or bail solicitor shall for any purpose, directly or indirectly, enter into an arrangement of any kind with a law enforcement officer, newspaper employee, messenger service or any of its employees, a trusty in a jail, any other person incarcerated in a jail, or with any other persons to inform or notify any licensee directly or indirectly of the fact of an arrest, or the arrest of any person, his name or address, his personal or legal representative, his friend or relative, or any other information relating thereto.

"2100. No bail bond shall be issued except upon a full and complete written application therefor.

"2101. Every application for a bail bond shall be signed by the licensee accepting same and shall have endorsed thereon or attached thereto a statement, in a form approved by the Department of Insurance, setting forth full information as to the source from which notice or knowledge leading to the solicitation or negotiation of bail was received. Full information shall include: (a) Full name of the person supplying the information. (b) The address of such person. (c) Connection or relation of such person to the arrestee. (d) Where the application is received direct from the arrestee a statement of the manner in which the arrestee communicated with the bondsman. (e) Where the arrestee is one who has been previously bailed, a statement of the date, the charge, the bond number covering the previous arrest. (f) The date and the time at which the application or information leading to the application was received."

stipulation read in part "Where it is stipulated that if called a person would testify to certain facts, such stipulation is in lieu of actual testimony and is to be considered admitted without objection unless an objection on specified grounds is expressly reserved for the particular testimony in writing. * * * All facts recited herein as stipulations are agreed to be true and correct, and may be used in lieu of evidence, and are to be considered proven by competent evidence." It was also stipulated that exhibits No. 1 through No. 55 were offered in evidence and were to be considered admitted without objection in the absence of a written objection upon some ground other than lack of foundation. When we refer to testimony of the witnesses at the hearing we will be speaking in terms of the stipulation.

The points on appeal are (a) the court should have found that the commissioner's findings were not supported by the weight of the evidence within the meaning of section 1094.5 of the Code of Civil Procedure; (b) the findings of the commissioner are not supported by the evidence; (c) the penalty imposed is excessive; (d) the court erred in refusing to hear oral testimony as to the good character and reputation of petitioners; and (e) as a matter of law the order of the commissioner and the judgment of the court should be vacated and the licenses restored.

[1] The trial court was required to exercise its independent judgment in deciding the factual issues. Code Civ.Proc. § 1094.5, subd. c; *Moran v. State Board of Medical Examiners*, 32 Cal.2d 301, 196 P.2d 20; *Hohreiter v. Garrison*, 81 Cal.App.2d 384, 184 P.2d 323; 2 Cal.Jur.2d, § 231, p. 385. It did so, and not only found expressly that the commissioner's findings were supported by the weight of the evidence but made its own findings which conformed in all respects to those of the commissioner.

[2] We consider first appellants' argument as to the insufficiency of the evidence to justify the material findings. It is said

"It is submitted that the most serious finding and decision of respondent and the trial court with reference to the character, integrity and honesty of appellants was based on the so-called 'arrangement' or conspiracy between appellants August Maurice Nardoni and Brazell Nardoni, and a police officer named Frank Vargas." As previously noted, the court found that the Nardonis had an arrangement with Vargas, a member of the Los Angeles Police Department, under which they were furnished information relative to arrests. In their briefs appellants have not set forth the substance of the evidence tending to prove or disprove the existence of such an arrangement. In the absence of such a statement the court will not consider a claim of insufficiency of the evidence to support a finding. It will not make an independent study of the record to inform itself as to the merits of the objection of insufficiency of the evidence. *Goldring v. Goldring*, 94 Cal.App.2d 643, 211 P.2d 342. However, we have deemed it necessary to familiarize ourselves with the evidence contained in the stipulation in order to give consideration to the contention that the findings of the court were improperly based upon hearsay evidence.

It is argued by appellants that the testimony of certain witnesses (as set out in the stipulation) which was relied upon as tending to prove the existence of the alleged arrangement with Vargas, and some of the other charges, was hearsay evidence, that it was improperly admitted over the objections of appellants and that their motions to strike the evidence should have been granted. The admission of the evidence over objection is not urged as error which furnishes an independent ground for reversal. It is said in the brief "It is further submitted that if the objections had been sustained and motions to strike granted as set forth in Exhibit A (the written objections) there would have been no substantial evidence warranting the penalty imposed by respondent." Although not required to do so, respondent in his brief states a summary of the evidence

tending to prove that the Nardonis were receiving from Vargas information respecting arrests which he had made and that they acted upon that information in contacting relatives of the persons arrested and arranging for their release on bail. The facts stipulated leave no room for doubt that the Nardonis and Vargas worked together in this manner on several different occasions. It was a reasonable inference that this was under a prearranged plan.

[3] Appellants say correctly that hearsay evidence alone is insufficient to support the revocation of a license, citing *Walker v. City of San Gabriel*, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383 and *Kinney v. Sacramento City Employees' Retirement System*, 77 Cal.App.2d 779, 176 P.2d 775. Section 11513(c) of the Government Code provides in part "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." But as we have said, appellants make no statement of the direct or the circumstantial evidence bearing on the question of the existence of a forbidden arrangement between the Nardonis and Vargas which was in addition to the claimed hearsay evidence. Nor do they argue the evidence bearing upon the other findings. They say only that such other evidence was unsubstantial. The reason for the omission of the statement of the material evidence is plain. Such a statement would have demonstrated its sufficiency to justify the principal findings of the court. This is true not only with respect to the Nardonis but also with respect to appellants Frank Earl Alexander and Charles August Archambault. The contention that the findings were based substantially upon hearsay evidence is clearly disproved by the record. Facts which were competent, relevant and material were established by the stipulation which, with reasonable inferences deducible therefrom, were sufficient of themselves to justify the court's findings.

[4, 5] We may add that while some of the testimony objected to was of hearsay character it was, in our opinion, properly received. It helped to explain conduct of appellants and the parties with whom they were dealing which constituted circumstantial evidence respecting the manner in which appellants were transacting their business. It consisted of statements of witnesses in the nature of verbal acts contemporaneous with their meetings with appellants and did not purport to establish, by mere assertion, any material fact. Moreover, we are convinced from a study of the record that the findings of the court were based upon sufficient evidence entirely apart from the evidence to which objection was made.

In the court trial appellants made a motion and offer to introduce oral evidence of their good reputation and character. The motion was denied and the ruling is assigned as error. It is stated by appellants Nardoni that they have been in the bail bond business at Los Angeles for more than 30 years during which they have rendered valuable service to the courts, attorneys and the public and have held a reputation for honesty and trustworthiness in the community. They urged these facts in their petition for reconsideration by which they sought a reduction of the penalty through an order placing them on probation.

[6] We detect no error in the rejection of the offer of proof. Evidence of good reputation is admissible upon the trial of an issue of fact because it may tend to prove that an accused of good character would not have committed the acts with which he is charged. Appellants no doubt realized that such evidence would have no tendency to prove them guiltless of the acts constituting the numerous violations, all of which were admitted by the stipulation. *People v. Green*, 217 Cal. 176, 183, 17 P.2d 730. Therefore, they urged the claim of good character and reputation only in their petition for reconsideration of the penalty. It would have been a proper matter for the commissioner to consider in determining what the penalty should be. But none of

the appellants was accused of being a person of bad character nor of having dealt dishonestly with his clients. The record does not disclose that their character or reputation was assailed or made an issue. And if, as they claim, they had a clear record as licensees that fact would necessarily have been known to the commissioner. In the light of the record, evidence of good character and reputation was not admissible in the court trial for any purpose. It was not the duty of the court to prescribe a penalty nor would the good character and reputation of appellants have furnished justification for the court's interfering with the penalty imposed by the commissioner.

Under section 1094.5(e), Code of Civil Procedure, the court may render judgment annulling orders such as the one before us or may remand the case for further consideration but "the judgment shall not limit or control in any way the discretion legally vested in the respondent."

[7] It is settled that where an administrative board has found the commission by a licensee of two or more offenses which would justify disciplinary action, and has made a single order of suspension or revocation for multiple offenses, and the court has determined the finding of guilt as to one or more of the charges to be contrary to the weight of the evidence, the matter will be referred to the board for reconsideration. *Cooper v. State Board of Medical Examiners*, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593; *Stoumen v. Reilly*, 37 Cal.2d 713, 234 P.2d 969; *Jones v. Maloney*, 106 Cal.App.2d 80, 234 P.2d 666; *Garfield v. Board of Medical Examiners*, 99 Cal. App.2d 219, 221 P.2d 705.

[8] All the accusations related to violations of duty by appellants as bail agents. The stipulated facts established the guilt

of appellants of those violations. They tacitly concede as much. All the evidence related to those violations. But as we have seen, the order of the commissioner revoked not only the licenses of the Nardonis to act as bail agents but also the license of August M. Nardoni to act as an Insurance Agent and Broker and a Life Agent and the license of Brazell Nardoni to act as an Insurance Agent.

We have concluded that the revocation of the licenses, other than the bail agent licenses, was unwarranted. The bail bond business is peculiar to itself. It is governed by regulations which cover every small detail of negotiation for and the issuance of bail bonds. These could not have the slightest application to other branches of the insurance business. Of the more serious faults sought to be prevented we mention the forbidden arrangements with police officers and others respecting information as to arrests, the recommendation to arrestees and others of attorneys, and participation in the preparation of petitions for writs of habeas corpus. These, and all the minor irregularities constituting violations found in the Administrative Code quoted above, are not evils to be found in the general insurance business.

Section 1731 of the Insurance Code specifies the grounds for disciplinary action against insurance agents, brokers, solicitors, life agents, surplus line brokers and motor club agents. The commissioner found that the Nardonis were subject to disciplinary action under section 1731(d), (e), (g), (i) and (j) of the Insurance Code.³

The court adopted a finding of the commissioner reading: "That by virtue of the violations of petitioners August Nardoni and Brazell Nardoni as hereinabove determined, the licenses of petitioner August

3. "(d) Such person has engaged in a fraudulent practice or act or conducted his business in a dishonest manner.

"(e) Such person has shown incompetency or untrustworthiness in the conduct of his business or has by commission of a wrongful act or practice in the

course of his business exposed the public or those dealing with him to the danger of loss.

"(g) Such person has failed to perform a duty expressly enjoined upon him by a provision of this code, or has com-

Nardoni to act as an Insurance Agent and Broker and to act as a Life Agent, and the license of petitioner Brazell Nardoni to act as an Insurance Agent are subject to disciplinary action by virtue of the provisions of section 1731 of the Insurance Code."

There was no finding that either of the Nardonis had engaged in a fraudulent practice or had conducted his business in a dishonest manner. There was no inherent dishonesty in their transgressions as bail agents. They were not shown to have been incompetent or untrustworthy with respect to their clients. As to section 1731 (g) they were guilty of violations of their duties as bail agents but these violations were of duties that could have no connection with the duties of insurance agents. Section 1731 must be given reasonable application. As to paragraph (g) of that section which was applied by the commissioner and the court it is to be noted that the acts and omissions which were relied upon were those particularly set forth as violations of the Administrative Code and not the Insurance Code. With respect to paragraphs (i) and (j) of the section we think they should not be held applicable to acts or omissions of employees of a bail agent with respect to violations of the stringent and technical requirements of the Administrative Code applicable to such employees. The violations charged against Alexander and Archambault consisted of the failure to keep proper records as to the identity of persons with whom they negotiated for bail bonds and as to Archambault that he negotiated for bonds with persons who had not been authorized in writing by the arrestees to negotiate. These acts were not in violation of the Insurance Code.

Our conclusion is that there was no proof and no finding of facts which would justify the revocation of the licenses of the

Nardonis other than their licenses as bail agents.

The order of the commissioner must be reversed insofar as it revokes the licenses of August M. Nardoni to act as Insurance Agent and Broker and as Life Agent, and the license of Brazell Nardoni to act as Insurance Agent. We think it should also be reversed insofar as it revokes the licenses of the Nardonis as bail agents, but as to the penalty only.

[9] We are convinced from the severity of the order of the commissioner that there was a belief, the equivalent of an implied finding, that the Nardonis are of such evil character as to be unqualified to engage in any branch of the insurance business, however far it may be removed from the bail bond business. And we do not doubt that the assumed total lack of qualifications to act as Insurance Agent, Broker or Life Agent must have influenced the commissioner to impose the maximum penalty of revocation. As to the Nardonis there should be a reconsideration of the penalty to be imposed for their violations of duty as bail agents.

Some expression of commendation is due appellants and their counsel for the manner in which they expedited the proceedings before the hearing officer. By stipulating the facts and admitting the mistakes of appellants, what would have been a long drawn out series of sessions was avoided. Appellants stated that they threw themselves on the mercy of the commissioner. They asked only for leniency. The penalty meted out to the Nardonis could not have been greater if they had been guilty of dishonesty. It seems to us that the ends of justice would have been better served by suspending their licenses as bail agents and placing them on probation.

The judgment is reversed with directions that a writ issue commanding the

mitted an act expressly forbidden by such a provision.

* * * * *

"(i) Such person has aided or abetted any person in an act or omission which would constitute grounds for suspension,

revocation, or refusal of license to the person aided or abetted.

"(j) Such person has permitted any person in his employ to violate any provision of this code."

commissioner to vacate his order of revocation of the licenses of the Nardonis and to proceed further only as to the penalty to be imposed for their violations as bail agents, as heretofore found by the commissioner and the court. As to appellants Alexander and Archambault, the judgment is affirmed. Each party shall bear his own costs on appeal.

PARKER WOOD and VALLÉE, JJ.,
concur.



Clarence RADAR, Walter J. Henry, Catherine Henry and Jacob's Ambulance Service, a fictitious firm composed of Walter J. Henry and Catherine Henry, Plaintiffs and Appellants,

v.

Alpha C. ROGERS, as Administratrix of the Estate of George W. Rogers, Deceased, Defendant and Respondent. *

Civ. 21612.

District Court of Appeal, Second District,
Division 2, California.

Nov. 2, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Granted Dec. 24, 1956.

Action against administratrix of estate of decedent allegedly responsible for personal injuries and property damages sustained by plaintiffs in automobile accident. The Superior Court of Los Angeles County, Walter R. Evans, J., entered judgment sustaining, without leave to amend, defendant's demurrer to plaintiffs' second amended complaint, and plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that where original complaint against estate was filed before appointment of administratrix of estate, and was never served upon anyone, and, though claim against estate was subsequently properly presented, and rejected, amended complaint was not filed until more than three months

after rejection of claim, and administratrix promptly demurred on ground that suit was too late because not brought within three months after rejection, demurrer was properly sustained without leave to amend.

Judgment affirmed.

Moore, P. J., dissented.

1. Limitation of Actions ⇐180(3)

Where second amended complaint against administratrix of estate of deceased tort-feasor was filed on April 4, 1955, some 7½ months after rejection of claims against estate, and affirmatively disclosed that fact, giving dates of appointment of administratrix, presentation of claims and rejection of same, complaint presented claim which on its face was barred by three months' limitation provision of probate code. West's Ann.Prob.Code, §§ 707, 714.

2. Limitation of Actions ⇐177(2)

If there was any excuse for plaintiffs' failure to sue within three months after rejection of their claims against estate, it was incumbent upon them to allege it in complaint against administratrix of estate of deceased tort-feasor filed more than three months after rejection of claims. West's Ann.Prob.Code, §§ 707, 714.

3. Executors and Administrators

⇐213, 437(3)

Failure to sue within statutory time forever bars claim against estate, and it is duty of administratrix to urge the point. West's Ann.Prob.Code, §§ 707, 714.

4. Parties ⇐1

A party to an action must be a living, natural person, or some legal entity recognized by the law.

5. Executors and Administrators ⇐438(1)

Where original complaint against estate of deceased tort-feasor purported to sue John Doe and Jane Doe, as administrator and/or administratrix of estate of certain person, deceased, though no personal representative was appointed for nearly one year thereafter, and complaint was never served upon anyone, complaint was nullity.

* Opinion vacated 317 P.2d 17.

6. Executors and Administrators ⇨431(2)

No cause of action against estate of deceased tort-feasor existed at time of filing of original complaint, which was filed nearly one year prior to appointment of personal representative of estate, because presentation and rejection of claim against estate is essence of an accrued cause of action.

7. Abatement and Revival ⇨81

Where administratrix had properly demurred to first amended complaint on ground of failure to file seasonable claim against estate, and second amended complaint showed on its face that claim had been rejected more than three months prior to filing of complaint, and that it was therefore barred by three months' limitation provision of probate code, and administratrix promptly demurred and raised point of abatement on account of prematurity by general demurrer and attached memorandum of authorities, administratrix properly and without delay raised question of prematurity at first opportunity. West's Ann. Prob.Code, §§ 707, 714.

8. Abatement and Revival ⇨20

Rule that plea in abatement based upon prematurity of action cannot prevail if ground for abatement has ceased to exist before presentation of that plea, does not apply when ground of abatement is prematurity of action in sense that cause has not yet accrued, and plea is made promptly and before trial.

9. Limitation of Actions ⇨180(3), 189

Where original complaint against estate of alleged tort-feasor was filed before appointment of administratrix of estate, and was never served upon anyone, and, though claim against estate was subsequently properly presented, and rejected, amended complaint was not filed until more than three months after rejection of claim, and administratrix promptly demurred on ground that suit was too late because not brought within three months after rejection, demurrer was properly sustained without leave to amend.

Gray, Glass & Allen, Gardena, for appellants.

Ball, Hunt & Hart, Long Beach, for respondent.

ASHBURN, Justice.

Appeal from judgment for defendant entered upon sustaining without leave to amend her demurrer to plaintiffs' second amended complaint. Defendant is administratrix of the estate of George W. Rogers, deceased, and is sued as such. The action is based upon alleged negligence of decedent in driving his automobile. Plaintiff Radar sues for personal injuries and plaintiffs Henry seek recovery of damages to their automobile ambulance which was being driven by Radar at the time of the accident.

The allegations of the second amended complaint, plus judicial notice of the contents of the file in this case, disclose the following situation. The accident occurred on December 15, 1952, and Rogers died the same day. The original complaint was filed on March 11, 1953. The second amended complaint alleges appointment of defendant as administratrix on March 10, 1954, the fact of her qualifying and acting in such capacity, the presentation of claims against the estate by the respective plaintiffs on August 12, 1954, and their rejection on August 20, 1954. The original complaint was filed a year before any personal representative of Rogers' estate was appointed; it made no averment that any such appointment had been made, and named as defendants "John Doe and Jane Doe, as Administrator and/or Administratrix of the Estate of George Rogers, Deceased, and Doe's One To Ten." The only allegation concerning a personal representative is "that the defendants John Doe and Jane Doe are sued herein as Administrator and/or Administratrix of the Estate of George Rogers, deceased, for the reason that the true name of the administrator and/or administratrix is unknown to the plaintiffs at this time." Of course there was no allegation of presentation or re-

jection of claims on behalf of plaintiffs. Appellants' opening brief says: "A copy of the summons and complaint was not served at that time for the reason that there was no representative of said estate to be served." Respondent's brief confirms this fact.

A first amended complaint was filed on February 21, 1955. It named as defendants, "Alpha C. Rogers, as Administratrix of the Estate of George W. Rogers, Deceased; Doe One through Doe Ten," and alleged the appointment and qualification of Alpha C. Rogers, as administratrix, and her acting in that capacity. As appears from the later (second amended) complaint, plaintiffs had presented claims on August 12, 1954, which were rejected on August 20, 1954. But the first amended complaint contains no allegation on the subject. This pleading was filed more than three months after the rejection of the claims, i. e., six months and one day. Defendant promptly demurred, generally and specially, raising the point that there was no averment concerning presentation of claims. The demurrer was sustained with ten days to amend. The second amended complaint was filed on April 4, 1955, some seven and one-half months after rejection of the claims. It affirmatively discloses that fact, giving the dates of appointment of administratrix, presentation of claims and rejection of same. Defendant, on April 13, 1955, demurred to this complaint and raised the point that the suit was too late because not brought within three months after rejection of claims. The demurrer was sustained without leave to amend, and hence the judgment from which the instant appeal is taken.

[1,2] The second amended complaint presents a claim which on its face is barred by § 707 and § 714, Probate Code. If there was any excuse for plaintiffs' failure to sue within three months after rejection of their claims it was incumbent upon them to allege it. *Bass v. Berry*, 51 Cal. 264, 265; *Sullivan v. Shannon*, 25 Cal.App.2d 422, 427-428, 77 P.2d 498; 16 Cal.Jur. § 215,

p. 621. The demurrer was properly sustained, but the question whether leave to amend should have been denied requires that cognizance be taken of the filing and contents of the preceding complaints, especially because of appellants' reliance upon *Security-First Nat. Bank v. Bennett*, 17 Cal.App.2d 641, 62 P.2d 798, and *Bemmerly v. Woodward*, 124 Cal. 568, 57 P. 561.

[3] Those cases hold that presentation of a claim which has been filed within the statutory period, but after suit brought, may be alleged in a supplemental complaint, and that objection to this mode of procedure raises a question of prematurity of action which is a matter of abatement, a plea that is waived unless interposed at the earliest opportunity. The *Bemmerly* opinion adds this significant statement which is pertinent at bar: "If, however, the time for the presentation of claims had wholly elapsed before or after suit brought, and the claim had not been presented, it would have been a different matter. Then the claims would be forever barred, and it would be both the privilege and the duty of the executrix to urge the point. And she would be entitled, as matter of right, to file a supplemental answer, if the defense had accrued after the issues had been made up." 124 Cal. at page 575, 57 P. at page 564. Likewise it should be said here that failure to sue within the statutory time forever bars the claim and it is the duty of the administratrix to urge the point.

Appellants, in order to bring themselves within the doctrine of the cases holding that a plea of premature action sounds in abatement and must be promptly raised, are forced into reliance upon the original complaint, because both the first and second amended complaints were filed more than three months after rejection of their claims.

It should be recognized that the original complaint in this case was no complaint at all, a complete nullity. It purports to sue "John Doe and Jane Doe, as Administratrix and/or Administratrix of the Estate of George Rogers, deceased." It is not

alleged that there is any such personal representative in existence. The complaint merely says: "[T]hat the defendants John Doe and Jane Doe are sued herein as Administrator and/or Administratrix of the Estate of George Rogers, deceased, for the reason that the true name of the administrator and/or administratrix is unknown to the plaintiffs at this time." This complaint was filed on March 11, 1953, and it appears that no personal representative was in existence until Alpha C. Rogers was appointed administratrix on March 10, 1954.

[4,5] It is fundamental that a party to an action must be a living, natural person, or some legal entity recognized by the law. In *Tanner v. Best's Estate*, 40 Cal. App.2d 442, 445, 104 P.2d 1084, 1086, this court held that an action against "Estate of John L. Best" would not support a judgment in favor of plaintiff for the reason that an estate is not a cognizable entity which can be sued. At pages 444-445 of 40 Cal.App.2d, at page 1086 of 104 P.2d it is said: "It is fundamental that before an action can be instituted in the superior court there must be a party plaintiff and a party defendant. Code Civ.Proc., title III, part 2, § 367 et seq. In the case at bar there is no defendant before the court. * * * While Attorney Ball was named as a defendant there is nothing to indicate that he had any interest in the estate and he emphasized that fact by filing his disclaimer in the action which left as a defendant only the 'Estate of John L. Best'. We thus have a civil action with a real plaintiff asserting a real cause but without a defendant against whom a judgment could be entered. * * * But we find no provision of said code authorizing the prosecution of an *ex parte* action for establishing personal property rights as against the possible claims of others. The 'estate' of a decedent is not an entity known to the law. It is neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent,

or of a bankrupt. 11 Cal.Jur. 79. In order for a civil action to be prosecuted, there must be some existing entity aimed at by the processes of the law, and against whom the court's judgment will operate." At page 446 of 40 Cal.App.2d, at page 1087 of 104 P.2d: "Although the evidence presented on behalf of plaintiff is impressive, we find it impossible to invoke the support of section 4½ of article VI of the Constitution because we have not before us the parties who are entitled to resist the demands of plaintiff. The judgment is reversed with instructions to dismiss as to 'The Estate of John L. Best, sometimes known as John L. Bender'." This case was followed in *Estate of Bright v. Western Airlines*, 104 Cal.App.2d 827, 828-829; 232 P.2d 523, and cited with apparent approval in *Johnston v. Long*, 30 Cal.2d 54, 63, 181 P.2d 645. See also, 2 Witkin California Procedure, p. 1002, § 25; 67 C.J.S., Parties, p. 946, § 30; 39 Am.Jur. § 4, p. 852; *Mortimore v. Bashore*, 317 Ill. 535, 148 N.E. 317, 319; *McPherson v. First & Citizens Nat. Bank*, 240 N.C. 1, 81 S.E.2d 386, 397; *Cutler v. Winfield*, 241 N.C. 555, 85 S.E.2d 913, 915; *St. Paul Typothetae v. St. Paul Bookbinders' Union*, No. 37, 94 Minn. 351, 102 N.W. 725, 726. The original complaint at bar not only failed to name any existing entity as defendant, but it was never served upon anyone.

[6] The Supreme Court in *Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 658, 20 P.2d 940, 945, after ruling that the holder of a trust deed note must first exhaust the security before resorting to the personal liability of the trustor, said: "Plaintiff contends that under the circumstances this action must be deemed one to 'keep the obligation of the note alive' until it could sell under the deed of trust. * * * Moreover, it is elementary that under our system there is no such thing as filing an action to keep an obligation alive, unless at the time of filing the complaint a cause of action existed." No cause of action existed at the time of filing the original complaint in the case at bar, because

presentation and rejection of a claim against a decedent's estate is of the essence of an accrued cause of action. *Burke v. Maguire*, 154 Cal. 456, 462-463, 98 P. 21; *Morrison v. Land*, 169 Cal. 580, 585, 147 P. 259; *Tropico Land & Improvement Co. v. Lambourn*, 170 Cal. 33, 41, 148 P. 206; *Estate of Wilcox*, 68 Cal.App.2d 780, 785, 158 P.2d 32. When the cause of action came into being plaintiffs waited too long before asserting it.

If the matter be viewed from the standpoint of abatement on account of prematurity of the action the result is the same. *Kelley v. Upshaw*, 39 Cal.2d 179, at page 187, 246 P.2d 23, at page 27, in discussing this subject, says: "Thus, although a timely plea in abatement, properly proved, *requires judgment for the defendant*, it is an objection which may be waived if not seasonably urged." (Emphasis added.) Various authorities, such as *Fireman's Fund Indem. Co. v. Knorr*, 117 Cal.App.2d 761, 256 P.2d 1005, deal with a situation in which the defendant has failed to promptly raise the point that the action was premature in whole or in part. That case is clearly distinguishable from the situation at bar. Although the plaintiff did not know it, letters of administration upon Knorr's estate had been granted four days before his suit was filed; thus there was a real defendant who was sued under a fictitious name. After suit filed, but within the statutory period, plaintiff presented a claim against the estate, it was rejected and those facts were set forth in an amended complaint. This brings the case within the same category as *Security-First Nat. Bank v. Bennett*, supra, 17 Cal.App.2d 641, 62 P.2d 798, and *Bemmerly v. Woodward*, supra, 124 Cal. 568, 57 P. 561. When this amended complaint was filed defendant administrator answered without suggesting any matter of abatement. That was first brought forth by way of amended answer which was presented at the opening of the trial on May 24, 1951; the amended complaint having been filed on October 31, 1950, this delay was held to constitute a waiver of the claim of prematurity.

[7] The instant record shows that the original complaint was never served; that therefore the first knowledge of plaintiffs' claim that the administratrix had was when it was presented to her on August 12, 1954. She promptly rejected it and when the first amended complaint was filed on February 21, 1955, she appeared by demurrer and raised the point of failure to file a seasonable claim, both by general and special demurrer. When the second amended complaint was filed on April 4, 1955, it showed on its face that the claim had been rejected on August 20, 1954, and was therefore barred by § 714, Probate Code. The administratrix promptly demurred and raised the point by general demurrer and attached memorandum of authorities. A general demurrer is sufficient for the purpose according to *Burke v. Maguire*, supra, 154 Cal. 456, 463, 98 P. 21. But if the rule be deemed modified by *Kelley v. Upshaw*, supra, 39 Cal.2d 179, 246 P.2d 23, to the extent of requiring a special plea, the demurrer at bar fulfilled that prerequisite. There was no delay whatever on the part of the administratrix; she raised the question of prematurity at the first opportunity and persisted in that position. Under the *Kelley v. Upshaw* case she was entitled to the judgment which she received.

[8] It is suggested that a plea in abatement based upon prematurity of the action cannot prevail if the ground for abatement has ceased to exist before presentation of that plea. While that seems to be true of other grounds of abatement, such as failure to file a fictitious firm name certificate, *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 281-282, 193 P. 775, that rule does not apply when the ground of abatement is prematurity of action in the sense that the cause has not yet accrued and the plea is made promptly and before trial. 1 C.J.S., *Abatement and Revival*, § 85, p. 126, says: "If the objection shows not merely that the action was prematurely brought, but that there was no right of action at all, it is a matter in bar and not in abatement." *Turney v. Shattuck*, 96

Cal.App. 590, 596, 274 P. 442, 445: "Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. 'If a party has no cause of action at the time of the institution of his action he cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred.'" (Wittenbrock v. Bellmer, 57 Cal. 12; Gordon v. San Diego, 108 Cal. 264 [41 P. 301]; Hill v. Den, 121 Cal. 42 [53 P. 642].)" (See also, 2 Witkin on California Procedure, § 615, p. 1631.) Kelley v. Upshaw, supra, 39 Cal.2d 179, at page 187, 246 P.2d 23, at page 27, while emphasizing the necessity of a prompt plea of prematurity, makes it clear that "a timely plea in abatement, properly proved, requires judgment for the defendant". That is the situation at bar.

[9] It would be a strange doctrine that would enable a claimant to wait more than three months after rejection of his claim and then, after bringing a belated suit, to successfully contend that the defect in his complaint was cured because, forsooth, he had brought an action against some non-existent entity prior to the time that he ever had or asserted a claim.

Judgment affirmed.

FOX, J., concurs.

MOORE, Presiding Justice.

I dissent. It must be remembered in this case that a claim *was* properly filed against the estate *within* the six months allowed by the Probate Code, and was rejected. The only possible ground for dismissing this action is that a "suit" was not on file within three months of the rejection of the claim as is required by Probate Code section 714.

Actually, a "suit" was on file against "John Doe and Jane Doe, as Administrator and/or Administratrix of the Estate of George Rogers, Deceased, and Doe's One

To Ten." To be sure, the suit was premature: premature because no administrator had yet been appointed to represent the decedent; premature because no claim had yet been filed against the estate. But appellants' cause of action had arisen. Their right to freedom from interference with their bodily well-being had been wrongfully invaded by decedent tort-feasor. The question is whether the law must apply in this case harshly to prevent redress for their injuries.

The majority fails to meet the point that a plea that a suit is premature is dilatory and in abatement. Kelley v. Upshaw, 39 Cal.2d 179, 186, 246 P.2d 23; Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 405-406, 154 P.2d 399; Seches v. Bard, 215 Cal. 79, 81-82, 8 P.2d 835; Verbeck v. Clymer, 202 Cal. 557, 562, 261 P. 1017; Kazanteno v. California-Western States Life Ins. Co., 137 Cal.App.2d 361, 377, 290 P.2d 332; Archibald v. Iacopi, 120 Cal.App.2d 666, 669, 262 P.2d 40; Fireman's Fund Indemnity Co. v. Knorr, 117 Cal.App.2d 761, 256 P.2d 1005; Mears v. Jeffry, 80 Cal.App.2d 610, 615-616, 182 P.2d 294; Green v. Sherritt, 17 Cal.App. 2d 732, 737, 62 P.2d 769; California Thorn Cordage, Inc., v. Diller, 121 Cal.App. 542, 547, 9 P.2d 594; Abatement and Revival, 1 Cal.Jur.2d § 6, p. 32. One cardinal rule of law relative to matter in abatement is that *it must yet exist at the time the plea is raised*. Archibald v. Iacopi, supra, 120 Cal.App.2d 666, 669, 262 P.2d 40; Buhrmeister v. Buhrmeister, 10 Cal.App. 392, 396, 102 P. 221; Schlueter v. Nelson, 74 Idaho 396, 263 P.2d 386, 388; Gradeless v. Gradeless, 114 Ind.App. 10, 49 N.E.2d 398, 400; Larsen & Son v. Retail Merchants' Mut. Ins. Co., 212 Iowa 943, 237 N.W. 468, 469-470; Shreveport Long Leaf Lumber Co. v. Garson Bros., 152 La. 343, 93 So. 117, 118; Marine Production Co. v. Shell Oil Co., Tex.Civ.App., 146 S.W.2d 1024; 1 C.J.S., Abatement and Revival, §§ 85 and 86, pp. 125-127; Abatement and Revival, 1 Cal.Jur.2d § 5, p. 32. The cited cases deal with abatement because of prematurity rather than abatement on other

grounds. The distinguishing by the majority of *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 281-282, 193 P. 775, whether valid or not, *does not apply to these cases*. Here, *at the time respondents first raised their plea in abatement*, the administratrix had been appointed, the claim had been filed and rejected, and thus the grounds for abatement had evaporated.

Cases cited by the majority to the effect that a premature complaint is a nullity and cannot be supplemented, *Wittenbrock v. Bellmer*, 57 Cal. 12; *Gordon v. San Diego*, 108 Cal. 264, 41 P. 301, etc., are clearly inconsistent with the proposition that prematurity is only matter in abatement. If the suit were a complete "nullity," the defect could not even be waived. *Kelley v. Upshaw*, supra, 39 Cal.2d 179, 186, 246 P.2d 23; *Fireman's Fund Indemnity Co. v. Knorr*, supra, 117 Cal.App.2d 761, 256 P.2d 1005, and other recent decisions establish beyond argument that the present rule is that prematurity is indeed only matter in abatement.

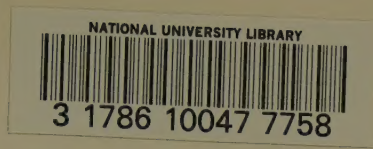
The majority cite *Tanner v. Best's Estate*, 40 Cal.App.2d 442, 445, 104 P.2d 1084 and other cases holding that a suit by or against an "estate" is a nullity. Such is definitely a sound and appropriate conclusion. A suit against an "estate" is tantamount to suing a brick or a locomotive. The distinction lies in the fact that Radar sued the "Administrator and/or Administratrix" of the Rogers estate.

Of course, it was undoubtedly poor practice for appellants' attorneys to file this lawsuit prematurely. However, neither the law nor this court exists for the purpose

of giving lawyers marks for their efforts. The goal is justice for the litigants within the law. The Probate Code imposes certain restrictions upon suits against estates in order to promote expedition in administration and militate against fraud. Admittedly, these considerations may and must take precedence over some valid claims. However, *when the spirit and purpose of the code are clearly complied with*, and law exists which will justify a holding that the *letter of the law has also been fulfilled*, a court should not go out of its way to bar a just claim. All requirements of notice to the administratrix of the existence of the claim were here fully met. The only question is whether a "suit" had been filed within three months of rejection of the claim. Can any detriment to administration of the estate result from the fact that the "suit" was premature rather than actually filed for the first time during the three months following the rejection of the claim? Not one iota. The majority makes much of the fact that the original complaint here was not served, but this is wholly beside the point. Section 714 merely requires that suit be "filed" and not that the complaint be served within three months of the rejection of the claim. Because a suit was on file at the time his demand was rejected, as required by the code, his valid claim should be tried on its merits.

Therefore, inasmuch as the grounds of prematurity had evaporated by the time the plea was presented, the plea should not have been entertained. The judgment should be reversed.





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